ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm has long represented Edward Entrepreneur (Eddie).

Eddie calls one day and tells me that he and Paul Partner (Paul) want to set up a hedge fund. Eddie and Paul tell me that they do not want to incur the expense of multiple lawyers to draw up the agreements, and because you are the preeminent lawyer in the field, they want you to draft them all. Are there any problems with this request? If so, can I fix them and how?

During the representation, Eddie asks my firm to set up Hedge Fund GP, in which Eddie and Paul are equal partners. My firm draws up the papers for Hedge Fund GP to become the general partner of an onshore fund that my firm has organized called Hedge Fund Partners. Because of my firm's long relationship with Eddie, I saw no need to send Eddie an engagement letter for this work, and I chose not to run a conflict check. (1) What are the consequences of the failure to run a conflict check or to send an engagement letter under these circumstances; and (2) what should the engagement letter have said?

Lastly, during the course of my firm's representation of Eddie and Paul, I participated in numerous confidential communications with each of them pertaining to their joint venture. To whom does the attorney-client privilege for those communications belong? Eddie has asked me to keep certain confidential information which he has disclosed to me secret from Paul. Is this a problem? What if the information relates to work that I performed for Eddie concerning his other business ventures?

Sincerely,

I. Needa Lawyer

Dear I. Needa Lawyer:

Joint Representation of Multiple Clients

The joint representation of Eddie and Paul implicates Rule 1.7 (Conflict of interest: current clients) of the New York Rules of Professional Conduct (NYRPC). Under Rule 1.7(a)(1), a lawyer shall not represent multiple clients if the clients have "differing interests." Rule 1.0(f) broadly defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." The main purpose of this rule is to prevent a lawyer from taking on a new client or new matter that may require the lawyer to take certain steps or positions on behalf of one client that could be materially adverse to the interests of another client, unless the lawyer can satisfy all the terms of Rule 1.7(b). *See* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 240 (2012 ed.) (Simon's NYRPC).

Rule 1.7(b) permits a representation despite a concurrent conflict under Rule 1.7(a) if (1) the lawyer "reasonably believes" that the he or she can provide "competent and diligent" representation to each affected client, (2) the representation is not prohibited by law, (3) "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal," and (4) "each affected client gives informed consent, confirmed in writing."

The first issue that must be considered is whether the joint representation of Eddie and Paul involves "differing interests" under Rule 1.7(a)(1). Even though the creation of their partnership and the hedge fund is a common goal shared by both Eddie and Paul, and even though the common representation involves a transactional matter, not litigation, it is possible that your clients may have potentially different interests now or in the future.

In view of the fact that you appear to have a potential conflict within the meaning of Rule 1.7(a)(1), the analysis shifts to whether it is consentable under Rule 1.7(b)(1). In other words, do you reasonably believe that you can provide "competent and diligent representation" to both clients, particularly in light of your firm's long-standing relationship with Eddie? The answer is fact specific and will depend on the circumstances. Rule 1.7, Comment 28. As counsel, you must determine whether your loyalty to Eddie, as a result of the firm's prior relationship, will impair your competence and diligence on behalf of the new client Paul, and, vice versa, whether your loyalty to Paul as a new client might impair your competence and diligence on behalf of Eddie. For example, do you have confidential information in your possession from the firm's prior representations of Eddie that would in any way adversely affect your independent professional judgment in representing Paul? Should you determine, at any point, that your continuing duty of confidentiality to Eddie would prevent you from providing competent and diligent representation to Paul, then the conflict is non-consentable and you would be required to withdraw from the common representation.

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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If you "reasonably believe" that you can provide competent and diligent representation to both Eddie and Paul, the common representation would fall within the category of a consentable conflict. Comment 28 of Rule 1.7 gives an illustration that provides guidance here. It states that while a lawyer may not represent multiple parties in a negotiation if their interests are fundamentally antagonistic to one another, common representation is permissible where the clients are generally aligned in interest, even though there may be some difference in interest among them such as when the lawyer is helping to organize a business in which two or more clients are entrepreneurs. *See also* Rule 1.7, Comment 29 and N.Y.C. Bar Ass'n, Comm. on Prof. and Jud. Ethics Op. No. 2001-2 (stating that "[i]n a transaction where common interests predominate over issues in dispute, the possibility of an adverse effect on the exercise of the lawyer's independent professional judgment is significantly mitigated" and opining that a lawyer may represent multiple parties in a single *transaction* where interests of represented clients are generally aligned or not directly adverse, with disclosure and informed consent, so long as the "disinterested lawyer" test is satisfied).

