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## Corporate Practice of Architecture

### PRELUDE

Man's first attempt to build beauty into his dwellings proclaimed the conception of architecture. As early civilizations built temples to the gods, sculptors and artists moulded beauty into the design. By the time Greece had become glorious, architecture as a calling was well established. The word "architecture" itself is derived from the Greek term for master-builder.

Thus, the mighty complex of today's building designs are nurtured through roots that live alongside those of the professions of law, medicine, and theology. As Britain developed, the latter three became known as the "learned professions." Almost from the inception of the use of the word in modern times, this triad has been accorded the respect and stature manifested by the word "professional." An exploration of the connotations of the term is necessary in the examination of how a particular calling may be affected by permitting its practice as a corporate entity.

### *What Is A Profession?*

A profession has been defined as a self-disciplined group of individuals who hold themselves out to the public as possessing a special skill derived from training or education and who are prepared to exercise that skill primarily in the interest of others.<sup>1</sup> A basic quality that characterizes a profession is the self-prohibition of certain kinds of conduct that might bring the professional group into disrepute, even though the conduct might otherwise be profitable to the individual.

The term has been extended to cover many callings that have sought the dignity inferred from the title. As a result, a number of categories of professions, not necessarily complete, may be enumerated; first, the learned professions, such as law, medicine, and divinity, wherein the practitioners render personal service only and the practitioner-client relationship is a confidential one; second, the profession of industrial technicians such as engineers, architects, surveyors, and chemists, who function primarily in order to improve technical processes through scientific societies; third, the profession of office technicians such as accountants and actuaries who have their own professional associations; fourth, the profession which embraces directors of men such as managers and superintendents; and fifth, the profession of the arts: sculpture, painting, acting, and writing.<sup>2</sup>

1. Wright, *What is a Profession*, 29 CAN. B. REV. 748 (1951); *Characteristics and Functions of a Profession*, 82 SOL. J. 24 (1938); Blaich, *Nature of a Profession*, J. Accountancy, April 1956, p. 54.

2. *Ibid.*

In addition to the above categories, the word "profession" has been appropriated by embalmers, auctioneers, patent agents, pharmacists, beer and insurance salesmen, veterinarians, secretaries, and many other callings, in an attempt to counteract the adverse implication of being termed a tradesman.<sup>3</sup> The word has, of course, been used in the mercenary sense, in sports, and in the military. Thus, to speak of a profession is not to convey a precise idea; the meaning has so decayed that it is virtually impossible to obtain a clear judicial interpretation of whether a particular calling is a profession.<sup>4</sup>

Whether the practice of architecture is a profession in the eyes of the law has not been adjudicated in most jurisdictions. A definitive meaning has not been given to the typical section found in corporation codes that: "A corporation may not engage in a profession."<sup>5</sup> Does the term "profession" include the practice of architecture? Or is it restricted to "learned professions"? The question is resolved in most jurisdictions by reference to a direct statement in the particular Architect's Registration Law concerning whether a corporation may practice architecture.<sup>6</sup> But the professional status of architecture is not thereby made certain.

### *Business or Profession?*

There is some evidence concerning the tendency of architects to lean more in the direction of a business entity than toward the concept of a single practicing professional. This is especially true in the instance of firms with several hundred employees engaged in the design of construction projects for corporate clients. The impersonal practitioner-client relationship is evident when this type of activity is compared with that of the physician in operating directly on his patient. However, architecture has not always been practiced primarily as a business.

In its early days, architecture was practiced basically as an art. As the vagaries of history altered construction techniques and artistic tastes, the architect became a student of the past and a specialist in design. Nineteenth century practitioners studied the work of their predecessors and thus gradually required greater knowledge and skill in order to be able to practice; the opportunity to categorize themselves as professionals grew accordingly. During the emergence of the twentieth century, as technical and artistic complexities were be-

3. Wright, *supra* note 1, at 751.

4. Wright, *supra* note 1, at 752; Farnsworth, *The Nature of a Profession*, 8 MODERN L. REV. 163 (1945). There is some authority to the effect that a calling which is licensed by the state on the basis of personal qualifications, constitutes a profession; this would include plumbers, electricians and beauticians; see 13 AM. JUR. *Corporations* § 838 (1938); Note, *Practice of the Learned Professions*, 4 U. PITT. L. REV. 244 (1938).

