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COMMON ETHICAL ISSUES IN CRIMINAL DEFENSE

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Introduction

A lawyer representing a person charged with a criminal offense, juvenile delinquency, or youthful offender matter must be familiar with the applicable Massachusetts Rules of Professional Conduct. The Attorney and Consumer Assistance Program (ACAP) of the Office of Bar Counsel (OBC) commonly receives complaints concerning ethical issues arising in the criminal defense context. This article covers the ethical issues lawyers must consider when taking on a new criminal representation, including evaluating their competence to handle the matter; timely memorializing in writing the scope and financial terms of the representation; ensuring they have no conflict of interest; and communicating effectively with the client. The issues addressed in this article are the ones that are most often the subject of the client calls and written complaints received by OBC.

Evaluating Your Competence

Whether a lawyer is appointed or retained, a lawyer must be able to competently represent the client in the criminal matter. Mass. R. Prof. C. 1.1 states that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." However, "[a] lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation." Mass. R. Prof. C. 1.1, Comment [4]. Thus, lawyers should evaluate their own experience and skill level prior to agreeing to represent a person in a specific criminal matter. *See Matter of Fitzgerald*, 35 Mass. Att'y Disc. R. 137, 145 (2019) (lawyer displayed lack of competence by filing an incomplete or inadequately supported pretrial motion in a Superior Court case). Beyond possessing the requisite competence to accept a representation, a lawyer must demonstrate that competence in all aspects of the representation: "Even if a lawyer possesses the requisite amount of competence generally or in a specific subject area, he may violate the rule if, on the matter in question, he failed to act competently. In other words, competence is not static; it is situational." *Matter of DiLibero*, 40 Mass. Att'y Disc. R. ___ (2024), 2024 WL 1234448, at *6 (Ma.St.Bar.Disp. Bd. Feb. 12, 2024). *See also Admonition No.* 22-06, 38 Mass. Att'y Disc. R. 601, 610 (2022) (lawyer received admonition for failing to exercise competence and diligence where, after learning that certain representations in a draft motion to vacate a prior conviction were inaccurate, she failed to make changes and filed the inaccurate motion).[1]

[1] As to accepting an appointment to represent a criminal defendant, lawyers "**shall not seek to avoid an appointment**", Mass. R. Prof. C. 6.2 (emphasis added), except for good cause, such as when the representation

Surfacing Potential Conflicts of Interest

At the outset of a criminal case, lawyers must determine whether they or their law firm have any conflicts of interest and, if so, seek the informed written consent, where permissible, of any client or former client whose interests may be affected. *See* Mass. R. Prof. C 1.7 (current client conflicts); Mass. R. Prof. C. 1.9 (former client conflicts); Mass. R. Prof. C. 1.10 (imputation of conflicts on firm). Note that lawyers employed by the Public Counsel Division of the Committee for Public Counsel Services (CPCS) and those assigned to represent clients by CPCS's Private Counsel Division are not deemed to be "associated." Mass. R. Prof. C. 1.10 (a).

A conflict review is crucial because a conflicted representation is grounds for a new trial, whether or not the lawyer's conflict is shown to have actually affected the representation. *Commonwealth v. Croken,* 432 Mass. 266, 272 (2000), *citing Commonwealth v. Shraiar*, 397 Mass. 16, 20 (1986) (if a defendant shows that his attorney had a "genuine" or "actual" conflict of interest, nothing more need be shown to establish that there has been a denial of the defendant's right to the effective assistance of counsel).

In ensuring that the lawyer's representation of a client will not be affected by any conflicting engagements or interests, the conflict review must take into account a potentially long list of individuals who can be expected to play a role in the outcome of the client's criminal case, including any co-defendants, complaining witnesses, or other witnesses. Representation of the co-defendant in the same case would likely violate Mass. R. Prof. C. 1.7 (a)(1) as the two clients' interests would be "directly adverse." Mass. R. Prof. C. 1.7, Comment [23] provides that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant, or more than one person under investigation by law enforcement authorities for the same transaction or series of transactions, including any grand jury proceeding."

As a general matter, a lawyer should not represent a client's co-defendant even in a *different* matter (such as representing Defendant A in a criminal case while also representing Co-Defendant B in an immigration matter). This is because, under Mass. R. Prof. C. 1.7(a)(2), a conflict exists not merely in the presence of "directly adverse" interests, but also "where 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"). In the scenario above, the lawyer's duty of loyalty and desire to protect "B's" interests in the immigration matter would expose "A" to an unreasonable risk that the lawyer will not be sufficiently aggressive toward B in the criminal case, if and when it is in A's strategic interests to discredit B or present B as the more culpable defendant.