Your joint representation of Eddie and Paul appears to be a consentable conflict; as long as an actual conflict has not yet arisen between them, you may be able to rectify the situation and avoid future difficulties if you immediately take steps to obtain the "informed consent" of both clients, confirmed in writing. Obviously, the best practice here would have been to get informed consent before the joint representation began, or within a reasonable time thereafter. That ship has sailed, but you cannot ignore the problem. You must act to obtain informed consent and a waiver of any conflicts as between these clients at this time before the representation proceeds any further.

To obtain the "informed consent" of Eddie and Paul under Rule 1.7(b)(4), means that you must explain the implications of the common representation, which should include a discussion about the advantages and risks involved, the effect on the attorney-client privilege, and the material and reasonably foreseeable ways that the conflict could affect the interests of each client. *See* Rule 1.7, Comment 18. As part of the discussion, you should advise the affected clients that in the event a dispute were to arise between themselves, there would be no expectation of privacy as to any privileged communications they had with you in connection with this matter. *See* Restatement (Third) of the Governing Lawyers § 75. Further, you should address how you and the affected clients would proceed in the event that an actual conflict arose between them or in the event either client changed his mind and revoked consent. Absent the informed consent of each affected client in such circumstances, you may be forced to withdraw from representing all affected clients pursuant to Rule 1.9(a) (Duties to Former Clients) and Rule 1.7(a)(1).

Significantly, the rules do not require that the informed consent and/or conflict waiver be signed by the client; they simply require that the informed consent be *confirmed* in writing. Rule 1.0(e) provides an attorney with a choice of three methods to memorialize the informed consent: (i) the lawyer may obtain a writing from the client confirming that the client has given consent; (ii) the lawyer may promptly transmit a writing to the client memorializing the client's oral consent; or (iii) the lawyer may obtain a statement by the client made on the record of any proceeding before a tribunal. Under Rule 1.0(x), an electronic transmission constitutes a writing.

It is possible that you have already discussed the risks and advantages of this common representation with both clients and have advised Paul of your prior representation of Eddie. If that is the case, we suggest that you immediately confirm those conversations and the clients' agreement to waive any conflicts in writing. If you have not had any such discussions, we recommend that you do so now, and that you confirm the discussions contemporaneously in writing and obtain the appropriate conflict waivers. You may consider using the following or similar language to confirm the informed consent and conflict waivers of the affected clients in writing:

> Mr. Edward Entrepreneur and Mr. Paul Partner:
>
> As you know, our Firm has in the past represented and currently represents Mr. Entrepreneur, in connection with matters unrelated to your venture to set up Hedge Fund GP and Hedge Fund Partners (the "Hedge Fund Venture"). As we have indicated to you, your interests may currently and in the future be adverse for purposes of the ethics rules by which lawyers are bound, and pursuant to those rules we would be unable to represent you in connection with the Hedge Fund Venture unless you both consent to this representation.
>
> Pursuant to my discussions with you both, Mr. Partner has consented to the Firm's representation of him and Mr. Entrepreneur in connection with your partnership and Hedge Fund Venture even though we have represented Mr. Entrepreneur in the past and may continue to represent him in the future. While we will act in a manner which we believe to be in your best interests, we have advised you that you should consider consulting separate counsel in connection with the Hedge Fund Venture as your interests may be better served by independent counsel.
>
> You both acknowledge and agree that: (1) you have been informed of the potential conflicts of interest that may arise in our joint representation of Mr. Entrepreneur and Mr. Partner generally, and in connection with your partnership and Hedge Fund Venture specifically, and we have advised you that retaining separate counsel may better represent your interests; (2) you waive those potential conflicts; (3) we will continue to represent Mr. Entrepreneur in connection with matters unrelated to the partnership and Hedge Fund Venture;

(4) if your respective interests come into conflict with each other, we may continue as counsel to Mr. Entrepreneur; and (5) any confidential information that either of you provides to the firm in connection with this representation will be shared with the other client and may not be protected by the attorney-client privilege, as against the other, and that disclosure of such information may be compelled in any future litigation between you.

