CHAPTER 10

Managing Client Relationships*

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Scope Note

This chapter provides practical advice on handling the attorney-client relationship, addressing the initial client engagement, communications, billing, and terminating the relationship.

§ 10.1 INTRODUCTION

"Practicing law would be great if it wasn't for the clients." A senior partner at a prestigious law firm shared that bit of insight with the author when he was a young associate. The partner rolled his eyes and shook his head; the irony was inescapable. The author does not recall what led to the comment, but assumes that the partner had just concluded a difficult conversation with a recalcitrant client. Of course, without cli-

* Any views or opinions expressed in this chapter are solely those of the author and not of the Massachusetts Board of Bar Overseers.

ents, we would all be out of work. The purpose of this chapter is to provide some practical advice, supported by references to ethical rules, to make the client relationship—if not always a 100 percent happy one—at least one of minimal frustration and danger. Although other chapters in this book may touch on some of these topics, this chapter will put them in the context of the entire attorney-client relationship.

§ 10.2 THE INITIAL ENGAGEMENT

§ 10.2.1 Screening the Client and Matter

(a) *Screening the Client*

Managing the client relationship starts with the first contact. Most often, attorneys find clients by referral or through marketing efforts, such as advertising, lecturing, or writing. The client who calls on the phone, sends an e-mail, or finds his or her way to your office is often a person you have never met. Or the client may be a social acquaintance with whom you have not previously had a professional interaction.

The most important task at the initial stage is to carefully, objectively, and unsparingly evaluate the potential client and the case or transaction for which the client seeks a lawyer. The attorney-client relationship is one of candor, confidentiality, and absolute loyalty. As soon as the relationship starts (even before an engagement letter is signed), the Massachusetts Rules of Professional Conduct impose serious duties on the lawyer, the violation of which could lead to discipline. Difficult clients can lead to ethical problems, as well as financial, professional, and personal stress.

> **Practice Note**
> Rule 1.18 of the Massachusetts Rules of Professional Conduct discusses duties to "prospective clients." The rule imposes a duty of confidentiality regarding information discussed during the preengagement stage, even if the lawyer is never retained. It also may lead to the lawyer being "conflicted out" of subsequent representation of a different client in the same or a "substantially related" matter. (See § 10.2.4, below, for further discussion of conflicts of interest.)

It is important to choose clients with care and to vet thoroughly all potential clients. Especially early in your career or early in the life of a new firm, you will be tempted to accept all comers in an effort to build a large practice. However, the better practice is to presume that the person or entity that seeks to engage you will *not* become a client and that it is up to the prospect to convince you otherwise. This need not be done in an overt, adversarial, or unpleasant manner. But until the lawyer has had the opportunity to evaluate the client and matter, it is best to avoid committing to an engagement.

The first step is to conduct a thorough interview of the potential client. This may be done over the phone, but it is better in person. Depending on the nature and complexity of the matter (whether litigation, transactional, or advisory), the client should send

the lawyer the file on the matter in advance of the meeting so that the lawyer has the opportunity to review it and be prepared for the meeting. Although practices vary from lawyer to lawyer and firm to firm, it is customary not to charge the client for a brief, initial review of a file or the initial interview.

The mission at the initial stage is to get a sense of the person who seeks to engage you and the task at hand. As for the client, it is important to make sure that the person is someone with whom the lawyer can work. See **Checklist 10.1** (identifying some red flags).

The vetting should not be confined to the interview. Some online research is also necessary, either before or after the first meeting. In addition to learning more about the potential client and the matter, independent research will allow the attorney to verify what the client says during the interview.

The same lawyer who bemoaned the need for clients (see § 10.1, above) also advised that the case never gets better than the first time the client tells his or her story. Remarkably, in the first interview, the case often seems like a slam dunk that should be resolved quickly and cheaply. Once the lawyer starts digging, however, things usually become much more complicated. In other words, the decision to represent a client should not be based only on what the client tells you in the first meeting.

Given all of this work, it is wise not to commit to an engagement the first time you meet the client. Inform the client that you will need to do more research on the matter and that you will be in touch soon. Do *not* give in to pressure to take the case because of a perceived urgency. Clients with "emergencies" often have many such crises, which may reveal a troubling fact about how they conduct their business or personal lives.

