

Who's the Client?

Representing a business partnership may require some detective work

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Being the attorney for a partnership can be troublesome because of the difficulty in knowing just who your client is. Consider the following:

► Client A, a general partnership with 50 partners, has just retained you to be its general counsel. The partners disagree on how they should negotiate their acquisition of a building. Whose directions do you follow?

► Client B, a limited partnership, has hired you to represent it in litigation against a former general partner. In your view, continuing the lawsuit is not in its interest. How do you advise the partners?

Whenever you represent a partnership, it's essential to first identify your client and ask how you can fulfill your duty of loyalty. Note that if "the client" is really 50 people with differing interests, it's virtually impossible to discharge this duty. This is quite likely the case with clients A and B.

For guidance on whether there is a conflict, consult ABA Model Rule 1.7, which is premised on the principles of disclosure and consent. The Comment to the Rule states:

"A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them."

For instance, Client A is a general partnership that can't reach a consensus. Contrast that to Client B, in which the general and limited partners have different interests.

In both situations, the conflicts are pronounced. Sometimes, however, conflicts are hidden beneath the surface. Often, these occur in a slowly deteriorating partnership, where some partners may be secretly jockeying to buy out other partners or, worse for you, to remove one of the partners from the partnership.

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If there is any hint of trouble brewing, the first step should be a counseling and disclosure session. The partners must be told that you cannot represent them if they have fundamental differences or if they are materially limiting your ability to represent the partnership because of internal disagreements.

If, after counseling, you still believe you can represent the partnership despite perceived differences, then you should set forth clearly your concerns and recommendations in writing.

This second step is essential. Although documenting your concerns can be problematic, you should remember that malpractice claims are often brought by one partner who alleges that the lawyer favored another partner. If you are sued, you will benefit more from a careful memo than by an oral disclosure that will later be forgotten or misunderstood.

Model Rule 1.7 specifically states that your disclosure statement "... shall include (an) explanation of the implications of the common representation and the advantages and risks involved."

Your third step, soliciting the parties' consent, is optional, depending on the state of the partnership.

If, as with Client A, there is a common interest in consummating a particular transaction but the partners are personally or professionally antagonistic, it may be prudent to have them acknowledge in writing

that they have read and approved your disclosure.

Limited partnerships provide even greater potential for conflicts. Beware of the general partner who never consults with limited partners. And if, as with Client B, you question whether the limited partners will be helped by their desired course of action, insist on a meeting and disclosure. An uninformed, dissatisfied limited partner is among the likeliest to sue you.

Vigilance Required

Representing partnerships requires constant reassessment by the responsible lawyer.

It also requires continuing communication with a representative group of the entire partnership, chosen by the partnership, for you and the partners to be well-informed at all times. Because many partnerships are entrepreneurial ventures, money may become scarce and problems frequently and unexpectedly erupt.

Don't be the lawyer/defendant who says, "I didn't know they were considering dissolving the partnership," or even worse, "I didn't know the limited partners had sued the general partner for extracting excessive management fees."

The message here is worth repeating: Beware of the partnership client, as representing partnerships can be hazardous to your professional health if not handled with extreme caution. ■