The same concern applies to other people involved in A's case as well. For example, a Rule 1.7(a)(2) conflict may arise because the lawyer hired or appointed to represent a defendant already has a complaining or other important witness as an existing client in another matter. In such a situation, the lawyer should decline or withdraw from the representation of the new client, rather than existing representation, as the lawyer presumably will have already acquired, with respect to

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would likely result in a rule violation, create an unreasonable financial burden on the lawyer, or require the lawyer to advocate for "the client or the cause [that] is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." Mass. R. Prof. C. 6.2(a)(c).

the existing client, "information protected by Mass. R. Prof. C. 1.6 and 1.9(c)." *See* Mass. R. Prof. C. 1.9 (b)(2).

It should be noted that Rule 1.7(b) contemplates the possibility of a conflict waiver that would enable the lawyer to proceed with the representation of the new client if certain conditions are met. According to this provision, a conflict waiver can only be used to where the lawyer reasonably believes that both matters can be handled competently and diligently notwithstanding the conflict, the representation is not prohibited by law, the two clients are not asserting any claims *against each other*, and each client gives informed, written consent. However, bar counsel would strongly caution criminal defense lawyers to consult with independent counsel, CPCS, or bar counsel's Ethical Helpline (see below) before undertaking to resolve a conflict through the use of conflict waivers. (Note also that a conflict that exists because the clients are "directly adverse" can never be waived!)

Former Client Conflicts

Pursuant to Mass. R. Prof. C. 1.9, the lawyer must also analyze whether there are any co-defendants, complaining witnesses, or other witnesses who are the lawyer's former clients. Mass. R. Prof. C. 1.9 (a) provides that a "lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." The first question this provision raises is whether the current case is the same or is "substantially related" to the former matter. The comments to Rule 1.9 defines "same or substantially related matter" as one arising from the same transaction or one in which "there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Mass. R. Prof. C. 1.9, Comment [3]. If the matters are substantially related, and the current and former clients' interests are adverse, then unless the former client gives informed consent, confirmed in writing, the lawyer may not accept the new representation.[2]

> Here are two illustrations of how to analyze former client conflicts:
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> *Illustration 1*: A lawyer represents a defendant (D1) for arraignment only, and D1 then retains other counsel. Shortly thereafter, a co-defendant (D2) asks the lawyer to represent him in the same case. The conflict analysis starts with Mass. R. Prof. C. 1.9(a): Is the matter in which the lawyer is being asked to represent D2 the same or a substantially related matter in which the lawyer represented D1? The answer is yes; D1 and D2 are co-defendants in the same case. The next question is whether D2's interests are materially

[2] It may be helpful to think of a lawyer's duties to a former client as essentially twofold: They consist of (a) never representing another client (adverse to the first client) in the same or in a substantially related matter, except with the former client's consent; and (b) never (without consent) using *confidential information* relating to the prior representation of the former client except as permitted or required by Mass. R. Prof. C. 1.6 (Confidentiality), Mass. R. Prof. C. 3.3 (Candor Toward the Tribunal), or Mass. R. Prof. C. 4.1 (Truthfulness in Statements to Others). As discussed above, the first duty arises under Mass. R. Prof. C. 1.9(a). The second (not using a former's client's confidential information) arises under Mass. R. Prof. C. 1.9(c). (Although beyond the scope of this article, the prohibition against using a *current* client's confidential information can be found in Mass. R. Prof. C. 1.8(b).)

adverse to those of D1. In this example, D1's interests are presumptively materially adverse to the interests of D2, because defendants will often seek to defend themselves by establishing the culpability (or greater culpability) of a co-defendant. Therefore, the lawyer could not represent D2 in this scenario. If there were no material adversity, or if D1 (the former client) were to give informed, written consent, the lawyer could represent D2.[3]

Illustration 2: A lawyer who represented D1 in a concluded criminal matter is asked to represent (former) co-defendant D2 in regard to D2's alleged, subsequent probation violation. In this example, D2's probation violation case is not the same or a substantially related matter as D1's criminal case because the issue is only whether D2 violated the terms of his probation, and D1 has no stake in the resolution of that issue.