If any red flags are raised, you are best served to politely send the client on his or her way. Since a lawyer-client relationship may last for many years, you are inviting a world of problems and stress by engaging with a troublesome individual or company. Do not fret about the lost business; attorneys with the good sense to turn away work will find plenty of other clients.

If you decide not to take on the client, it is advisable to send a letter confirming that you have declined the engagement. Return the client's file with the letter. This will avoid confusion (legitimate or otherwise) on the client's part as to whether the lawyer has been retained. Several significant malpractice cases have arisen because, while the lawyers denied any attorney-client relationship, potential clients alleged that they believed that the lawyer had been engaged on their behalf. The letter should reaffirm that, even though no attorney-client relationship was formed, information discussed in the meeting and any calls or correspondence will remain confidential.

Opinions vary on whether a lawyer should represent family, friends, neighbors, or associated entities. On the one hand, such persons may provide a ready and steady stream of business. On the other hand, if difficulties arise (and they almost always do during a case or transaction), the closeness of the relationship may impair the law-

yer's ability to provide objective advice, and it could lead to stress outside of the professional relationship. Each situation should be evaluated on a case-by-case basis.

(b) *Screening the Matter*

Just as important as screening the client is the related task of screening the matter for which the client seeks to retain you.

Initially, the lawyer should confirm that the matter is within his or her area of competence. Rule 1.1 of the Massachusetts Rules of Professional Conduct requires that a lawyer provide "competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This does not mean that the lawyer must be an expert in the field. Obviously, there is a first case for everyone. A lawyer who has handled mostly real estate litigation may be able to competently handle corporate litigation. On the other hand, a real estate transactional lawyer should hesitate before handling a criminal case. The key is to feel comfortable with the nature of the case or transaction. This comfort could include having access to other attorneys who may provide advice or guidance.

> **Practice Note**
> As discussed above, be wary of emergencies—for example, the client who walks into the office with a trial scheduled for the following week. Competence requires preparation. In addition, a client with emergencies may be a red flag.

Next, the lawyer should make sure that the client understands the nature of the matter and the legal work involved, and is able to pay for it. (See the discussion of budgets in § 10.2.2, below.) The lawyer should also ensure that the client has similar and realistic expectations for the outcome. For example, a lawyer who consults with a personal injury plaintiff should make sure that the client has a realistic expectation as to the likely recovery and whether there are any defenses that could compromise the case. A client who owns property with a title defect must understand the work and cost involved in clearing title as well as the likelihood of success.

§ 10.2.2 Discussing Costs and Budgets

In most cases, the attorney is well advised to prepare a budget. A budget is an estimate, with clear caveats that it is based on current, preliminary information and is subject to change.

Preparing a budget will serve several purposes. First, it will alert the client to the potential costs. If the client balks at the amount of anticipated costs and fees, this is a good sign that he or she should be sent elsewhere. Second, the budget provides a road map for handling the matter; in this regard, it should be as detailed as possible. It provides an overview of the activities that will be necessary to bring the matter to fruition. Third, a budget can be of invaluable assistance to the lawyer as she or he analyzes a new matter and begins to think about the work that will be involved. In

sum, it is a valuable tool to begin a conversation between lawyer and client about objectives, strategy, and costs.

Once the budget is prepared, the attorney should discuss costs and billing arrangements with the client. The best time to do this is after the initial meeting, once the lawyer has had time to analyze the potential matter and prepare a budget.

Fees and billing are discussed in chapter 3 of this book. For purposes of managing the client relationship, it is critically important not to underestimate the likely costs. There is nothing more harmful to the attorney-client relationship than a case or transaction where the costs exceed the client's expectations.

> **Practice Note**
> Attorneys, particularly younger attorneys, tend to be defensive when discussing legal fees. Do not be! Legal work is expensive; competing on price is not a growth strategy. A client who resists the estimated costs is a client who will resist paying the bill. It is better to have that conversation at the outset.

§ 10.2.3 Engagement Letters

Rule 1.5(b) of the Massachusetts Rules of Professional Conduct requires written engagement letters for all matters except single-session consultations or where the lawyer reasonably expects the total fee to be under $500. Engagement letters must set forth the scope of the representation and the basis or rate of the fee and expenses. The letter must be sent before or within a reasonable time after commencing the engagement.

