

Ethics Opinion

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QUESTION PRESENTED: If a lawyer represents a partnership, and one of the partnership members is expelled, can the lawyer sue the expelled partner without violating the conflict of interest former client Rule 1.9?

ANSWER: Yes.

ANALYSIS: The lawyer represents the partnership as a separate jural entity, not the expelled member individually. The applicable rule is Model Rule 1.13, in particular 1.13(a), which provides:

"A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

This rule has been adopted by the Montana Supreme Court and has been effective since July 1, 1985. The comments to the rule provide that the duties defined apply equally to unincorporated entities, and that constituents (here, partners) are persons acting for "organizational" clients that are not corporations.

The basic precept of Rule 1.13 is that a lawyer representing an entity client does not thereby become the lawyer for any of the entity's members, agents, officers, or other constituents as they are referred to in this rule. This has been the traditional view (see Ethical Consideration 5-18 of the Code of Professional Responsibility), but the Model Rules give this entity theory more prominence. In contrast with the competing "group theory" (that the lawyer would be regarded as acting on behalf of a group of individuals who are associated with each other), the ABA and the Montana Supreme Court -- in rejecting this group theory -- adopted the entity approach, which postulates that the lawyer has only one client -- the entity itself. Under the entity approach, the interest of the other players must still be taken into account, but they are the interests of nonclients. The reason for rejecting the group theory in favor of the entity concept is the separate jural personality of the entity. It can enter legal relationships in its own right, including the lawyer-client relationship. By the same token, the individuals involved are agents of the jural personality.

The lawyer has no conflict of loyalties under the entity approach taken by the Model Rules, for the lawyer was only on one side to begin with. The lawyer is required to stay loyal to the one client -- the entity; that, in turn, might very well require the lawyer to be "disloyal" to a particular individual. This policy is legally correct and a necessary consequence of the well established principles of agency law upon which the entity theory rests.

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