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Mr. Joe Tacopina
275 Madison Avenue, 35th Floor,
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Re: Conflict of Interest of Mr. Joseph Tacopina and his firm, Tacopina Seigel & DeOreo, in the pending criminal case, *The People v. Donald J. Trump*

Dear Mr. Tacopina:

I am counsel for Stephanie Clifford (aka Stormy Daniels). I have represented Ms. Clifford since March of 2019, following the termination of representation of Michael Avenatti. Prior to Mr. Avenatti's retention by Ms. Clifford in February of 2018, Ms. Clifford was referred to and did in fact consult with your firm. I have reviewed the emails exchanged between Ms. Clifford and @tacopinalaw and she has further informed me about the details of the communications leading to your willingness to represent her and your offer to be retained upon payment of an initial cash retainer. Although, at that time, Ms. Clifford ultimately retained Mr. Avenatti, the confidential communications she shared with you and your colleagues—leading to a quote of a retainer fee—consisted of shared confidences regarding an opposing party clearly identified in those communications. For you to now represent that opposing party—Donald Trump—would be an ethical breach damaging Ms. Clifford and potentially leading to professional discipline.

While Mr. Trump has a Sixth Amendment right to counsel of his choice, that right is not absolute. *Wheat v. United States*, 486 U.S. 153, 159 (1988). In New York, as elsewhere, the right to counsel of choice will yield when "confronted with some overriding competing public interest." *Matter of Abrams*, 62 N.Y.2d 183, 196, 476 N.Y.S.2d 494, 500-01, 465 N.E.2d 1. The potential for serious ethical conflicts is a compelling enough consideration of judicial administration that outweighs a defendant's right to counsel of choice to require disqualification. *See Wheat*, 486 U.S. at 162-63; *see also In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 251 (2d Cir. 1986); ("Criminal defendants have been constitutionally required to retain other counsel *when the need to preserve the highest ethical standards of professional responsibility outweighs the accused's constitutional right*[.]") (emphasis added) (cleaned up).

Ms. Clifford consulted the Tacopina law firm as a prospective client about substantially the same subject matter as is at issue in the criminal case—the NDA and the payment of $130,000 to her. Emails in our possession appear to establish that there were communications between Ms. Clifford and your firm in February 2018. Those communications were a part of Ms. Clifford's efforts to retain counsel to represent and advise her, specifically relating to her encounters with Mr. Trump. Those encounters with Mr. Trump are covered by the NDA. Following initial

telephone conversations, which prompted the replies in the emails we have in our possession, Ms. Clifford had a long teleconference with you and other lawyers in your firm. In fact, as the media has recently reported, in a 2018 interview with CNN, you extensively commented on the very NDA at issue and its illegality:

> In a separate 2018 panel discussion on CNN, Mr. Tacopina said that the payments and alleged falsification of records about the money was an 'illegal agreement' and 'fraud.' 'I mean, you know, once that net is out, once the microscope is on you, everything is fair game,' he said. 'And it's hard to argue, 'oh, you can't look at this or you can't look at that'. So, yes, if there's an issue with that payment to Stormy Daniels being that it was made on behalf of the candidate. Okay. And it was not declared. That's fair game. Unfortunately, if that's the case.' He added: 'And you know, quite frankly, you know, Michael Cohen, again has made statements that would give rise to suspicion. 'For any prosecutor to say that doesn't make sense, that a lawyer took out a home equity loan with his own money, paid somebody that he didn't even know on behalf of a client who, by the way, had the wherewithal and the money to afford $130,000. 'And, by the way, didn't tell the client about the settlement agreement. It's an illegal agreement. It's a fraud, if that's, in fact, the case. It doesn't pass the straight-face test, and quite frankly, if that is what happened, we have a potential campaign finance issue,' he added.

See Rachel Sharp, *Messages Between Trump Attorney and Stormy Daniels Handed to Manhattan DA*, The Independent (Mar. 23, 2023; 06:35), https://www.independent.co.uk/news/world/americas/us-politics/stormy-daniels-joe-tacopina-trump-arrest-b2305754.html (cleaned up). Thus, contrary to your public statements that you refused to represent Ms. Clifford, your firm allegedly presented her with a representation offer conditioned on payment of an upfront cash retainer. She ultimately chose Mr. Avenatti on terms he proposed.