The rules do not require that the client actually sign the engagement letter, except where the client retains the lawyer on a contingency fee basis. Mass. R. Prof. C. 1.5(c). However, it is a good practice to use countersigned agreements or letters in all circumstances. The letter should be written in plain, easy-to-understand language.

Engagement letters need not be lengthy, but they should cover the following points:

- the identity of the case, transaction, or legal advice to be provided;
- the billing arrangement—for example, flat fee, hourly, contingent, or hybrid (see chapter 3 of this book for a discussion of fees and billing);
- whether a retainer fee will be paid, in what amount, and whether the retainer will need to be replenished (see discussion of fees and billing in § 10.4, below);
- the scope of the representation and whether there are any limits;
- the handling of client files;
- confidentiality of information and the attorney-client privilege;
- the use of electronic communication and the client's consent to it; and

- termination of the representation, including handling of the file after the engagement is terminated.

It is important to make clear the limits of the engagement. For example, in a litigation matter, if the lawyer will not handle an appeal, this must be set forth in the letter. In addition, any unique or unusual circumstances should be mentioned.

Rule 1.2(c) of the Massachusetts Rules of Professional Conduct permits a lawyer to limit the scope of the representation provided that the limit is reasonable under the circumstances and the client gives informed consent.

Ethics Commentary

If you are representing a client in a contingency matter, Rule 1.5(c) contains detailed specific disclosures that must be included in the letter. The retainer letter must set forth the contingent event that will trigger compensation, the percentage fee of the representation and how that is to be calculated, and the method for determining what the fee would be were the attorney to be terminated from representation before the conclusion of the matter, including legal fees earned and expenses incurred.

§ 10.2.4 Conflicts of Interest

Any initial assessment of a new client or matter must involve an analysis of actual or potential conflicts of interest. As discussed in § 10.2.1, above, pursuant to Mass. R. Prof. C. 1.18 the Rules of Professional Conduct are implicated even where a meeting with a prospective client does not lead to an engagement. The rules apply not only to current clients, but also to former clients in the same or a substantially related matter.

Pursuant to Mass. R. Prof. C. 1.7, a lawyer should not represent a client if the representation involves a concurrent conflict of interest, meaning that the representation of one client will be directly adverse to another client or there is a "significant risk" that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer. The conflict may be waived by both clients after both have given informed consent, but only if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each client, the representation is not prohibited by law, and the representation does not involve a claim by one client against another in the same proceeding.

Rule 1.9 of the Massachusetts Rules of Professional Conduct governs conflicts of interest involving former clients. The rule prohibits representing a client in the same or a substantially related matter against a former client if the present client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing. Rule 1.9(b) and (c) restrict a lawyer's ability to use confidential information about a former client.

A complete discussion of the law concerning conflicts of interest is beyond the scope of this chapter. Lawyers should review Mass. R. Prof. C. 1.7–.11 and the associated

commentary. (For a detailed discussion of conflicts of interest, see *Ethical Lawyering in Massachusetts* ch. 3 (MCLE, Inc. 4th ed. 2015).) As a general matter, a lawyer may not be adverse to a current client, even if the matters are unrelated, unless both clients give informed consent to the representation. "Adversity" is not limited to being on opposite sides of litigation. It encompasses any circumstance where the interests of two clients may diverge. At times, conflicts may also arise after the initial engagement. Thus, it is important to keep an eye out for conflicts that may develop during the course of a lawsuit or transaction.

For present purposes, lawyers must have a system to recognize potential conflicts of interest. This can be particularly tricky when representing corporate entities, which may have affiliates and subsidiaries.

Practice Note

Many lawyers, in their quest for new business, will rationalize away apparent conflicts. An obvious example is analyzing whether a new client poses a conflict of interest with a former client. Lawyers may try to convince themselves that the two matters are not "substantially related." Do not fall into this trap. If there is a theme to this chapter, it is that it is always better to be safe than sorry. Discuss the issue with the client. In most cases, informed consent will enable the attorney to take the case.

Ethics Commentary

If you have any doubts about whether a conflict exists between you or your law firm and the potential client, call the Board of Bar Overseers hotline and ask for the duty attorney's advice. Remember to take notes of the conversation and place the notes in your client file. It is generally prudent to refrain from representation where you have serious doubt as to whether a conflict exists and in situations where a conflict exists, it cannot be waived under Rule 1.7. Even if a client would consent, a lawyer cannot proceed with representation if the lawyer has reason to believe that representation would adversely affect a client or a former client.