5. OHIO REV. CODE § 1701.03; Campbell, *Illegal Practice of a Profession*, 25 CAN. B. REV. 1146 (1947).

6. Annot., 56 A.L.R.2d 726 (1957).

ing imposed upon the structures, architects found it necessary to spend even more time in "professional" training.<sup>7</sup> Finally, with the generally felt governmental tendency to regulate activities that affect the public health, safety, and welfare, registration laws were passed in many jurisdictions ostensibly creating a legal category of professionalism in architecture.

But the construction needs of the twentieth century expanded almost exponentially. The individual practitioner, while still able to cope with minor local construction needs, has in general given way to the large partnership and corporation, where the latter is permitted. The clients, too, have changed with the times. Historically, the church or a European nobleman was the architect's large-budget client. But ordinary individual architectural practice concerned ordinary individual clients. The close personal relationship of architect and client was more or less a prevalent part of the practitioner's business life. This situation persists today primarily for those architects whose practices cater to the individual home builder.

By far the greater percentage of the construction dollar is now spent, however, by the corporate client whose requirements are vastly different from those of the individual home owner. With an industrial plant, an airport, a Caribbean hotel, an urban redevelopment project, or a Brasilia, an architect-client relationship is created which differs greatly from that involved in the family of four who wants an expandable home. But the legal relationships of an architect and client have remained virtually unchanged, even though the internal architectural organization has had to change drastically in order to meet the modern client's needs. Not uncommon are firms with several hundred employees covering all branches of architectural services from design, economic analysis, and engineering, to office methods, accounting, and public relations staffs. In effect, these firms act and look like corporations, but usually are partnerships in form.

Another characteristic of many mid-century clients that has effected a change in service requirements is the international scope of many of their operations. This feature has brought about the need for greater stability in the architectural firm, as well as the financial strength requisite for manifold operations. These needs are satisfied by the very large partnership organizations conducting themselves with the external stability of a corporation.

### *Dilemma of Professional Corporate Practice*

The corporate form of business entity has characteristics with regard to continuity, planning, and tax status that seem to make it desirable as a form for professional practice. There are, however, numerous objections that are normally offered against proposals to in-

7. AMERICAN INSTITUTE OF ARCHITECTS, WHAT IT IS, WHAT IT DOES (1959).

corporate. Some of these arise out of a semantic problem occasioned by such adverse connotations of the word "corporation" as size, robber-baron tendencies, gluttony, ruthlessness, Kruppism, or economic persecution. This type of emotional reaction creates an atmosphere in which reason cannot exist. Further, there is a lack of recognition that many different types of corporate entities, other than the ordinary business corporation, already exist under various statutory enactments. Charitable corporations, non-profit corporations, public corporations, government corporations, and the corporation sole are examples. Thus, the legal mind is capable of creating and procreating the concepts necessary to provide for the needs of the social and business community.

There seems, then, to be no real reason why a business entity cannot be devised that has the acceptable and desirable characteristics of a business corporation, but that will also provide for the special needs of the professional practitioner.

Some of the basic reasons usually offered against proposals for the corporate practice of a profession are: first, professional practitioners are licensed, and since a corporation may not be examined for license purposes, it may not be a professional; second, since a corporation is a body without a soul, it cannot have the characteristics that are necessary for the personal relationship required between a client and a practitioner and, hence, it would not be able to retain a position of trust; third, even though a corporation employs a registered practitioner, his primary duty would be to his corporate employer rather than to the client, thus circumscribing the normal practitioner-client relationship; fourth, public policy prohibits an intervention for profit by a third party, *i.e.*, the corporation, in establishing the practitioner-client relationship; fifth, title to corporate shares, although entirely owned initially by licensed practitioners, could be transferred by sale, operation of law, or succession, and thus, the shares would find their way into the hands of unlicensed laymen who would then own a corporation that was engaged in professional practice; sixth, a corporation could not be suspended or disbarred; and seventh, the corporate insulation of practitioners from liability in malpractice suits would result in greater risk to the public.<sup>8</sup>

Since the corporation is a creature created by the state, there is no valid reason why the state cannot mold what it will. Thus, each of the above objections, and doubtless others which could be raised, can be answered by a corporation with special characteristics. Such a proposal has indeed been made, and does provide the answers.<sup>9</sup> No

8. Jones, *The Professional Corporation*, 27 *FORDHAM L. REV.* 353 (1958); Lewis, *Corporate Capacity to Practice Law*, 2 *MD. L. REV.* 342 (1938); Note, *Practice of Law, Medicine and Dentistry by Corporations*, 10 *SO. CAL. L. REV.* 329 (1937); Note, *Corporate Practice of the Law*, 34 *COLUM. L. REV.* 571 (1934); Acton, *Unlawful Practice of Law*, 24 *ILL. BAR J.* 282 (1936); 19 *C.J.S. Corporations* § 956 (1940); 13 *AM. JUR. Corporations* § 837 (1938).

