

## Does the Lawyer for a Partnership Represent the Partners?

BY ROY SIMON

Does a lawyer for a partnership represent the general partners? A recent case granting a motion to disqualify spurred me to re-examine this issue. I found surprisingly few New York cases addressing the issue, but they nearly all speak with one voice. The answer in New York is yes, a lawyer for a partnership represents the general partners. (New York cases also hold that a lawyer for a limited partnership does not represent the limited partners absent an “affirmative assumption” of that duty – *see, e.g., Kushner v. Herman*, 628 N.Y.S.2d 123 (2d Dep’t 1995) – but in this article I address only general partners.)

I want to point out immediately that in most states, a lawyer who represents a partnership does not represent the general partners (absent a specific agreement). That’s because thirty-eight states have adopted either the 1994 or the 1997 version of the Uniform Partnership Act (often called the “Revised Uniform Partnership Act,” or “RUPA”), which establishes a partnership as a separate legal entity, not merely an aggregation of partners. Specifically, §201 of the Revised Uniform Partnership Act provides: “A partnership is an entity distinct from its partners.” The RU PA thus embraces the “entity” theory of partnerships. But New York has not adopted the RUPA. New York still follows the original Uniform Partnership Act of 1914, which had no section comparable to §201 of the RUPA and instead treated a partnership as an aggregation of partners rather than as a separate legal entity. New York thus embraces the “aggregate” theory of partnerships. (A list of jurisdictions that have adopted the RUPA is at [www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-upa9497.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa9497.asp).) Cases and ethics opinions from other jurisdictions are therefore of little or no value in analyzing the question of partnership representation.

Rule 1.13(a) of the New York Rules of Professional Conduct– like its identical predecessor in the Code, DR 5-109(A)– is therefore deceptive. Rule 1.13(a) states that a lawyer retained by an organization “is the lawyer for the organization and not for any of its constituents.” That would imply, quite strongly, that a lawyer retained by a partnership is the lawyer for the partnership and not for any of the individual partners. But that begs the question, because seemingly in New York a partnership itself has no independent existence and cannot retain a lawyer. Only the partners (or those acting on their behalf) may actually retain a lawyer. Thus, Rule 1.13(a) does not answer our question.

With that background, I will turn to the recent case that caught my attention.

### ***Steven's Distributors, Inc. v. Gold, Rosenblatt & Goldstein***

*Steven's Distributors, Inc. v. Gold, Rosenblatt & Goldstein*, 2010 NY Slip Op 31839U; 2010 N.Y. Misc. LEXIS 3336 (N.Y. County Supreme Ct., July 19, 2010) (Joan Madden, J.), was a legal malpractice case. In 2004, Steven's Distributors ("Steven's"), a retailer, retained the law firm of Gold, Rosenblatt, & Goldstein ("GR&G") to collect rent from Steven's subtenants. GR&G filed a commercial non-payment summary proceeding against the subtenants in Bronx County Civil Court. However, Steven's alleged that GR&G failed to diligently prosecute the proceeding, and that attorney Steven Goldstein forged interlocutory orders in the proceeding. Ultimately, after trial, the Civil Court dismissed Steven's case. Steven's was consequently unable to pay its landlord and was forced to file for bankruptcy. Steven's then retained the law firm of Robinson Brog to sue GR&G for legal malpractice.

After answering the suit, GR&G (now succeeded by Goldstein & Rosenblatt, LLC) moved to disqualify Robinson Brog. The motion raised the issue that caught my attention. While Robinson Brog was suing GR&G on behalf of Steven's, Robinson Brog was simultaneously representing a real estate investment partnership named Winhall II Funding Associates ("Winhall II") in a legal malpractice action in Westchester County Supreme Court. The details of the Winhall II action are unimportant. (Basically, Winhall II alleged that the defendant law firm had failed to secure and collateralize a \$1.3 million real estate loan.) What is important is that David Gold and Randi Rosenblatt, who were the sole members of Gold & Rosenblatt (successor firm to GR&G), were also general partners in Winhall II. Collectively, Mr. Gold and Ms. Rosenblatt owned a paltry 7.25 % interest in Winhall II.

Gold & Rosenblatt argued that Robinson Brog, by representing Winhall II, had established a current attorney-client relationship with Mr. Gold and Ms. Rosenblatt. Based on that premise, Gold & Rosenblatt argued that Robinson Brog's simultaneous representation of them in the Winhall Action and its opposition to Rosenblatt & Gold in the legal malpractice action created an impermissible conflict of interest. In short, Robinson Brog was suing a current client. Compounding the conflict problem, Gold & Rosenblatt argued, the same partner at Robinson Brog (Mitchell Greene) was directly involved in both the Winhall II litigation and the legal malpractice litigation.

Robinson Brog countered that the motion should be denied because (a) the Winhall II action and the legal malpractice action were not "substantially related" and (b) Robinson Brog's simultaneous representation of Steven's and Winhall II was not causing any prejudice, was not putting at risk any client confidences or secrets, and would not inhibit Winhall II's communication of future confidences to Robinson Brog.