There are numerous conflicts management software products on the market. For an American Bar Association comparison of selected practice management software products, a number of which include conflicts checking features, see https://www.americanbar.org/content/dam/aba/images/legal_technology_resources/Charts/PracticeCaseManagement_TimeBilling_IntegratedSoftwareChart.pdf.

Even in a small firm, there must be a system in place to recognize possible conflicts when every new matter is opened. Indeed, most malpractice insurance companies require such a system. For articles discussing the conflicts checking process, see Marian C. Rice, "Maintaining a Conflict-Checking System," *Law Prac. Mag.* Nov./Dec. 2013, *available at* https://www.americanbar.org/publications/law_practice_magazine/2013/november-december/ethics.html; Josh Camson, "Making a List: The Conflicts Check," *The Lawyerist*, May 4, 2017, *available at* https://lawyerist.com/making-list-conflicts-check. For a sample conflicts check form, see **Exhibit 10A**.

§ 10.3 CLIENT COMMUNICATIONS

§ 10.3.1 The Ethical and Practical Importance of Communicating with Clients

One of the most frequent complaints made by clients—and one of the leading causes of malpractice litigation and disciplinary proceedings—is the failure of a lawyer to keep the client informed about the status of a matter. Conversely, frequent communication can bolster an attorney-client relationship and lead to happy clients. In today's world of instant information, the importance of prompt communication is even more profound.

Pursuant to Mass. R. Prof. C. 1.4, a lawyer should

- promptly inform the client of any decision or circumstances where the client's informed consent is required,
- reasonably consult with the client,
- keep the client reasonably informed about the status of the matter,
- promptly comply with reasonable requests for information, and
- promptly inform the client of any limitations on the lawyer's conduct imposed by the rules.

Ethical requirements notwithstanding, it is simply good practice to promptly and thoroughly inform a client of everything that happens on a case or transaction. A legal matter (whether litigation or a transaction) is a significant event for a client, and even for an institution. It is on the mind of at least one person and probably more. Being kept in the dark breeds stress and frustration. On the other hand, when clients regularly hear from their lawyers, their stress is reduced, and they are more satisfied with the representation.

A good practice is to respond to any client communication (whether by phone, e-mail, or text) within twenty-four hours or during the same business day. Even if the lawyer is unable to provide a complete answer to a question, at least let the client know that an answer will be forthcoming.

> **Practice Note**
> Many institutional clients have guidelines for communications from lawyers. These guidelines should be internalized and calendar systems put in place to ensure compliance (for example, reporting on a litigation matter every thirty days).

It is tough to be the bearer of bad news: a motion that was lost, an unreasonable settlement offer, harmful facts obtained through discovery, or (most painful of all) a mistake by the lawyer. Human nature causes even the most diligent person to avoid uncomfortable conversations. Yet we all know that delay exacerbates the bad news,

while promptly informing the client will at least remove one potential complaint. So inform the client immediately of all developments, whether positive or negative.

> **Ethics Commentary**
> Even if you believe you can quickly fix the problem, it is almost always your obligation to let the client know of the problem. Keep in mind that the question of whether to continue representation rests with the client and the client must be informed of all events that could affect that representation.

§ 10.3.2 The Attorney-Client Privilege and Confidentiality

The attorney-client privilege is sacrosanct and one of the pillars of our profession. Related to the privilege is the concept of confidentiality in the Rules of Professional Conduct.

Rule 1.6 of the Massachusetts Rules of Professional Conduct governs confidentiality. Subject to exceptions listed in Rule 1.6(b), a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation." *See also* Mass. R. Prof. C. 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.") & cmt. 18.

The attorney-client privilege and its corollary, the work product doctrine, are rules of evidence. They protect a lawyer from disclosing information provided by the client. But the rule of confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. In the course of representation, a lawyer may obtain confidential information that may or may not be protected by the attorney-client privilege but still may be confidential, such as a company's trade secrets or an individual's psychological history. The range of protected information is very broad and extends even to information that may be in the public domain. It also includes information that may itself not be confidential but could lead to the discovery of confidential information by third parties. Confidentiality applies not only to information communicated in confidence by the client, but to all information relating to the representation, whatever its source.