9. Jones, *supra* note 8, at 360.

sincere professional practitioner would doubt the validity of many, if not all, of the objections to the corporate form. However, if the practitioner retains his present client relationship, but stands as a corporate entity for all other purposes, it would seem that many advantages might accrue.

What are these pressing needs that have been pushing the professions in the direction of some type of corporate form? Of basic importance now, and undoubtedly of increasing significance in the future, are the tax considerations. The tax shelter accorded corporate entities is manifested in such arrangements as profit-sharing and retirement plans, pension plans, deductible premium group life insurance, health and welfare plans and deferred compensation plans.<sup>10</sup> But "all that glitters" is not savings. The corporate gambit may well result in a checkmate for the Treasury Department. For example, the corporation might be categorized as a personal holding company under section 543 of the Internal Revenue Code of 1954. In that event, all undistributed income would be taxed at a rate of 75 per cent of the first \$2,000, and all in excess of the \$2,000 would be taxed at the rate of 85 per cent.<sup>11</sup> Such a catastrophe would quickly place the one-man professional corporation in search of a cooerage. Further, accumulated earnings are taxed at a rate of 27½ per cent on the excess. To avoid both or either of these results might not be possible. There is, of course, the possibility of a sub-chapter S election,<sup>12</sup> that is, the election by a small business corporation to be taxed as a partnership. By the express terms of the code, this would avoid the personal holding company tax, but it has disadvantages with regard to regulations prohibiting certain fringe benefit deductions.<sup>13</sup> Another possibility that confronts the one-man professional corporation is the disregarding of the corporate entity by the Treasury Department if it appears that incorporation was effected solely for the purpose of tax avoidance.<sup>14</sup> Various other corporate tax hurdles with respect to liquidations, redemptions, and distributions equated to dividends, all stand in the path of the professional corporation.<sup>15</sup>

Obviously, then, the tax aspects of professional incorporation will not only vary with the size of the corporation, but may actually increase tax liability over that which would be incurred by the partnership or individual practitioner; it thus appears that it is not feasible to make a precise prediction regarding the degree of tax shelter that might accrue to the professional corporation. But this much may be stated: all business corporations are faced with these same problems;

10. Jones, *Should Lawyers Incorporate*, 11 HASTINGS L.J. 150, 152 (1959).

11. Jones, *supra* note 8, at 366.

12. INT. REV. CODE OF 1954, §§ 1371-77.

13. Jones, *supra* note 10.

14. *Commissioner v. Smith*, 136 F.2d 556 (2d Cir. 1943).

15. Jones, *supra* note 8, at 371.

the professional man now has no opportunity, as do other lines of endeavor, to make a choice. Thus, from the tax standpoint, the eight million professional taxpayers are readily categorized as second-class citizens.<sup>16</sup>

Another tax advantage of the corporate form often overlooked is the increased liquidity of equity compared with the partnership form and the capital gain tax rate that applies to the value of the corporate shares upon transfer, if the assets of the corporation have grown during the shareholder's tenure. If these shares are to remain within the licensed professional ownership domain for ethical reasons, thus necessitating a sale upon the demise of the professional shareholder, the heirs become the recipients of substantial benefits through the increased value of the estate, *i.e.*, by the lower capital gains tax as opposed to the normal tax on income that would have been received by the practitioner during his lifetime. Although a similar savings would accrue if the practitioner were to retire and liquidate his corporate holdings, a further advantage results where the stock passes at the shareholder's death: the beneficiary takes on a stepped up basis, namely, the capital value of the stock at the time of death, which may result in very little, if any, capital gains tax at all.

Another advantage of the corporate form which may be advanced is the continuity that is created by virtue of the creating statute. The disturbances that can occur upon the death or disability of a partner, for example, are thus eliminated. The leverage created by the corporate accumulation of working capital also builds the financial strength and stability of the business entity; the result is more assured service to clients, no matter how complex or large the requirements may be.