"Personal" Conflicts

Lawyers must also analyze whether the representation of a client would conflict with their own personal interests, separate and apart from their duties to another client or former client. Mass. R. Prof. C. 1.7(a)(2) (a concurrent conflict of interest arises where "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer"). One obvious example is where a lawyer is in an intimate relationship with the prosecutor who is handling the case against the lawyer's client. For further discussion of this issue, *see Commonwealth v. Stote*, 456 Mass. 213 (2010); *Commonwealth v. Croken*, 432 Mass. 266 (2000); Constance V. Vecchione, *Lawyers in Love* (Feb. 2000). A lawyer's sexual relationship with a client is also generally viewed as a conflict of interest. *See Matter of Lebensbaum,* 21 Mass. Att'y Disc. R. 391, 394 (2005) (engaging in a sexual relationship with the client while representing her in a divorce violated Mass. R. Prof. C. 1.7(b)). *See also Commonwealth v. Dew*, 492 Mass. 254, 266 (2023) (defense counsel's animus toward client's race and religion constituted conflict of interest).

Fees and Fee Agreements

Upon agreeing to represent a private client in a criminal matter for an anticipated fee of $500 or more, the lawyer must provide the client with a fee agreement or other writing that states (1) the basis of the fee (flat or hourly[4]); (2) the amount or rate of the fee; and (3) the scope of the representation. Mass. R. Prof. C. 1.5(b). A formal fee agreement is not required by the rules but is the best and safest way to comply with Rule 1.5(b). The lawyer should describe the scope of the criminal representation as specifically as possible, setting forth what services and activities are and are not covered by the fee. For example, the agreement should state whether the representation includes any appeals (interlocutory or post-conviction) or representation of the client in any related or ancillary legal proceedings that the client is expected to be a party to. Some criminal defense

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[3] For a further discussion of this issue, see *Commonwealth v. Teti*, 60 Mass. App. Ct. 279, 286 (2004) (counsel's prior representation of a witness was not a conflict where the representation was limited and the lawyer's "judgment could not have been impaired when he was not aware of the potentially divergent interests of his two clients").

[4] Mass. R. Prof. C. 1.5(d)(2) prohibits contingent fee arrangements in criminal cases.

attorneys utilize a fee agreement that specifies certain fees for certain stages or events within the client's case (e.g., arraignment, motion to suppress, plea negotiation, trial).

A retainer the lawyer collects to be charged against hourly fees must be held in an IOLTA account until such fees are earned and billed. At the termination of the representation, any unearned portion of any fee (*including* flat fees) must be refunded to the client pursuant to Mass. R. Prof. C. 1.16(d). *See Matter of Grayer*, 483 Mass. 1013, 1018 (2019) (lawyer disciplined for failing to return unearned portion of fee). A lawyer may not characterize or treat a fee as "non-refundable." *See Smith v. Binder*, 20 Mass. App. Ct. 21, 22 (1985); *Admonition* No. 22-04, 38 Mass. Att'y Disc. R. 597 (verbal agreement for initial District Court flat fee violated Mass. R. Prof. C. 1.5 (b)(1); subsequent written Superior Court fee agreement containing non-refundable language violated Mass. R. Prof. C. 1.5(a)).

In an hourly fee case, the unearned portion of an hourly fee retainer can be readily determined by an attorney's time records. However, special attention must be paid to the calculation of an unearned flat fee. Often, fee agreements contain a clause that if the relationship ends prior to the resolution of the agreed upon scope of the criminal matter, an unearned flat fee shall be calculated based on the lawyer's hourly rate. However, this approach may lead to a violation of Mass. R. Prof. C. 1.5(a) (prohibiting clearly excessive fees), especially where the total fee calculated on the basis of the stated hourly rate equals or exceeds the entire amount of flat fee, yet the lawyer failed or was unable to complete the entire representation. In such a case, the calculation of the unearned fee that must be refunded should reasonably reflect the remaining portion or percentage of the work yet to be performed. In other words, if the lawyer was fired approximately halfway through the case, the client would be entitled to a refund of half of the flat fee. Ideally, the client would receive a refund sufficient to hire another lawyer to complete the other half of the representation. For a further discussion of flat fees, *see* Dorothy Anderson, *Flat Fees: A Three-Dimensional View* (June 2018).

