PRESENTED AT

LLCs, LPs and Partnerships
July 13-14, 2017
Austin, Texas

"HELLO!"

INADVERTENT PARTNERSHIPS

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John Ale is Senior Vice President, General Counsel & Secretary of Southwestern Energy Company, an energy company listed on the New York Stock Exchange whose wholly-owned subsidiaries engage in natural gas and oil exploration, development and production, along with natural gas gathering and marketing. It is the third largest natural gas producer in the Continental United States. Additional information on the company can be found at *www.swn.com*.

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I. Introduction

The partnership—what we often call a general partnership—is the law's default business entity. When starting a business enterprise, one can choose from a wide menu of possible forms, from corporations to limited partnerships to limited liability companies to business trusts. Forming one of these other entities typically requires some formal action, such as filing a certificate of formation with a governmental agency—in Texas, the Secretary of State.[1] Yet when people or entities associate to carry on a business for profit as co-owners and do not create some other entity, they are a partnership.[2]

This paper discusses situations in which individuals or entities, through their words or dealings, may wind up being treated as having formed a partnership even though they did not explicitly say they were doing so. A party dealing with another may seek to characterize their relationship as a partnership to take advantage of business opportunities or to impose fiduciary-type duties on the other party. Similarly, someone dealing with a party who is not solvent may seek to characterize the insolvent party's relationship with another as a partnership so that the other, solvent party becomes liable for the debts and obligations of their purported "business." These rules often are applied in hindsight. Practitioners and their clients must be careful in how they document their relationship and how they hold themselves out to third parties.

II. Basic Principles

A. Definition of partnership

Section 152.051(b) of the Texas Business Organizations Code ("TBOC") defines a partnership as follows:

> Except [for other entities created under the TBOC, other listed statutes or their non-Texas counterparts, such as corporations and limited liability companies, or if the person lacks legal capacity to be a partner], *an association of two or more persons to carry on a business for profit as owners creates a partnership*, regardless of whether:

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[1] *E.g.,* TEX. BUS. ORGS. CODE §§ 1.002(22) (hereinafter referred to as the TBOC) (defining "filing entity" as a corporation, limited partnership, limited liability company or one of several other types of entities), 3.001 (forming a filing entity requires filing a certificate of formation). This paper refers to cases and statutes principally from Texas. Nevertheless, because Texas' and most states' general partnership statutes are based on some version of the Uniform Partnership Act issued by the National Conference of Commissioners on Uniform State Laws, UNIF. PARTNERSHIP ACT (1997), the relevant statutory language is essentially the same throughout the United States except Louisiana.

[2] TBOC § 152.051. This and related provisions of the TBOC were taken essentially verbatim from the Texas Revised Partnership Act, TEX. REV. CIV. STAT. ANN. arts. 6132b-1.01 to -11.05 (superseded by chapter 152 and related provisions of the TBOC for partnerships formed on or after January 1, 2006, and for all other partnerships effective January 1, 2010 or such earlier date, if any, as the partnership may have specified). Precedents under the Texas Revised Partnership Act should apply under the TBOC's partnership provisions.

(1) the persons intend to create a partnership; or

(2) the association is called a "partnership," "joint venture," or other name.[3]

Note that this definition:

- Does not require a written or even oral agreement, although "association" implies some sort of understanding
- Does not require the participants to identify themselves as partners
- Does not require that business actually be conducted, but only that they "associate[e] . . . to carry on a business"
- Does require the business be intended for profit[4]
- Does require association as owners and not in some other relationship; *e.g.*, employer-employee, lender-borrower, landlord-tenant[5]

As noted in the comments to the Uniform Partnership Act—the model act on which Texas's partnership statute is based—this definition is an operative rule of law.[6]

B. Factors indicating partnership

Section 152.052(a) of the TBOC lists several factors in determining whether a partnership has been formed:

- Receipt or right to receive a share of profits of the business
- Expression of intent to be partners in the business
- Participation or right to participate in control of the business

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[3] TBOC § 152.051(b) (emphasis added).

[4] *See* MT Falkin Investments, L.L.C. v. Chisholm Trail Elks Lodge No. 2659, 400 S.W.3d 658 (Tex. App.—Austin 2013, pet. denied) (groups associating for nonprofit purposes do not create a partnership).

[5] *E.g.,* Bass v. Bass, 814 S.W.2d 38, 41 (Tenn. 1991) ("a contract of partnership, either express or implied, is essential to the creation of partnership status"); Ingram v. Deere, 288 S.W.3d 886, 893-94 (Tex. 2009) (partnership presupposes an agreement); Bohatch v. Butler & Binion, 977 S.W.2d 543, 544 (Tex. 1998) ("[p]artnerships exist by agreement of the partners"). For a more detailed discussion of these factors, see J. ALE, PARTNERSHIP LAW FOR SECURITIES PRACTITIONERS § 2:2 (2016-17 ed.).

[6] UNIF. PARTNERSHIP ACT (1997) § 202 comment 1. Because the partnership provisions of the TBOC derive from the Uniform Partnership Act, a court should construe these provisions "to effect its general purpose to make uniform the law of those states that enact it." TEX. GOV'T CODE § 311.028. *See* TBOC § 1.051 (Code Construction Act applies to the TBOC).

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