As professional firms grow in physical size, the organizational difficulties of a normal partnership become overwhelming. The need and desire for loyal members of the firm to acquire a measure of ownership are easily answered in the corporate form through the medium of stock distribution. The statutory standardization of methods of management, organization, and finance create an atmosphere of efficiency in operation that is evidenced in the widespread industrial use of the corporate form.

In our complex, dynamic economy, it would appear that those professions whose clients look for business characteristics in their advisors, would do well to consider carefully the corporate form.

The one theme that appears to be common in the image of all the large and successful [architectural] firms is that their reputation is grounded as much in sound business principles as that of the successful soap manufacturer or television manufacturer. Essentially, they are business men whose business is architecture, and their major clients and prospects are never allowed to forget this.<sup>17</sup>

16. Jones, *supra* note 10, at 155.

17. BURSON, *The Architect and Public Relations*, Architectural Record, Feb. 1960, p. 166. See also Architectural Record, April 1960, p. 207.

## STATUS OF CORPORATE PRACTICE

The regulation of the practice of architecture is accomplished by statute in every state of the Union,<sup>18</sup> and thus, the status of the corporate practice of architecture varies from jurisdiction to jurisdiction. The corporation codes of some states, such as Ohio, prohibit the corporate practice of a profession.<sup>19</sup> The similar common-law prohibition was directed toward the learned professions,<sup>20</sup> but, generally the statutory prohibition has been held applicable to other professions.<sup>21</sup> Statutes sometimes provide that in the case of architecture, a corporation may not itself practice the profession, but may employ licensed practitioners to do so.<sup>22</sup> However, in some states architecture may be practiced by a corporation.<sup>23</sup>

In a Pennsylvania case, it was held that under the registration act,<sup>24</sup> even though a corporation is composed of licensed architects, it cannot itself secure a certificate qualifying it to practice the profession of architecture.<sup>25</sup> This case also held that since the licensing statute used the personal pronouns in referring to licensees, only natural persons were implied, and thus, corporations may not practice architecture in Pennsylvania.

In Colorado, because of an ambiguity in the licensing law, a corporation was held not to be able to contract to furnish architectural services even though the corporation was composed of licensed architects, because the corporation is incapable of becoming a licensed architect itself.<sup>26</sup> The court admitted, however, that the legislature could permit the granting of licenses to corporations. Subsequently, the Colorado legislature clarified the law by specifically prohibiting such corporate practice.<sup>27</sup>

In New York, a corporation has been held to be unable to secure a certificate qualifying it to practice architecture.<sup>28</sup> But by statute,

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18. *Supra* note 7.

19. OHIO REV. CODE § 1701.03; 19 C.J.S. *Corporations* § 955 (1955); 14A C.J. *Corporations* § 2145 (1921).

20. *In re* Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); *L. Meisel & Co. v. National Jewelers' Bd. of Trade*, 152 N.Y. Supp. 913 (App. Div. 1915); *Hannon v. Siegel-Cooper Co.*, 60 N.E. 597 (N.Y. Ct. App. 1901).

21. 14A C.J. *Corporations* § 2145 (1921).

22. *People ex rel. State Bd. of Examiners v. Rodgers Co.*, 277 Ill. 151, 115 N.E. 146 (1917).

23. ARK. STAT. § 71-302 (3) (1957); CAL. BUS. AND PROF. CODE §§ 5535-37.

24. PA. STAT. tit. 63, §§ 28-31 (1959).

25. *Simons, Brittain & English, Inc. v. Citizen's National Bank*, 5 Pa. D. & C. 393 (C.P. 1924); 56 A.L.R.2d 726 (1957).

26. *Johnson Olmsted Realty Co. v. City and County of Denver*, 89 Colo. 250, 1 P.2d 928 (1931), *overruled on another point in* *McNichols v. City and County of Denver*, 130 Colo. 202, 274 P.2d 317 (1954).

27. COLO. REV. STAT., CUM. SUPP. 10-2-10 (2) (1955).

28. *American Store Equip. & Constr. Corp. v. Jack Dempsey's Punch Bowl, Inc.*, 174 Misc. 436, 21 N.Y.S.2d 117 (1939), *aff'd*, 258 App. Div. 794, 16 N.Y.S.2d 702 (1939), *appeal*



a lawfully organized corporation in existence prior to 1929 and practicing continuously since then may continue to practice architecture, provided the chief executive officer is a licensed architect.<sup>29</sup>

Although the Florida statutes prevent the issuance of a certificate to a corporation for the practice of architecture, it was held in *Weed v. Horning*<sup>30</sup> that a registered architect who was the sole stockholder in a corporation could legally collect for services that were furnished through the medium of the corporation.