The Failure to Issue an Engagement Letter or Run a Conflict Check

The failure to issue an engagement letter or run a conflict check is a potentially serious problem. Both the NYRPC and the joint rules of the Appellate Division require that lawyers have written engagement letters and fee agreements with clients. Part 1215 of the joint Appellate Division rules (Part 1215), which became effective on March 2, 2002, provides that

- an engagement letter is required for any client who first became a client after March 2, 2002;
- an engagement letter must explain the scope of the legal services to be provided, the fees and expenses to be charged, billing practices to be followed, and the right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator;
- the letter must be issued to the client before the commencement of the representation, or within a reasonable time thereafter;
- the letter is not required where the expected fee is less than $3,000 or where the attorney's services are of the "same general kind" as services previously rendered to and paid for by the client;
- the letter *is* required, even for existing clients, "[w]here there is a significant change in the scope of representation" (e.g., an existing corporate client became a litigation client, etc.), or "the fee to be charged" (e.g., fees based on hourly rates to a fixed fee, etc.); and
- a written retainer agreement will suffice if the agreement addresses the required matters.

Although as originally enacted it did not create an ethical obligation, that changed in April 2009 when New York adopted the Rules of Professional Conduct and a lawyer's obligation to issue an engagement letter became a matter of professional responsibility. *See* Rule 1.5(b).

Under these rules, you were required to issue an engagement or retainer letter to Eddie and Paul. As to the consequences for non-compliance with these rules, Part 1215 is silent as to what penalty, if any, should be assessed. *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 61 (2d Dep't 2007). In practice, however, a lawyer's failure to abide by this rule has resulted in dismissal of fee collection claims based on a breach of contract theory, but courts have usually allowed recovery on a quantum meruit or account stated basis (*see id.*; *Miller v. Nadler*, 60 A.D.3d 499, 500 (1st Dep't 2009) (allowing recovery of legal fees under theories of account stated and quantum meruit, despite plaintiff's failure to comply with the rules on retainer agreements); *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 55 A.D.3d 462, 464 (1st Dep't 2008); *see also Constantine Cannon LLP v. Parnes*, 2010 N.Y. Slip Op. 31956U, at *17 (Sup. Ct., N.Y. Co. July 22, 2010) (holding that an attorney's "failure to comply with 22 NYCRR § 1215.1 is not, in and of itself, a basis for disgorgement" or a bar to an attorney's recovery for services properly rendered to the client)).

As the court in *Seth Rubenstein, P.C.*, explained, attorneys have "every incentive" to comply with Part 1215 and are at a "marked disadvantage" if they fail to do so, because absent a letter of engagement or written retainer agreement, attorneys will have greater difficulty "meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon." *Id.* at 64. Absent a clearly written engagement or retainer agreement, there is no "guarantee . . . that the fact finder will determine the reasonable value of services under *quantum meruit* to be equal to the compensation that would have been earned" under a clearly written agreement. *Id.* Additionally, under Rule 1.5(b) of the NYRPC, a lawyer who fails to issue an engagement letter has committed an ethical violation that can be the subject of disciplinary action and may also jeopardize the right to collect a fee.

Your failure to run a conflict check also raises ethical issues. Rule 1.7(a) (addressed above) and Rule 1.10(e) of the NYRPC are implicated here. Rule 1.10(e) provides:

> A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:
>
> (1) the firm agrees to represent a new client;
>
> (2) the firm agrees to represent an existing client in a new matter; . . . .

Id. This rule requires law firms to make a written record of each new engagement "promptly" (i.e., at or near the time of the new engagement), because otherwise a conflicts check made between the time the new engagement commences and the time the engagement is recorded may miss a conflict with the new matter. Simon's NYRPC at 496. Moreover, the rule requires the law firm to implement and maintain a system for checking for conflicts of interest for each proposed engagement each time the firm agrees to represent a new client or agrees to represent an existing client in a new matter. *See* Rule 1.10(e), Comment 9.