The fee agreement or other written communication must be provided "before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate." Mass. R. Prof. C. 1.5(b). Commonly, a lawyer will be contacted by a client or a client's family member on short notice to represent a client at arraignment. While Mass. R. Prof. C. 1.5(b) does not define "reasonable time," if a fee agreement cannot be practically provided in writing at the arraignment, the lawyer should provide it within days, not weeks.[5]

If a third party is paying the client's fee, the lawyer must obtain the client's informed consent to the third-party payment. Mass. R. Prof. C. 1.8(f). Comment [15] provides that where a third party pays the fee, the lawyer must ensure that the payment creates no conflict of interest and must conform to the requirements of client confidentiality, Mass. R. Prof. C. 1.6. The fact that the client's mother (for example) is paying for the legal services does not allow the lawyer to discuss the case with her, let alone take direction from her or treat her as a co-client. The client could, of course, *authorize* the lawyer to speak with his mother about the case, but that authorization would

[5]Given that Rule 1.5(b) does not mandate the use of a fully executed, formal fee agreement, it is difficult to imagine circumstances in which the lawyer could not, at a minimum, memorialize the essential terms and scope of the engagement in an email or even a text message to the client within a few days of undertaking the representation.

need to be in addition to the client's authorization to accept fee payments from the mother (or anyone else). *See*, *e.g.*, *Admonition* No. 20-2, 36 Mass. Att'y Disc. R. 487 (lawyer violated Rule 1.5(b) for failing to communicate in writing the financial terms and scope of the representation; and Rule 1.8(f) by failing to secure client's informed consent for the lawyer to be paid by a third party).

Co-Counsel Fee Arrangements

Because many criminal defense lawyers are sole practitioners or work in small practices, it is often in both the client's and the lawyer's interests to add other attorneys to the defense team. This is a permissible practice so long as the lawyer complies with Mass. R. Prof. C. 1.5(e). That rule prohibits a lawyer from sharing fees with other counsel, outside of the lawyer's firm, without notice and the client's written consent. For example, where the agreement calls for a flat fee, and the lawyer intends to handle the case in association with (or just with the assistance of) other counsel, the lawyer must disclose the fact of the other lawyer's planned involvement and the fact that the flat fee will be divided (but not necessarily *how* it will be divided). In addition to these disclosure requirements, the overall fee must be reasonable (not merely *not* "clearly excessive," as Rule 1.5(a) requires); and the client must consent to the arrangement in writing.

Client Communication

Mass. R. Prof. C. 1.4 governs lawyers' communication with their clients. ACAP, which is OBC's screening and intake unit, advises attorneys to discuss with clients what their communication expectations are at the outset of the relationship and to agree to communication guidelines. This may include reviewing with an incarcerated client at which times the client has access to collect calls and when the lawyer is generally available to accept calls. The lawyer should advise the client that they cannot speak on a three-way third-party call because it is both recorded and will not be confidential. A discussion with the client regarding the type and frequency of the communication that will occur during the course of the representation should help maintain a successful attorney-client relationship and avoid eventual complaints to the OBC.

Mass. R. Prof. C. 1.4 requires regular communication but places particular emphasis on communications concerning important events in the case and instances where the client is affirmatively *requesting* information from the lawyer. Specifically, the rule provides that the lawyer shall "(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent … is required by these Rules," "(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished," "(3) keep the client reasonably informed about the status of the matter," "(4) promptly comply with reasonable requests for information," and "(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." Mass. R. Prof. C. 1.4(a).

Although there is no formula for determining what level of client communication is reasonable, lawyers should never allow long stretches to go by without some form of communication taking place with the client, even if there is nothing to report. If there is something important to report, such as a court decision on a motion or appeal, the client must be promptly told.

Must the lawyer answer or return every single call from the client? Comment [4] to Mass. R. Prof. C. 1.4 provides that if prompt response to a request is not feasible, the lawyer or member of the lawyer's staff must at least acknowledge the client's communication and advise as to when the client can expect a response. If and when clients become *overly* persistent in their demands for a lawyer's attention, the situation is to be managed, not ignored.

Allocation of Authority Between the Lawyer and Client

Lawyers should fully appreciate (and make clear to the client) which decisions must be made by the client, and which are in the lawyer's discretion. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." Mass. R. Prof. C. 1.2(a). It is implicit that all other decisions should be made by the lawyer, but that may be easier said than done.

Dilemmas that may arise in a criminal representation include: (1) the client insists that the lawyer file a motion to suppress, or other motion, that the lawyer believes has no chance of winning; (2) the client insists on asserting a defense that the lawyer believes will do the client more harm than good at trial; and (3) the client is determined to call certain witnesses at trial who the lawyer believes would prove damaging the client's chances of success. According to Mass. R. Prof. C. 1.2, the authority belongs to the lawyer in all three examples. Mass. R. Prof. C. 2.1 states: "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice." If, as in each of these examples, the client's desires are at odds with lawyer's professional judgment, the lawyer cannot simply defer to the client's wishes for the sake of remaining in the client's good graces.