New York law requires a lawyer and his law firm's disqualification when later representation would implicate a prospective client's confidential communications. *See Grunstein v. Grunstein*, 201 A.D.2d 621, 621, 607 N.Y.S.2d 974, 974-75 (2d Dept 1994) ("[P]rohibition is imputed to current and former members of the same firm"). Even with no attorney-client relationship in place, an attorney "has a fiduciary obligation to preserve the confidential secrets of prospective clients." *Sullivan v. Cangelosi*, 84 A.D.3d 1486, 1486–87, 923 N.Y.S.2d 737, 739 (2011). When, as here, the record is clear that confidential exchanges took place between attorney and prospective client, an evidentiary hearing is generally not required to establish a conflict; the court is allowed to infer a conflict. *Burton v. Burton*, 139 A.D.2d 554, 554, 527 N.Y.S.2d 53, 54 (1988) (no evidentiary hearing was required when from "the undisputed facts it is reasonable to infer that, during the interview with the defendant, [counsel] obtained confidential or strategically valuable information"). Generally, any "doubts as to the existence of a conflict of interest *must be resolved in favor of disqualification so as to avoid even the appearance of impropriety*." *Cohen v. Cohen*, 125 A.D.3d 589, 590, 2 N.Y.S.3d 605 (2015) (emphasis added). Rule 1.18 of the New York Rules of Professional Conduct provides that:

> (a)…[*A*] *person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client.'*

> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective *client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.*
>
> (c) A lawyer subject to paragraph (b) *shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter*, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)

Rules of Professional Conduct (22 NYCRR §1200.1.18) (emphasis added). Important still, a consulted-on matter bears substantial relation to a later-adverse matter when both involve similar subject-matter and the former and later matter center on the rights or obligations that stem from the subject matter. *E.g.*, *Seeley v. Seeley*, 129 A.D.2d 625, 627, 514 N.Y.S.2d 110, 112 (1987) (finding under old New York ethics rules that there was a substantial relation between matters as they both "involve[d] the same parcel of real property and both involve[d], at their core, the nature of the unrecorded ownership interest allegedly possessed"); cf. Rule 1.9, cmt. 3 ("[m]atters are substantially related" if they involve the same transaction or legal dispute).

Several New York cases have found a conflict of interest based on confidential information gained from prospective clients. In *Burton v. Burton*, 139 A.D.2d 554, 527 N.Y.S.2d 53 (2d Dept 1988), for example, the appellate court held that an initial consultation created a relationship between a consulting lawyer and a prospective client. That consultation relationship, the court held, made it improper for the consulted lawyer to represent a party whose interests were adverse to the prospective client. *Id.*; *Seeley*, 129 A.D.2d at 627, 514 N.Y.S.2d at 112 (finding there was a substantial relation between matters as they both "involve[d] the same parcel of real property and both involve[d], at their core, the nature of the unrecorded ownership interest allegedly possessed," which required disqualification of counsel).

You and your law firm have a conflict of interest. Ms. Clifford, as noted, consulted you and your law firm about the NDA and other related matters about Mr. Trump. Through that consultation, "it is reasonable to infer that, during the . . . [communications] with the [prospective client], [counsel] obtained confidential or strategically valuable information," *Burton*, 139 A.D.2d at 554, 527 N.Y.S.2d at 54, about the NDA to enable him to meaningfully comment on its contents and its legal implications. In fact, that consultation substantially relates to the same subject matter as the New York criminal case—the NDA and the $130,000 payment to her. Besides you, Ms. Clifford also had communications with other members of your law firm. So, the entire law firm has a conflict of interest. *See Grunstein*, 201 A.D.2d at 621, 607 N.Y.S.2d at 974-75. That Ms. Clifford is a non-party (and potentially a witness) in the criminal case does not lessen the conflict. Cf. *United States v. Kelly*, 870 F.2d 854 (2d Cir.1989) (disqualifying defense counsel who once represented prosecution witness). The same outcome is warranted here.

In conclusion, under the New York Rules of Professional Responsibility, both you and your firm have a conflict of interest in your representation of Mr. Trump in his criminal case.

In the event you fail, refuse, or ignore your ethical duties arising from the confidential communications shared in trust by Ms. Clifford, I will be compelled to report such conduct to the New York Bar Association and advise Ms. Clifford of all meritorious claims against you.

Sincerely,

Clark O. Brewster