It is important to discuss the attorney-client privilege and confidentiality at the initial meeting (reinforced in the engagement letter). There are two reasons for this. First, an understanding of the privilege will encourage candor from the client. It helps establish a relationship of trust and confidence, which is one of the reasons that the client has sought legal advice, and it facilitates the lawyer's ability to advise the client. Second, the client must understand that the privilege may be waived by disclosure. Unsophisticated clients in particular must be instructed that discussing legal advice with others (including a spouse) may be considered a waiver of the privilege. (For this reason, it helps set the stage to exclude spouses, children, parents, relatives, or friends from client meetings, including the initial consultation, unless necessary due to a client's diminished capacity (see § 10.3.3, below).)

It is important to make sure that client correspondence remains confidential as the matter progresses. Administrative staff should be instructed about the attorney-client privilege. The office should have systems in place to protect against inadvertent disclosure. The most glaring example is a letter or e-mail to the client that is inadvertently copied to opposing counsel.

Complacency is a particular challenge with e-mails and the "reply all" button. As a matter of practice, it is best *never* to include clients on e-mails with others. Even the most innocuous communications may cause problems. For example, a lawyer includes the client on e-mails with opposing counsel about scheduling a deposition or meeting, the client replies to "all" with a confidential remark to his or her lawyer, and the other counsel sees the message and learns privileged information. An argument could be made that the privilege is now waived for *all* purposes.

Practice Note

Special circumstances apply when the client is an employee of a company and communicates with the lawyer on a work computer. Depending on the company, the employer may have the right to monitor employee e-mails. The issue merits a discussion at the outset of the engagement.

§ 10.3.3 Dealing with Unreasonable Clients or Clients with Diminished Capacity

Even the best client may become difficult or unreasonable during the course of a matter. A client may make unrealistic demands, become uncommunicative or uncooperative, or change his or her views about the representation. It is important to remember the reasons that the client sought legal advice in the first place: the lawyer's specialized knowledge, experience, and skill. Although the client has the ultimate authority to determine the purposes to be served by the legal representation, it is important for the attorney to provide the full range of legal advice without being shy about it.

Rule 1.2(a) of the Massachusetts Rules of Professional Conduct requires the lawyer to "abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, . . . consult with the client as to the means by which they are to be pursued. A lawyer may make take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision to settle a matter." In a criminal case, it is the client's decision to enter a plea, waive a jury trial, and testify.

Rule 2.1 establishes the lawyer's role as "advisor" and mandates that counsel exercise independent professional judgment and render candid advice.

Almost inevitably, there will be differences of opinion as to goals, strategy, or tactics during the course of the engagement. As the rules dictate, ultimately the client will make the decision. The best the lawyer can do is to articulate his or her views and, if necessary, memorialize them in writing. For example, if a client refuses to respond to discovery in litigation and is at risk of an adverse judgment, the lawyer should

communicate in writing with the client, warning the client of the consequences of noncompliance. Another example involves costs, such as paying for an expert witness in litigation. The same advice applies to a client whose noncompliance puts a transaction at risk, such as a client who hesitates about the costs of due diligence.

What if the attorney believes that the client is acting unreasonably to such an extent that the lawyer in good faith cannot continue the representation? The lawyer has the option to withdraw. See § 10.5.1, below, and Mass. R. Prof. C. 1.16(b)(4).

The normal attorney-client relationship is built on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. The fact that the client has a disability, is a minor, or is elderly does not necessarily change the attorney-client relationship. All clients should be treated with attention and respect, even those who have a legal representative.

However, if the lawyer reasonably believes that the client's capacity to make informed decisions is diminished, the Rules of Professional Conduct provide a mechanism for protecting the client.

Rule 1.14 of the Massachusetts Rules of Professional Conduct governs clients with diminished capacity, whether due to minority, mental impairment, or some other reason. If the client is at risk of substantial physical, financial, or other harm, the lawyer is entitled to take reasonably necessary protective actions, including consulting with others. In this situation, information is protected by Rule 1.6, including the implied authorization provisions of Rule 1.6(a).

