ATTORNEY PROFESSIONALISM FORUM

To the Forum:

Jonathan Entrepreneur (Jonathan) had been a long time client of my firm. Back in 2011, he decided that he wanted to set up a hedge fund with his friend, Paul Partner ("Paul"). At Jonathan's request, my firm did the work that resulted in the creation of Hedge Fund GP, in which Jonathan and Paul became equal partners. My firm also prepared the papers for Hedge Fund GP to become the general partner of Hedge Fund Partners, an onshore fund my firm organized. Because of my firm's long-standing relationship with Jonathan, we did not issue an engagement letter for this work. In addition, Jonathan asked that our firm also represent Paul in the formation of the fund entities, and we were happy to grant his request.

My firm generated a bill each month for legal services rendered to Hedge Fund GP, to Hedge Fund Partners, to Jonathan, and to Paul and addressed the bills only to Hedge Fund GP.

Hedge Fund GP was always behind on paying its bills. However, earlier this year, Hedge Fund GP ran into trouble and completely stopped paying our firm's bills.

We want to commence an action against Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul to collect the fees that are owed. I have heard different views from several people on whether we were required to issue engagement letters to Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul if they were all to be responsible for our fees, but I have been unable to get a definitive answer. What are the rules on engagement letters and is the absence of an engagement letter fatal to my firm's claim for unpaid legal fees?

Sincerely,

I.N. Confusion

Dear I.N. Confusion:

Attorneys should be familiar with the rules requiring written engagement letters. 22 N.Y.C.R.R. Part 1215 (Part 1215) contains several rules that no lawyer can or should overlook:

§ 1215.1. Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter

(1) if otherwise impracticable or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term *client* shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) Explanation of the scope of the legal services to be provided;

(2) Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§ 1215.2. Exceptions

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000,

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or

(c) representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R.), or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As originally enacted, the requirement that attorneys issue written engagement letters was a court rule and not a matter of professional responsibility or legal ethics. That changed in April 2009 when New York adopted the Rules of Professional Conduct (RPC). Rule 1.5(b), which essentially incorporated Part 1215, makes written engagement letters an ethical obligation:

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> A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

Prior to 2009, the penalty for not having a written engagement letter was arguably, at best, the loss of a breach of contract claim in an action to collect fees. *See Brown Rudnick Berlack Israels LLP v. Zelmanovitch*, 11 Misc. 3d 1090(A), 2006 N.Y. Slip Op. 50800(U) (Sup. Ct., Kings Co. Mar. 14, 2006). Rule 1.5(b) takes the engagement letter rule beyond the realm of fee collection matters and can potentially expose an attorney to disciplinary action. Although this is uncharted territory, there is a risk that cases interpreting Part 1215 in the fee collection context (which we discuss below) will be applied in the disciplinary forum.

Many lawyers believe that there is a safe harbor which makes engagement letters unnecessary when they get new work from existing clients. So the question is, what would be considered new work? And, which existing clients would fall within the scope of the exception? It is true that Rule 1.5(b) says that engagement letters are not necessary for "a regularly represented client" where there is no change in the fee arrangement and the engagement is for "services that are of the same general kind as previously rendered." *Id*. The problem is that there is no definition of "regularly represented client," and there may be a difference in the two rules because Part 1215 does not use the words "regularly represented client" or even the words "existing client." Comment [2] to Rule 1.5 reminds all of us that it is best to always issue an engagement letter and avoid the risks associated with not having one.

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. *See* 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

Another issue that is worth avoiding is whether a new engagement involves "services that are of the same general kind" as the services that the firm has been providing. In the words of one commentator, "if it's a close call as to whether the new services are the 'same general kind' as prior matters, it will take less time to send a written engagement letter than to analyze Rule 1.5(b)." *See* Simon's New York Rules of Professional Conduct Annotated at 171 (2014 ed.).

