

Who is a Partner?
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I. The Fundamental Question

People commonly refer to each other as “partners” but who is truly a partner for legal, ethical and tax purposes? This discussion will cover partners by estoppel (purported partners), non-equity partners, and other circumstances in which the status of being a “partner” is important.

As noted below, the definition of a partner and partnership varies from situation to situation. As a general proposition there must be partners in order for there to be a partnership and there must be a partnership in order for a person to be a partner. Simply stated a partnership comprises all the partners and the partners compose the partnership. Under most definitions, the partners composing the partnership are defined by the rights they have in, and the obligations they are owed by, the partnership. These rights of a partner include the rights to receive financial returns, participate in the management (governance and agency rights), and receive information from the partnership and the obligations owed by a partner, each of these rights is accompanied by a corresponding obligation to the partner by the partnership and, in some cases, the other partners. A partner has obligations to the partnership to make the agreed upon contributions (including, in some cases, to contribute to the losses of the partnership) and to refrain from violating duties to the partnership in connection with the partner’s exercise of the partner’s governance rights or information rights, each of which obligations gives rise to a corresponding right to enforce performance on the part of the partnership and, sometimes, the other partners. The rights and obligations of the partners and the partnership *inter se* may be modified in the partnership agreement.

As explained below, the determination of whether a person is a partner will often turn on the rights and obligations the person in question owes to the partnership and, in some cases, whether the partnership even exists. Thus, the appropriate response to the question, “Is this person a partner?” is “Why do you want to know?”

This paper explores various circumstances in which a person may be considered a partner in a general partnership. For purposes of this paper, the reference to partnership is to a general partnership that is not a limited liability partnership (LLP).¹ Many of the same concepts, particularly those based upon the economic participation in the partnership and the rights and obligations in connection with governance apply to other unincorporated or alternative entities such as limited partnerships, LLPs, and limited liability companies (LLCs). On the other hand, those circumstances under which a partner would have vicarious liability to third parties will not be applicable to limited partners and members of LLCs.

II. Who is a Partner for Business Law Purposes?

A. Definition of Partner

1. *Statutory Definition of Partnership* Under most partnership statutes, a partnership is defined as “an association of two or more persons to carry on as co-owners a business for profit.”² Under the Texas Business Organizations Code (“TBOC”), a general partnership is “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a “partnership,” “joint venture,” or other name.”³ Of course there is a rich body of common law on whether the actions of participants created a partnership, as a result of which either creditors may enforce joint and several liability on them for debts and obligations or the parties are required to share the benefits of the activities with each other. Such issues are beyond the scope of this outline.

2. *Statutory Definition of Partner* While partnership statutes all define partnership or general partner the uniform general partnership acts before UPA (2013)⁴ do not provide explicit definition of “partner.” The

¹ See Christine Hurt *Firm Governance: The Anatomy of Fiduciary Obligations in Business* (forthcoming 2020 Cambridge U. Press, Arthur Laby & Jacob Russell, eds.), Chapter ___ Extra Large Partnerships (“Extra Large Partnerships”) Part I.

² Uniform Partnership Act (1914) (UPA (1914)) §6(1), Uniform Partnership Act (1997) (UPA (1997)) §101(6) (“‘Partnership’ means an association of two or more persons to carry on as co-owners a business for profit formed under Section 202, predecessor law, or comparable law of another jurisdiction.”); Uniform Partnership Act (1997) (last amended 2013) (UPA §101(11) (“‘Partnership,’ except in [Article] 11, means an association of two or more persons to carry on as co-owners a business for profit formed under this [act] or that becomes subject to this [act] under [Article] 11 or Section 110. The term includes a limited liability partnership.”).

³ TBOC §152.051(b). See also TBOC §1.001(34) applying this definition to describe general partnerships throughout the TBOC outside of Chapter 152.

⁴ UPA (1914) and UPA (1997).

TBOC defines a general partner to include each partner in a general partnership.⁵

a. Co-owner of Business for Profit. In the absence of an explicit definition of partner in the uniform acts, one might extrapolate the definition of a partner to be one of the “two or more persons to carry on as co-owners a business for profit” who had associated to become a partnership.⁶

b. Person Admitted as a Partner. Under the UPA (2013), a definition of “partner” has been added defining a partner as “a person that . . . has become a partner in a partnership under Section 402 (dealing with admission of partners) or was a partner in a partnership when the partnership became subject to this [act] under Section 110 (dealing with the application of UPA (2013) to existing partnerships); and . . . has not dissociated as a partner under Section 601.” This definition of partner differs from the one above in that under this definition a person may be a partner by virtue of being admitted without respect to whether the person is a “co-owner” of the business. Thus, this definition accommodates non-equity partners described below.

3. *Attributes of Partnership* For state law purposes, a partner is defined by reference to three attributes, none of which are mandatory. All of these attributes characterized a partner in a general partnership under UPA (1914) but each may be modified structurally in later partnership statutes: vicarious liability, financial interest in the partnership, and management rights. Other statutes defining partners will draw upon one or more of these attributes.

a. Vicarious Liability. Historically each partner was personally liable (jointly or jointly and severally) to creditors of the partnership for partnership obligations. This vicarious liability has been modified or eliminated in limited partnerships and limited liability partnerships.

b. Financial Interest in the Partnership. Because a partnership is “an association of two or more persons to carry on as co-owners a business for profit,” it would seem axiomatic that each partner would have an interest in the capital and profits of the partnership. Of course, there have always been circumstances in which a partner may have no current interest or a highly contingent interest in capital and profits as a result the economic condition of the

⁵ TBOC §1.001(33)(A). The definition goes on to define a general partner as the general partner in a limited partnership. TBOC §1.001(33)(B).

⁶ As adopted in 2004, the Colorado Uniform Partnership Act (C.R.S. § 7-64-101(18) defined a partner as “means a person who has associated with another person to carry on as co-owners a business for profit as a partnership.” 2004 Colo. Legis. Serv. Ch. 343 (H.B. 04-1398)). Similarly,

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