When representing individual clients, it is advisable to have a sense of family members, close friends, or caregivers. These people may provide a useful connection if the client is impaired or becomes impaired during the engagement. If the client has already appointed a legal representative, the lawyer should look to this person for decisions on the client's behalf. With minor clients, the situation may be more complicated, depending on whether the interests of the child and the adult (typically a parent) are aligned or adverse. A lawyer who represents the guardian, as distinct from the ward, may have an obligation to prevent or rectify the guardian's misconduct. Mass. R. Prof. C. 1.2(d).

Many of the challenges confronting clients with diminished capacity are beyond the training of most lawyers. So it is advisable not to jump to conclusions. To the greatest extent possible, a normal relationship should be maintained. In many cases, by explaining issues in simple terms and eliciting a response that allows the lawyer to proceed, the relationship may continue. In addition to consulting with the client's family or others, the lawyer may want to consider giving the client time to clarify or reconsider his or her position, using a limited power of attorney, or consulting with support groups, professional services, or adult-protection agencies. The lawyer should take into account the client's wishes, values (to the extent known), and best interests, as well as the least intrusive means of impacting the client's autonomy. A legal representative, such as a guardian, guardian ad litem, or conservator, may be

needed. For example, if a client with diminished capacity has property that needs to be sold, the lawyer should request appointment of a legal representative.

When representing clients with diminished capacity, withdrawal from the engagement is usually not an option. Indeed, such clients probably need attorneys more than most. The better solution is to seek appointment of a legal representative, as discussed above.

§ 10.4 BILLING (AND BUSINESS TRANSACTIONS WITH CLIENTS)

Fees and billing are discussed in chapter 3 of this book and will not be repeated here. For present purposes, it is important to remember the impact that fees and billing have on the attorney-client relationship.

Rule 1.5(a) of the Massachusetts Rules of Professional Conduct prohibits charging an unreasonable fee or an unreasonable amount for expenses. A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.

After poor communications, nothing causes friction in the attorney-client relationship more than billing and fees. Legal work is expensive. Unsophisticated clients, who rarely use lawyers, are usually shocked by both the hourly rates and the amount of time necessary to do the work. Even institutional clients—sensitive to the bottom line—will complain about bills.

The best way to head off or minimize the issue is to be honest and forthcoming at the outset of the engagement. As discussed above, it is advisable to discuss a budget for the case or transaction. Ultimately, it is the client's decision as to how much to spend.

It is advisable to get a retainer at the outset of the matter. There are several types. The most common retainer is a payment against future legal fees. The retainer is deposited into the client trust account and, once earned, transferred to the lawyer's operating bank account. *See* Mass. R. Prof. C. 1.15. A less common approach is a type of evergreen retainer that is held until the final bill at the conclusion of the engagement. All or part of the retainer may be held until the end. For example, if the client pays a retainer of $5,000, the entire amount or any portion of it (such as $2,500) will be held in the client trust account for the final invoice. If a portion is held, the balance of the retainer may be used to pay ongoing invoices. The advantage of a partial or complete evergreen payment is that it provides some assurance that the final invoice will be paid.

Do not be reticent about asking for a substantial retainer. This is part of the client screening process. Once the lawyer prepares a budget, there should be a general understanding about the potential costs of the engagement. The initial retainer should be based on the total expected cost of the case. If the potential client appears unable or unwilling to pay the retainer, the lawyer should have serious concerns about entering into a lawyer-client relationship.

Assuming that the client is being billed on an hourly basis, invoices should be sent regularly—preferably monthly. The client should get into the habit of receiving and paying legal bills each month. The only exception is if a matter is inactive and the client's balance to the firm is zero. Otherwise, it is important to bill regularly and not allow the client to fall behind on payments.

Unfortunately, many clients do fall behind. This can make for uncomfortable conversations, as the lawyer needs to communicate both about the case and the financial arrangement with the client. Obviously, the best way to deal with this is not to allow the balance to grow too large. Failing this, it is not uncommon to negotiate a new arrangement during the course of the case or transaction. For example, the client could be encouraged to make payments against the balance. In litigation, it is possible to change the arrangement to a partial contingency if the client cannot make payments based on hourly billing.