However, Robinson Brog conceded that Mr. Gold and Ms. Rosenblatt, as general partners of Winhall II, were "technically" clients of Robinson Brog. Robinson Brog sought to blunt the force of this concession by noting that Gold and Rosenblatt were just two of the twenty-two partners of Winhall II, that the two together held only a 7.25% interest in the partnership, and that they had played no active role in the prosecution of the Winhall II action.

In addition, Robinson Brog asserted that Mr. Greene's role in both this action and the Winhall II action had been "limited to attempting to settle the claims before they became enmeshed in litigation." In support of this point, Robinson Brog submitted the affirmation of Mr. Greene, who stated that (a) Robinson Brog's contact at Winhall II was neither Mr. Gold nor Ms. Rosenblatt; (b) another Robinson Brog partner (Robert Milner) had "primary responsibility" for prosecuting the Winhall action; (c)

Greene's only role was to attempt to settle the Winhall action; and (d) Greene had not had any telephone conversation or other interactions with Mr. Gold or Ms. Rosenblatt regarding the Winhall action. But Greene also acknowledged that (i) Winhall II was organized by another client of Robinson Brog (H.P. Capital), and (ii) Greene was the "originating partner" for H.P. Capital, was responsible for billing H.P. Capital matters, and oversaw H.P. Capital matters at Robinson Brog, including the Winhall II matter.

Robinson Brog also submitted an affirmation from Mr. Milner (the partner with primary responsibility for the Winhall II matter). Mr. Milner stated that Robinson Brog's representation of Winhall II had "nothing to do with Mr. Gold or Ms. Rosenblatt in a personal capacity" and that he did not "foresee any need for me, or any other attorney at Robinson Brog to engage in confidential communications with Mr. Gold or Ms. Rosenblatt in our prosecution of the Winhall II action." For good measure, he added that "my and Robinson Brog's ability to vigorously represent Winhall II will not be compromised by reason of the fact that Robinson Brog is suing Gold Rosenblatt."

In addition, Robinson Brog denied that it was currently opposing its own clients (Mr. Gold and Ms. Rosenblatt) in the legal malpractice action. It was true that the action had interoriginally been filed against the general partnership known as Gold, Rosenblatt & Goldstein, but that general partnership no longer existed and had been succeeded by Gold & Rosenblatt, LLC, a professional limited liability company. Thus, Robinson Brog argued that it was not suing its own individual clients but rather was suing a separate entity.

In reply, Gold & Rosenblatt asserted that the "substantial relationship" test did not apply to a situation in which a law firm was simultaneously representing a client in one matter while suing it in another matter. Under those circumstances, Gold & Rosenblatt argued, "a per se rule applies which requires Robinson Brog to obtain the consent of Mr. Gold and Ms. Rosenblatt or establish that there is no actual or apparent conflict ...." Gold & Rosenblatt said that Robinson Brog could not satisfy either of these criteria.

The court granted the motion to disqualify Robinson Brog. The court gave several reasons to support its decision.

### **Lawyers for a partnership represent the partners**

First, the court agreed that Robinson Brog had created an attorney-client relationship with Mr. Gold and Ms. Rosenblatt by virtue of representing Winhall II, in which Mr. Gold and Ms. Rosenblatt were general partners. The court quoted two cases to support this conclusion. The first case was *Dembitzer v. Chera*, 728 N.Y.S.2d 78 (2d Dept. 2001). There, a law firm that currently represented a partnership had sought to represent a third party in an action against a general partner who owned a 50% interest in the partnership. The 50% partner moved to disqualify, and the court granted the motion, stating: "A partnership is not generally considered a separate entity existing independently of the persons who control it." But did the *Dembitzer* holding apply in the case at bar, where Robinson Brog pointed out that Gold and Rosenblatt together owned only 7.25% of Winhall II? Yes, the court said. "While the interest of Mr. Gold and Ms. Rosenblatt in Winhall II is relatively small, as general partners in Winhall II they nonetheless are clients of Robinson Brog." In other words, a client is a client.

The other case cited by the Steven's court was *Colon v. Aldus III Associates*, 745 N.Y.S.2d 425 (1st Dept. 2002). There, the plaintiff had been injured while tuckpointing a building owned by his employer. He could not sue his employer due to the Workers' Compensation Law, so he sued (among others) the building's owner, Aldus III Associates, a limited partnership in which the decedent's employer was a general partner. The trial court granted summary judgment for Aldus III, stating that "partnerships, unlike corporations, have no existence independent of the persons who create or control them ...." Thus, plaintiff could not sue the partnership-- and since he also could not sue its general partner, his employer, the court dismissed the case.