In Illinois, it has been held that a corporation not licensed as an architect may contract to do architectural work if it employs a licensed architect to do the work,<sup>31</sup> or if the work is performed by and under the direction of a duly licensed architect who is an employee of the corporation.<sup>32</sup> Another Illinois case<sup>33</sup> has held that where a corporation contracts to furnish architectural services, any lawfully licensed member of the corporation may perform the services, and the fact that one or more members of the corporation are not licensed architects does not invalidate the contract.

In California and in Texas, corporate practice of architecture is specifically permitted by the code.<sup>34</sup> It has been held that under the California registration act, a corporation that undertakes to perform architectural services may do so if it employs a certificated architect to prepare the plans,<sup>35</sup> but it may also furnish services *without* having plans prepared by a certificated architect if it so informs its client.<sup>36</sup> Another California case held that a corporation that prepares preliminary plans largely by unlicensed and unsupervised employees is not entitled to recover for their preparation.<sup>37</sup>

In *People v. Allied Architect's Association*,<sup>38</sup> the California court distinguished between the corporate practice of architecture and the corporate practice of law primarily on the basis of the confidential relationship between attorney and client, and said that while the registration act did not permit a corporation itself to be licensed, a corporation could employ licensed architects and contract with others for

*denied*, 258 App. Div. 876, 17 N.Y.S.2d 220 (1939), *aff'd*, 283 N.Y. 601, 28 N.E.2d 23 (1940).

29. N.Y. EDUCATION LAWS § 7307.

30. Robert L. Weed, Architect, Inc. v. Horning, 159 Fla. 847, 33 So. 2d 648 (1947).

31. Keenan v. Tooma, 240 Ill. App. 448 (1926).

32. Continental Paper Co. v. Fisher, 3 Ill. App. 2d 118, 129 N.E.2d 577 (1945); *People ex rel. State Bd. of Examiners v. Rodgers Co.*, 277 Ill. 151, 115 N.E. 146 (1917).

33. Haynes v. E. St. Louis Council No. 592 Knights of Columbus, 258 Ill. App. 38 (1930).

34. TEX. CIV. STAT. tit. 32, art. 1302 (45) (1945); CAL. BUS. AND PROF. CODE §§ 5535-37. Interpretation of the latter is found in *Binford v. Boyd*, 178 Cal. 458, 174 Pac. 56 (1918).

35. *Binford v. Boyd*, 178 Cal. 458, 174 Pac. 56 (1918).

36. *People v. Allied Architect's Ass'n*, 201 Cal. 428, 257 Pac. 511 (1927); *Walter M. Ballard Corp v. Dougherty*, 106 Cal. App. 2d 35, 234 P.2d 745 (1951).

37. *Meyer v. Bowman*, 121 Cal. App. 112, 8 P.2d 936 (1932).

38. 201 Cal. 428, 257 Pac. 511 (1927).

architectural services. In *Ballard v. Dougherty*,<sup>39</sup> it was held that the statute applied to foreign corporations as well and that the rule in *Binford v. Boyd*<sup>40</sup> permitting corporate practice was valid.

In a 1954 Georgia case, it was held that the "personal pronoun" type statute did not preclude the practice of architecture by a corporation.<sup>41</sup> Proposed new licensing legislation in Georgia specifically permits the corporate practice of architecture.<sup>42</sup>

Arkansas permits architectural practice by a corporation provided the principals of the corporation are each registered architects and that their names appear in the corporation name.<sup>43</sup> In a case involving a corporation,<sup>44</sup> it was held that compliance with the statute was not effected by the corporation merely employing an architect.

Those courts that have adjudicated the question of the corporate practice of architecture have based their decisions primarily on statutory grounds. To these courts, corporate practice may be rendered objectionable irrespective of any considerations of confidential client relationships such as are found in the learned professions.<sup>45</sup> Although it is clear that architecture, like the learned professions, is creative work and involves high ethical considerations, it is not at all clear that the public interest suffers when architects incorporate in order to practice their calling.<sup>46</sup> Where the public interest is adequately protected by the licensing statute, some courts are not unwilling to permit corporate practice.<sup>47</sup>

It is generally supposed, and is specifically provided by statute in New York,<sup>48</sup> that a professional corporation organized prior to the enactment of legislative prohibitions may continue to practice after such enactment. However, there is some doubt concerning the validity of such an assumption. A recent Ohio appellate case<sup>49</sup> stated that although corporate charters possess the elements of a contract, the state may, under the reserved powers clause of the Ohio Constitution,<sup>50</sup> alter or repeal laws under which corporations are formed. The court specifically held that the later enacted legislation preventing

39. *Walter M. Ballard Corp. v. Dougherty*, 106 Cal. App. 2d 35, 234 P.2d 745 (1951).