> **Practice Note**
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> Suing a client over a fee is not advisable. Often, it will lead to a counterclaim for malpractice. Prior to filing suit, the prudent lawyer will attempt to negotiate a resolution of the dispute. Mediation, even if the dispute is not in litigation, is a useful step. In addition, the Massachusetts Bar Association (MBA) has a fee arbitration program, pursuant to which either the lawyer or client may seek to resolve a dispute over the amount of the fee. The fee arbitration is voluntary; both parties must agree to participate. The arbitration resolves only the issue of legal fees; it does not address nor preclude other issues, such as malpractice by the lawyer. Information and forms are available on the MBA website.

At times, clients will propose that they pay in "property." For example, the lawyer may be given an equity interest in the client's company or an interest in real estate. Such arrangements are not prohibited, but they often have qualities that appear to be business transactions between lawyer and client, which are subject to specific rules.

Pursuant to Mass. R. Prof. C. 1.8, a lawyer may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction is fair and reasonable to the client and the terms are fully disclosed in writing in a manner that can be reasonably understood by the client, the client is advised in writing to seek the advice of independent counsel, and the client consents in a writing signed by the client.

It is advisable to carefully review the rules on client business transactions and make sure that the client has the opportunity to seek outside legal advice. Common situations involve loans from client to attorney or vice versa. These transactions are subject to the strict requirements of Rule 1.8(a). A lawyer may not solicit a substantial gift from a client, but other gifts (for example, holiday gifts or tokens of appreciation) are permitted. Mass. R. Prof. C. 1.8(c). The lawyer may receive an unsolicited substantial gift, but the gift may be voidable and, if the gift requires preparation of a legal instrument, the client should be advised to obtain independent legal advice.

Another situation that may arise in connection with litigation is a request by a client for financial assistance. Rule 1.8(e) forbids a lawyer from providing such assistance (for example, cash payments to help with housing or food costs) except that the lawyer may *advance* court costs, the repayment of which may be contingent on the outcome of the case, and a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. No matter how financially needy the client, the lawyer may not provide charitable financial assistance. The policy behind the rule is a fear that providing such assistance may encourage frivolous lawsuits and may give lawyers too great an interest in the outcome of the litigation. If a client needs financial assistance, the lawyer may help obtain support—for example, by helping the client apply for government aid or private charity.

Another common situation arises when someone other than the client pays for all or part of the legal services. This is permitted, but only if the client gives informed consent, there is no interference with the lawyer's independent judgment or with the attorney-client relationship, and information remains confidential under Rule 1.6. Mass. R. Prof. C. 1.8(f). It is important to make sure that both the client and the payor understand that the payment of legal fees does not entitle the payor to make decisions about the matter or to obtain confidential information. In other words: keep your distance from the payor.

§ 10.5 ENDING THE ATTORNEY-CLIENT RELATIONSHIP

§ 10.5.1 Termination of the Relationship

In the most straightforward situations, a case or transaction has a clear end point: a closing or the end of a lawsuit. In those instances, the lawyer should prepare a final bill and send it to the client. Hopefully, it will be paid. As discussed in the prior section, holding part of the retainer until the end of the case will help with payment of the final bill.

The attorney-client relationship is contractual. It may be ended by either party. A client can fire the lawyer. A client may hire a new lawyer. (For a discussion of handling client files, see § 10.5.2, below.) A lawyer may be fired with or without cause. If terminated, the lawyer should send a final bill along with a letter that confirms the termination. Even if unhappy about being fired, the lawyer has a duty to ensure a smooth transition to successor counsel (if any).

A lawyer may withdraw from representation in certain situations. In other situations, withdrawal is mandatory.

Pursuant to Mass. R. Prof. C. 1.16(a), a lawyer should withdraw (and not take the engagement in the first place) if the representation of a client will result in the violation of the Rules of Professional Conduct or the lawyer's physical or mental condition impairs the ability to represent the client. A lawyer may withdraw

- if withdrawal may be accomplished without material adverse impact on the client,

- if the client persists in criminal or fraudulent conduct,
- if the client has used the lawyer's services to perpetrate a crime or fraud,
- if the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,
- if the client fails to fulfill an obligation to the lawyer regarding the lawyer's services,
- if the representation will result in an unreasonable financial burden on the lawyer or has been otherwise made unreasonably difficult by the client, or
- for any other good cause.

The trickiest situations confront litigation counsel who represent a client in court or an administrative proceeding. In Massachusetts, withdrawal requires permission of the tribunal (the judge or the administrative panel). Mass. R. Prof. C. 1.16(c). In other situations—such as transactions or providing general legal advice—a lawyer may withdraw without permission. However, it is important to make sure that withdrawal does not prejudice the client.