You don't have an engagement letter and want to recover your fees, so what can you do about your non-paying client? Since the enactment of Part 1215, although the absence of a written engagement letter may be fatal to a breach of contract claim, several courts have ruled that a law firm's failure to comply with the written engagement letter rule "does not preclude it from suing to recover legal fees for the services it provided." *See Miller v. Nadler*, 60 A.D.3d 499, 500 (1st Dep't 2009) (citing *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 63–64 (2d Dep't 2007)). One court has also held that

> the caselaw does not distinguish between the recovery of fees under a theory of *quantum meruit* or an account stated. Instead, this Court has held that [22 N.Y.C.R.R. § 1215.1] contains no provision stating that failure to comply with its requirements *bars a fee collection action*. Indeed, the regulation is silent as to what penalty, if any, should be assessed against an attorney who fails to abide by the rule.

Constantine Cannon LLP v. Parnes, 2010 N.Y. Slip Op. 31956(U), 15 (Sup. Ct., N.Y. Co. July 22, 2010) (emphasis in original) (internal citations omitted.)

The fact that you did not issue an engagement letter to Jonathan and thereafter sent invoices exclusively to Hedge Fund GP does not in our view prevent you from pursuing a legal fee claim against either Jonathan or Paul, or their related entities. But, as suggested in one case, this may not be an easy road and you may face certain obstacles in your attempt to collect fees. *See Davidoff Malito & Hutcher, LLP v. Scheiner*, 38 Misc. 3d 1201(A), 966 N.Y.S.2d 345 (Sup. Ct., Queens Co. Dec. 11, 2012) (law firm's motion for summary judgment on its *quantum meruit* and account stated claims denied where issues of fact existed arising from the law firm's failure to enter into a written fee agreement with its client).

The better practice would have been to issue an engagement letter to all individuals and entities involved in connection with the formation of Hedge Fund GP and Hedge Fund Partners. Furthermore, because your firm appeared to represent both Jonathan and Paul in connection with this matter, one way your firm could have drafted the engagement letter was to set forth clear language about

the potential for conflicts of interest. Sample language could state:

> While we do not currently see a conflict between your interests, whenever a firm represents multiple parties in a single matter, there is always the possibility that a conflict may develop. In the event such a conflict arises, we may be required to cease representing one of you in connection with this matter. We will make the decision with respect to our representation if and when such circumstances arise. Lastly, you understand that if we continue to represent one or more of you, we will be able to use any information we obtained during the joint representation in the continuing representation.

A word to the wise is that strict compliance with Part 1215 is a critical part of professional responsibility. The importance of this was underscored by the court in *Seth Rubenstein, P.C.*, 41 A.D.3d 54:

> Attorneys who fail to heed rule 1215.1 place themselves at a marked disadvantage, as the recovery of fees becomes dependent upon factors that attorneys do not necessarily control, such as meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon. There is never any guarantee that an arbitrator or court will find this burden met or 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 retainer agreement or letter of engagement.

Id. at 64.

We hope that this gives you an understanding of the rules, their potential impact on fee collection cases, and the possible issues that may arise when law firms fail to issue engagement letters. It should come as no surprise that we believe that lawyers should err on the side of caution when it comes to engagement letters. Borrowing from Professor Simon, if you need to spend time thinking about whether an engagement letter is required, it's probably a good idea to simply send one.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq. and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My firm represents Blackacre, a real estate investment trust (REIT) with real estate holdings located throughout many portions of the United States, and has represented the company in almost all of its real estate transactions. A wholly owned subsidiary of Blackacre owns a luxury ski resort development in Utah, and the principals of Blackacre have located a second resort property in Utah that they hope to purchase and add to the company's ever-growing real estate portfolio. My firm only has an office in New York and does not employ any attorneys who are admitted to practice in Utah. Would this transaction require Blackacre to hire local counsel in Utah to assist my firm in the deal? I have heard that if I do not retain local counsel, then I would potentially be engaging in the unauthorized practice of law. Is this true? What are the consequences for engaging in the unauthorized practice of law?

Sincerely,

I. Need Help