Second, the court addressed Robinson Brog's argument that it was not suing its own clients because the defendant in *Steven's* was Gold & Rosenblatt, LLC, not Mr. Gold and Ms. Rosenblatt as individuals. The court took a pragmatic approach and rejected this argument. "Given the realities of this situation, including that a limited liability company operates only through its members," the court said, "the rule regarding simultaneous representation should apply." Thus, "by representing Steven's in this action Robinson Brog is effectively suing its own clients Mr. Gold and Ms. Rosenblatt." Third, the court agreed with Gold & Rosenblatt that the substantial relationship test was the wrong test. The court said: When, as here, the issue concerns a conflict of interest arising out of the current representation of a client as opposed to the representation of a former client, the "substantially related" test proffered by Robinson Brog . does not apply. Instead, "when the law firm simultaneously represents opposing parties in different lawsuits and 'the relationship [between attorney and client] is a continuing one, adverse representation is prima facie improper.and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution of the vigor in representation.'"

#### **Rule 1.7 of the New York Rules of Professional Conduct**

The court then quoted and analyzed Rule 1.7 of New York Rules of Professional Conduct, which the court noted "governs disqualification based on concurrent conflicts of interest." Robinson Brog had not shown that its simultaneous representation of Steven's in this action and Mr. Gold and Ms. Rosenblatt in the Winhall II action was permissible under Rule 1.7. On the contrary, Robinson Brog's representation of Steven's in the malpractice action while simultaneously representing Mr. Gold and Ms. Rosenblatt in the Winhall Action involved the representation of "differing interests" which is broadly defined in Rule 1.0(f) as including "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Rule 1.7(a)(1) prohibited simultaneous representation involving differing interests absent client consent, and Mr. Gold and Ms. Rosenblatt had not consented.

(In a footnote, the court noted that Gold & Rosenblatt's papers had cited conflict provisions in the old New York Code of Professional Responsibility, which the court pointed out had been replaced by the Rules of Professional Conduct effective April 1, 2009. But this did not matter because "the relevant provisions governing concurrent conflicts of interoriginally est are similar in substance to the relevant provisions of the Code of Professional Responsibility relied on by Gold & Rosenblatt." For this proposition the court cited New York Professional Responsibility Report, Simon, *Comparing The New York Rules of Professional Conduct to the New York Code of Professional Responsibility*" which appeared in NY PRR in February of 2009.)

### **Confidentiality Concerns**

Robinson Brog also failed to persuade the court that its simultaneous representation of both Steven's (in the malpractice action) and Mr. Gold and Ms. Rosenblatt (in the Winhall II action) would not involve "an actual or apparent conflict of interest ...." The court was troubled by the involvement of a Robinson Brog partner (Mr. Greene) in both the representation of Steven's in this action and the representation of Winhall II in the Winhall II action. "Given Mr. Greene's involvement in an action in which his firm represents Mr. Gold and Ms. Rosenblatt as general partners and this litigation against a professional liability company whose sole members are Mr. Gold and Ms. Rosenblatt," the court said, "Robinson Brog cannot show an absence of, at the very least, an apparent conflict of interest and loyalties." Not content merely to utter these words, the court gave an example:

[A]s counsel to Winhall II, Robinson Brog knows about an asset held by Mr. Gold and Ms. Rosenblatt [their 7.25% interest in the partnership], which could potentially provide leverage in settling this action. Furthermore, given the nature of the allegations in this action, including that a former member of the predecessor limited liability company forged court orders, Robinson Brog may come into possession of sensitive information that could adversely affect the firm's attorney-client relationship with Mr. Gold and Ms. Rosenblatt.

Thus, the court was concerned not only with the loyalty aspects of the conflict but also with the confidentiality aspects.

Finally, the court noted that the malpractice action was in its early stages, so that "any harm caused to Steven's in granting his [Gold & Rosenblatt's] motion will be minimal." In this regard, the court noted that Robinson Brog "fails to submit an affidavit from Steven's showing how it will be harmed in the event of Robinson Brog's disqualification." Accordingly, the court granted Gold & Rosenblatt's motion to disqualify.

### **Conclusion: Check Carefully for Conflicts**

The *Steven's Distributors* case breaks no new ground. It simply reminds us that in New York a lawyer nominally retained by a partnership in fact represents not the partnership as an independent entity but rather the general partners. That is because New York still adheres to the original Uniform Partnership Act that took effect in 1914 (the year World War I began), and under that law a partnership has no independent existence but is merely an aggregation of its partners.

The real lesson of *Steven's Distributors* is the need for thorough conflict checking. A law firm that agrees to represent a partnership must ascertain the name of every general partner, large and small (even those who hold only a 7.25% interest). Indeed, this appears to be required by Rule 1.10(e), which mandates that "a law firm shall make a written record of its engagements, at or near the time of each new engagement ...." Since the engagement is really with the general partners and not with the partnership itself, the law firm must find out the names of the general partners and enter those names into its current client database (the "written record"). As long as the law firm continues to represent the partnership (meaning the general partners) in any matter, the law firm may not accept any engagement adverse to any of the partners absent informed consent, confirmed in writing, pursuant to Rule 1.7(b).

Implementing the lesson of *Steven's Distributors* will be a significant administrative burden in the short run, but it should avoid motions to disqualify in the long run.

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