40. 178 Cal. 458, 174 Pac. 56 (1918).

41. *Folsom v. Summer, Locatell & Co.*, 90 Ga. App. 696, 83 S.E.2d 855 (1954).

42. HB 355, Ga. Leg. (Jan. 25, 1960) to revise GA. CODE ANNOT., 84-301-22 (1952).

43. ARK. STAT. § 71-302 (3) (1957).

44. *Arkansas State Bd. of Architects v. Bank Bldg. & Equip. Corp.*, 225 Ark. 889, 286 S.W.2d 323 (1956).

45. Note, *Corporations Doing Professional Service Through Others*, 45 MICH. L. REV. 885 (1947).

46. *Ibid.*

47. *Ibid.*

48. N. Y. EDUCATION LAWS § 7307.

49. *H. C. Downer & Ass'n, Inc. v. Westgate Realty Co.*, Docket No. 4892, 9th Dist. Ct. App. Ohio, Nov. 25, 1959.

50. OHIO CONST. art. XIII, § 2.

corporate practice effectively modified the original corporate charter to the extent of "making the plaintiff corporation legally incapable of lawfully practicing the engineering or architectural professions."<sup>51</sup> Thus, at least in Ohio, the penumbra of doubt is cast over other professional corporations similarly chartered.

There is a dearth of case law in this area, but it seems that since architectural registration laws are enacted ostensibly for the public safety, the application of the strict approach accorded the corporate practice of a learned profession is somewhat inappropriate with regard to architecture. The public is safeguarded from the improper activity of corporate entities in other areas; why can it not be in this one? The courts seem somewhat confused by the meaning of the word "profession," and tend to interpret the restrictive legislation accordingly. Only in jurisdictions where specific permissive statutes exist, do the courts freely concede the legality of the corporate practice of architecture.

#### FUTURE TRENDS

The proposals that have been made, and referred to above, concerning the possibility of a special type of corporate form to be used by professionals would answer most if not all of the reasoned objections made by those who have examined the problem. The possibility also exists of effecting these "professional corporate restrictions" under existing corporation codes.

The practice of architecture by or through the medium of corporations in at least seven states<sup>52</sup> with a total population of over fifty-one million persons would indicate that the public can be adequately protected without the necessity of special types of corporations. The future of the professional status of the architect is a question that seems answerable in terms of considerations other than the effect on the profession of the use of the corporate form. The following comment by an internationally known architect seems pertinent:

And just as the role of architecture will grow in public life, so will it grow in industry. More than merely rendering a professional service to his client, the architect will be a valued advisor, especially in site selection and economic matters involving land values and probably building costs . . . . More and more important is the fact that buildings must be sound investments for clients. With the ever increasing need for sound economic planning in all types of building projects, during the coming

51. *H. C. Downer & Ass'n, Inc. v. Westgate Realty Co.*, Docket No. 4892, 9th Dist. Ct. App. Ohio, Nov. 25, 1959. *But see, State ex rel. McElroy, Attorney Gen. v. A. M. Kinney, Inc.*, 171 Ohio St. 193 (1960). [Ed.]

52. Arkansas, California, Florida, Georgia, Illinois, New York, and Texas. It appears notable that the American Institute of Architects is itself a corporation; further, one of the duties of the A.I.A. Committee on Professional Insurance is: "To intensify the study of advantages and disadvantages of rendering architectural services by incorporation of architectural firms . . . ." *A.I.A. Document I-101-C* (1960).

decade we will be a part of public and business life as we have never been before.<sup>53</sup>

Another applicable comment was made by a Design School Dean:

The new architect will be planner, coordinator, consultant, and comprehensive designer — knowledgeable in the complexity of the new technology and the changing factors of an exploding economy.<sup>54</sup>

It appears that clients are even now looking for economic and business characteristics in their architect as well as for the aesthetic features that have historically been the practitioner's basic distinguishing professional feature. The latter is no longer sufficient. As mentioned above,<sup>55</sup> the *business* of architecture is already in existence. Practitioners in fact do not have the personal confidential client relationship that characterizes the learned professions, and the trend is ever further away. The written contract that usually exists between an architect and his client is an example of a distinguishing business feature that is not normally present in the learned professions. Recent decisions tending toward finding architects liable for negligence to third persons not privy to a contract,<sup>56</sup> comprise another page in the book of architect-business characteristics.