Under Rule 1.10(f), a substantial failure to keep adequate records or to implement a conflict check under Rule 1.10(e) may subject the law firm as well as the attorney to professional discipline regardless of whether an improper conflict occurs. *See also* Rule 1.10(g) ("Where a violation of paragraph (e) by a law firm is a substantial factor in

causing a violation of paragraph (a) by a lawyer, the law firm as well as the individual lawyer, shall be responsible for the violation of paragraph (a).”). Therefore, if the phrase “no harm, no foul” was ever applicable with respect to checking for conflicts of interests, it is no longer true today under the new rules. *See* Simon’s NYRPC at 510.

You seem to have violated Rule 1.10(e) on three separate grounds. First, from the facts provided, it does not appear that you made a written or electronic record of the new engagement, which would allow the members of your firm to check whether any of the firm’s former, current or prospective clients have any conflict with Eddie or Paul either presently or going forward. Second, although you have taken on a new client under Rule 1.10(e)(1) with Paul, you have not run a conflict check to determine whether (1) the firm is currently opposed to Paul in any matter, (2) Paul is opposed to any of the firm’s former clients in a substantially related matter; and (3) Paul will be a co-plaintiff or co-defendant in any contemplated or ongoing litigations with any of the firm’s current or former clients. As discussed below, this will present serious consequences for you and potentially for the firm under the imputation rules of Rule 1.10(a) if it is ultimately determined that Paul has conflicting interests with either a former or current client of the firm. Third, notwithstanding the firm’s long relationship with Eddie, Rule 1.10(e)(2) requires that whenever an existing client brings a new matter to the firm, that new matter needs to be checked for conflicts against every pending and past matter in the firm’s database. These checks are essential because, absent the proper conflict check, you and your firm will be unable to determine whether the firm has a conflict under, *inter alia*, Rules 1.7(a) and 1.9(a)–(b) (involving duties to former clients), or whether any conflict arising under Rule 1.7(a) is non-consentable under Rule 1.7(b)(1)–(3). Moreover, absent the proper conflict check, your firm would lack the information necessary to obtain “informed consent” to the conflict from each affected client under Rule 1.7(b)(1) and (4).

While we have not seen any authority analyzing the penalties for a violation of Rule 1.10(e), one can infer that the penalties applied to lawyers who have failed to detect a conflict and have continued to represent conflicting interests under Rule 1.7(a) without having obtained the appropriate conflict waiver would also be applicable here. The most common consequence likely to be encountered is disqualification of the lawyer and firm from representing any of the affected clients. *See Alcantara v. Mendez*, 303 A.D.2d 337, 338 (2d Dep’t 2003) (disqualifying attorney from continuing to represent any plaintiffs in the action). In addition, the attorney’s ethical violation may jeopardize the firm’s ability to recover its fees. An illustrative case is *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012), where the Ninth Circuit recently held that a law firm which represented multiple clients with conflicting interests, but which neglected to obtain a conflict waiver from them, was deprived of all compensation for the representation, notwithstanding that the firm achieved a $49 million recovery for its clients, and notwithstanding that the law firm’s ethical breach appeared to have caused no damage to any of the clients. *Id.* at 655, 658 (applying federal law; reasoning that the “representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees”); *see also Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917, 920 (2d Cir. 1950) (the usual consequence where an attorney represents opposed interests “has been that he is debarred from receiving any fee from either [client], no matter how successful his labors”); *Quinn v. Walsh*, 18 A.D.3d 638 (2d Dep’t 2005) (denying an attorney legal fees for services rendered during his conflicted representation of plaintiffs, in violation of DR 5-105(a) (now, Rule 1.7)). Other risks you may face for failing to detect and disclose a conflicting representation include liability for breach of your fiduciary duty to the client (*see Schlissel v. Subramanian*, 25 Misc. 3d 1219(A), 2009 N.Y. Misc. LEXIS 2954, at *24–25 (Sup. Ct., Kings Co. 2009); *Macnish-Lenox, LLC v. Simpson*, 17 Misc. 3d 1118(A), 2007 N.Y. Misc. LEXIS 7138, at *21–23 (Sup Ct., Kings Co. 2007)) and / or a potential complaint to the Grievance Committee and public censure (*see In re Drysdale*, 27 A.D.3d 196, 199 (2d Dep’t 2006) (attorney censured for professional misconduct for engaging in a pattern of impermissible conflicts of interest)).