There are two common situations where a lawyer may want to withdraw from the engagement. First, the client may fail to cooperate in the matter or listen to the attorney's advice on a substantial matter. This is a difficult burden for the lawyer to bear. The disagreement must be on a substantial issue. Frustration is not sufficient. As discussed elsewhere in this chapter, most important decisions are up to the client rather than the lawyer. The second reason that a lawyer may seek to withdraw is that the client refuses to fulfill his or her obligations, the most common of which is failing to pay the bill. This reason also covers the client's obligations in litigation to respond to discovery or respond to attorney communications.

Care must be taken when filing a motion to withdraw. It is important not to prejudice the client's interests. Accordingly, the reason for withdrawal should be discussed in an affidavit filed in camera with the court. The motion itself should be short and simply recite the applicable rule, and it should include a request for in camera filing of the affidavit and other supporting documentation. The client should be copied. If a hearing is held, the client should be notified.

Because the decision to let a lawyer out of the engagement is discretionary with the court, there is no guarantee that the lawyer will be allowed to withdraw. This is particularly true in criminal cases, where the client's right to counsel is constitutional.

§ 10.5.2 Client Files

As of the date of this writing, the Supreme Judicial Court has sent out for public comment revisions to the Massachusetts Rules of Professional Conduct concerning client files. As proposed, new Mass. R. Prof. C. 1.16A will provide detailed guidance for handling client files, including at the end of a matter, when the client hires new counsel, and after a mandated period of file retention. Because the rules are not yet

final, this chapter will refrain from a detailed discussion. Readers are advised to check the current version of the rule.

In general, the client is entitled to the file. This includes any documents necessary to allow the client or successor counsel to continue the matter. Thus, in a litigation case, the file would consist of pleadings, discovery, memorialized legal research, correspondence, and the like. In a transaction, the file would consist of closing documents, correspondence, memorialized legal research, and anything that would go into a closing binder. Typically, the file does not include drafts or notes, unless they are the only record of activity, nor would it include the lawyer's internal administrative file. The lawyer may retain copies of documents sent to the client, but may not charge the client for the copies.

Ethics Commentary

If you have a question about your obligations with respect to client files in your possession after the termination of representation, a good place to start is the Board of Bar Overseers article, "Talking Trash Recycled (Again)" (2014), which is available on the BBO website. Also, if a client requests that you return the file, you cannot withhold the file pending payment of copying costs, because the file belongs to the client.

The proposed rule contemplates that records may be stored in digital form. This should reduce storage expenses. However, lawyers must make sure that their technology is up to date so that, years later, the records will be retrievable.

ü CHECKLIST 10.1

Red Flags in Evaluating Potential Clients

While there are any number of considerations that may inform your decision to take on a new client, you should be alert for the following red flags:

- q the client has had multiple lawyers on the matter before consulting you,
- q the client makes negative comments about prior counsel,
- q the client appears to have unrealistic expectations for the case or transaction,
- q the client is unable to clearly and succinctly articulate why he or she needs a lawyer,
- q the client's file and documents are disorganized,
- q the client balks when fees or retainers are discussed, or
- q the client says anything else that gives you pause.

EXHIBIT 10A—Sample Conflicts Check Form*

*Reprinted from James S. Bolan, "Ethics, Risk, and Malpractice Avoidance," *in Ethical Lawyering in Massachusetts* (MCLE, Inc. 4th ed. 2015).

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CONFLICTS CHECK—PERSONAL AND CONFIDENTIAL

Responsible Attorney:

Date:

Prospective/Existing Client:

Prospective Opposing Party:

Opposing Counsel:

Other Persons, Parties or Witnesses:

Others:

Matter:

Our File Reference:

(If entity, list Manager for LLC and member/owners, partners for LLP, general and limited partners for LP, each partner for partnerships, shareholders for PC and corporations, beneficial or other interest holders for nominee trusts, trustee for trusts.)

Please review above-listed information and indicate below whether you might have any information which would give rise to an actual or potential conflict. If you have any such information, please note it below and inform Managing Partner promptly.

Attorney/Staff	No Conflict	Conflict Issue	Attorney/Staff	No Conflict	Conflict Issue