Thus, the professional status seems to be changing, regardless of the business form or medium through which the profession is practiced.

A unique development that affects the architectural profession is the quirk of history that has separated it from the engineering profession. The separation with regard to the branches of engineering that are applicable to the construction industry seems unfortunate, if not arbitrary, in view of the great similarity and the overlapping of these functions. This overlapping is generally recognized by statute through provisions in the architectural and engineering registration acts giving architects the prerogative of practicing such engineering as may be incidental to the practice of architecture and conversely, giving engineers the right to practice such architecture as may be incidental to the practice of engineering. Where does one stop and the other begin? A substantial amount of acrimony between the professions has developed in recent years as modern buildings have required more and more engineering talents in their design. A recent New Jersey hearing before a special board was conducted for consideration of the question of whether or not a project with only a minor amount of engineering in its design, as opposed to the architecture

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53. Becket, *The Decade Ahead*, Architectural and Engineering News, Jan. 1960, p. 14.

54. Kamphoefner, *ibid.*

55. Burson, *supra* note 17.

56. Note, *Architects' and Engineers' Third Party Negligence Liability*, 10 WEST. RES. L. REV. 563 (1959).

involved, was nevertheless within the prerogatives of the engineering profession.<sup>57</sup>

What is the effect of this phenomenon on corporate practice? As the profession of engineering grew, it saw fit, in contradistinction to architecture, to permit its members to engage in building contracting. This was a primary force in the early trend toward incorporation within the profession of engineering.

Thirty-four states now permit the corporate practice of engineering in some manner, usually limited only by requirements as to the registration of certain personnel.<sup>58</sup> Three more states permit practice by corporations organized prior to the enactment of restrictive legislation.<sup>59</sup> Four other states indicate that corporate practice is permitted, with certain limitations.<sup>60</sup> Thus, only nine states and the District of Columbia completely prohibit the corporate practice of engineering.<sup>61</sup>

Here then, is a major rent in the architect's professional armor. Engineering corporations that are engaged in the design and construction of buildings are legally practicing architecture incidental to their engineering and are finding corporate clients who not only do not seem to be adversely affected thereby, but who appear increasingly to order their construction requirements through that medium. The implications are that, like television, corporate practice is here to stay. It seems to be somewhat naive to divorce the profession from the needs of the economy. Engineering corporations and industrial-designer corporations are not only meeting these needs, but are taking advantage of the apparent abandonment by the architects, and are virtually pre-empting new areas, while absorbing others that were once within the exclusive province of the architectural profession.<sup>62</sup>

The practice of medicine in the corporate form through medical "associations" and incorporated hospitals has been in existence for many years.<sup>63</sup> The laws of Connecticut and Oklahoma have been amended to permit the corporate practice of medicine.<sup>64</sup> A substantial amount of activity has taken place regarding the possibilities of

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57. Am. Eng'r., Dec. 1959, p. 31. See *Douglas v. Smulski*, 20 Conn. Supp. 236, 131 A.2d 225 (1957); *People v. Babcock*, 343 Mich. 671, 73 N.W.2d 521 (1955); Am. Eng'r., Feb 1960, p. 46.

58. Stitt, *Corporate Practice of Engineering*, 14 BUS. LAW. 969, 985 (1959).

59. *Id.* at 987.

60. *Id.* at 988.

61. *Ibid.*

62. Bourne, *The New Rivals: Architects and Designers*, Architectural Forum, April 1960, p. 138.

63. Jones, *Should Lawyers Incorporate*, 11 HASTINGS L.J. 150, 155 (1959).

64. *Ibid.*

the corporate practice of law.<sup>65</sup> Architecture is thus not alone in its bewilderment.