Accordingly, you would be well-advised to run the necessary conflict checks for the new matter and new client immediately and deal with the consequences of its results, rather than ignore the conflict check process and face even more dire consequences in the future.

There Is No Expectation of Confidentiality Between Joint Clients

In response to your question concerning the attorney-client privilege for communications in a common representation, the prevailing rule is that, while those confidential communications are generally protected from disclosure to third parties, as between jointly represented clients, no privilege attaches. In other words, if a litigation were to ensue between Eddie and Paul arising from the partnership and hedge fund venture, there would be no privilege as between Eddie and Paul and neither should have any expectation of privacy. *See Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 137 (1996) (“where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients”).

Moreover, if one client asks the lawyer not to disclose information to the other client relevant to the joint representation, this is generally inappropriate because the lawyer has an

equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interest and also has the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4; *see also* Rule 1.7, Comment 31. Therefore, the lawyer will be required to withdraw if one client insists that information material to the joint representation should be kept secret from the other. Rule 1.7, Comment 31 ("as part of the process of obtaining each client's informed consent, the lawyer should advise each client that . . . the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other"). In certain limited circumstances, the lawyer may proceed with the representation if the affected clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the jointly represented clients. *Id.* In other words, the lawyer must obtain the other client's informed consent before doing so.

Based on the foregoing, Eddie's request that you keep certain information secret from Paul does present a problem and may require you to withdraw from the representation if the information is material to the partnership and hedge fund venture. However, if the confidential information relates solely to Eddie's other business ventures and does not adversely affect your representation of Paul and Eddie in connection with the partnership and hedge fund venture, you may be able to oblige Eddie's request. *See id.* ("lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients"). However, you must inform Paul of the circumstances without divulging Eddie's confidential information, and confirm his consent in writing. Lacking Paul's informed consent, you would have to withdraw from the common representation. For the future, this is one of the areas that you should address in your engagement letter when representing multiple clients (*see supra*) and for which you should obtain the appropriate waivers.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Maryann C. Stallone, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represent Wishful Thinking Development (WTD). In 2007, WTD took out a multi-million dollar mortgage on a piece of commercial real property which it owns in midtown Manhattan.

After approximately four years, WTD ceased paying its mortgage and the lender instituted a foreclosure action by filing a summons and complaint in Manhattan Supreme Court in early 2012.

The complaint was personally served upon Inover Hishead (IH), the principal of WTD, at his office in downtown Manhattan on February 1, 2012. On the morning of February 13, IH called to inform me that he was previously served with the complaint, and I advised him that we needed to respond to the complaint within 20 days, which would require a response by February 21, 2012. The complaint contained 10 separate causes of action against WTD, which consisted of nearly 200 paragraphs of allegations. Because of the complexity of these allegations, I consulted with IH and we decided that it would be appropriate to request a 30-day extension of time from the lender's counsel so that we could respond to the foreclosure complaint. In addition, I needed an extension of time as well because last fall I was scheduled to begin a weeklong trial in federal court in California on February 16.

Later that day, I telephoned opposing counsel and advised him that I was just retained to represent WTD and requested a 30-day extension to respond to the complaint both because of the time required to address the complex nature of the lender's allegations in the complaint as well as my upcoming trial on the West Coast. The lender's counsel informed me that his client wanted to aggressively pursue this action and foreclose on the property immediately. In short, I was informed by my adversary that the lender wanted a "take no prisoners" approach in the case and was instructed by his client not to grant any requests to extend deadlines or courtesies to me or my client. Although I explained to opposing counsel that an extension of time is a basic courtesy and would not prejudice the lender, he responded that his client was "sick and tired of lawyers being nice to each other" and told me that my request for an extension was denied. He further informed me that if I did not answer or move to dismiss the complaint by February 21, 2012, then he would immediately file a motion for a default judgment against WTD.

Isn't my adversary's conduct a violation of the Rules of Professional Responsibility and the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
Concerned Counsel