Several possibilities exist for gaining some of the advantages of the corporate entity, while nevertheless retaining the individual practitioner or partnership form in order to conform to the fiction of professional status. One of these is the Keough-Simpson bill,<sup>66</sup> which in its present form would permit professionals and other self-employed persons to deduct up to \$2,500 of income per year for pension plans. This bill was originally introduced in Congress as the Jenkins-Keough bill in 1951.<sup>67</sup> It was reintroduced several times and was actually passed by the House in 1958.<sup>68</sup> The Treasury Department's opposition has been against the draft of the bill that would not only permit self-employed persons to set up their own pension plans without requiring a provision for retirement compensation for employees, but that would also permit the taxpayer to vary his retirement payments from year to year as a means of minimizing annual taxable income; as of April 1960, this opposition was in the process of being mitigated.<sup>69</sup> Thus, after nine years of negotiation, there seems to be a modicum of blue on the horizon. But this bill, even if ultimately passed, would be merely a partial answer, and only in a narrow area of taxation; the other corporate advantages, where these are desirable, would remain non-existent.

Another possibility is that suggested by a federal court in *United States v. Kintner*.<sup>70</sup> Over the strenuous opposition of the Treasury Department, an unincorporated association of physicians in Montana was permitted to pay its taxes as a corporation<sup>71</sup> and thus enjoy the benefits of a pension plan.<sup>72</sup> In that case the association was organized as a clinic with the individual doctors as employees; full managerial powers, including the fixing of salaries, were vested in a committee. Probably few professionals would agree to this type of corollary restriction even though a tax saving were to result. The Commissioner has not acquiesced; however, a proposed regulation has been issued regarding situations similar to *Kintner*.<sup>73</sup> Thus, there is no way of knowing what tax status would exist if a group of architects, or even another group of doctors, were similarly to organize. Here, again, the results, even if attained, would be beneficial

65. *Ibid.*; Wormser, *Corporations and the Practice of Law*, 5 FORDHAM L. REV. 207 (1936).

66. H.R. 10, 85th Cong., 1st Sess. (1958).

67. H.R. 4371, H.R. 4373, 82d Cong., 1st Sess. (1951).

68. Jones, *The Professional Corporation*, 27 FORDHAM L. REV. 353, 364 (1958).

69. Wall St. Journal, Feb. 24, 1960, p. 1, col. 5.

70. *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954); *Galt v. United States*, 175 F. Supp. 360 (5th Cir. 1959).

71. 26 U.S.C. § 401 (1958).

72. Jones, *supra* note 67, at 364.

73. Proposed Treas. Reg. § 301.7701, 24 Fed. Reg. 10423 (1959).

primarily insofar as a pension plan is concerned; other corporate tax advantages would accrue, but no other features of the corporate form would be available.

Another avenue of escape is the professional use of the business form known as the common-law joint stock company. This entity consists of an organization of partners who provide in their agreement that the partnership will not dissolve upon the death of a partner; that the organization will be managed by a group of annually elected directors; that each partner's share will be represented by a certificate called "stock"; that no partner will be liable for any debt beyond the amount of his original contribution; and other similar corporation-type provisions. The joint stock company is thus a partnership in law, but is organized as though it were a corporation. Presumably, it would be taxed as a corporation.

Where this type of entity is permitted by state law, it would seem to be the best answer to those who would like to gain the corporate tax and organizational advantages, but retain the partnership form. However, the attitude of the Treasury Department in that regard is not clear; since this business form was organized primarily as a result of early attempts to limit generally partnership liability, it is distinguishable from a corporation for tax purposes in a manner similar to the partnership that elects to be taxed as a corporation.<sup>74</sup> The election refers only to income taxation, and does not result in permission to deduct pension payments or other corporate-type expenses. In view of the very limited familiarity, even by attorneys, with this business form, there is great likelihood that it would indeed be viewed as a subterfuge and thus not eligible for the fringe tax benefits available to a corporation. It would appear then, that this solution would take the practitioner into uncharted waters that could test not only the quality of his seamanship, but the seaworthiness of his business form as well.

What, then, is the most constructive approach? Should the keystone of the professional arch be the phantom word "profession," with its status significance that disappears as more callings become "professions"? Must the concept of professional ethical characteristics be attached only to a particular form of business enterprise? The configuration should certainly not be such as to deteriorate the ethical considerations of the professional, but neither should the business form be determined on the basis of the fiction that it will necessarily destroy the profession.

The following salient features are pertinent: first, because of the major differences among callings that use the term, substantive differences exist regarding the meaning of the word "profession"; second, means can be devised for maintaining the so-called professional status and nevertheless making all business forms available to the

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74. INT. REV. CODE OF 1954, § 1361.