A client's insistence that the lawyer pursue flawed or baseless theories of defense may also implicate additional rules, particularly Mass. R. Prof. C. 3.1, which provides that:

> A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Thus, a lawyer in a criminal matter has somewhat more leeway in asserting defenses and putting the prosecution to its proof than would exist in a civil case. Moreover, as Mass. R. Prof. C. 3.1, Comment [2] clarifies, a lawyer may assert a defense even though "the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery" (emphasis added). Therefore, Rule 3.1 should not be construed in a way that would impair a lawyer's ability to pursue defenses that may in due course prove to have a substantial basis in fact and in law, as this would interfere with the lawyer's duty of zealous advocacy.

Returning to the questions posed above, a lawyer may (consistent with his or her professional judgement) proceed with filing and litigating the motion to suppress even if the motion has little chance of success, because it is permissible under Rule 3.1 to compel the prosecution to prove that its evidence was obtained through legal means. The same principle applies to the assertion of a defense that is merely unlikely to succeed.

False Testimony by the Client

Mass. R. Prof. C. 3.3 ("Candor Toward the Tribunal") governs situations when the client in a criminal case wishes to take the stand in order to present false testimony. "If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation." Mass. R. Prof. C. 3.3(e)(1). The rule further provides that "[i]f, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission." Mass. R. Prof. C. 3.3(e)(2). The rule proscribes specific requirements that "[d]isclosure of privileged or prejudicial information shall be made only to the extent necessary to affect the withdrawal"; and"[i]f disclosure of privileged or prejudicial information is necessary, the lawyer shall make an ex-parte motion to withdraw before a judge who is not the judge who will preside at trial." During trial, if the "lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client." The rule further provides that the if the "lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal." The lawyer must also comply with Rule 3.3(e)(3), which states that "[i]n no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals." For further discussion of this issue, *see* Jane Rabe, *False Testimony by a Defendant in a Criminal Case: What Do You Know and When Do You Know It?* (June 2004).

Confidentiality

Client confidentiality is governed by Mass. R. Prof. C. 1.6 and 1.9. "A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Mass. R. Prof. C. 1.6 (a). Section (a) further provides that "'Confidential information' does not ordinarily include . . . information that is generally known in the local community or in the trade, field, or profession to which the information relates." It is crucial to understand that the fact that information about a client's criminal case may be accessible to the public does not mean it is no longer confidential. The information must be "widely known" for it to not be confidential. *See* Mass. R. Prof. C. Comment [3A]. "Information about a client contained in a public record that has received widespread publicity would fall within this category." *Id.* Media coverage of a client's criminal case, by itself, does not make it "widely known." The question is whether information is *known*, not whether it is *knowable*: "That the information is available in a public record is not dispositive; rather, the focus is on how many people in the relevant community, trade, field, or profession actually have learned the information." *Matter of Kelley*, 489 Mass. 300, 304 (2022).

Rule 1.6 requires that the client provide informed consent to the lawyer prior to the lawyer's revealing confidential information. Sometimes a client may grant the lawyer permission to discuss "anything" with a third party, such as a family member or friend. Otherwise, the lawyer must obtain informed consent and review with the client the scope and specifics of what may be provided. A lawyer should discuss with the client the potential harm of providing confidential

information to others and should advise the client that any information provided to third parties be narrowly tailored in order to protect the client's interests.

Attorneys should exercise caution when posting client information on law firm websites or social media. Withholding the client's identity in a post does not always protect confidentiality. Mass. R. Prof. C. 1.6, Comment [4] provides in part: "This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." For example, a lawyer was found to have violated Mass. R. Prof. C. 1.6 by discussing his client's Care and Protection matter in a Facebook post, violated Mass. R. Prof. C. 1.6, even though the client was not identified. *Matter of Smith*, 35 Mass. Att'y Disc. R. 554 (2019).

Communication with Represented Persons

Criminal defense attorneys must be cognizant of the rule prohibiting lawyers from speaking with persons who are known to be represented by their own counsel in regard to the matter. The applicable rule, Mass. R. Prof. C. 4.2, provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." By its terms, this rule applies only where the communication is about the subject matter on which the person is represented by another lawyer. For example, lawyer one (L1) represents a client in an assault and battery case. Lawyer two (L2) wishes to interview L1's client, who happens to be a witness to L2's client's armed robbery offense. L2 may interview L1's client without L1's consent. Similarly, L1 may interview, or have an investigator interview, a witness who is represented by L2 in another matter, as long as the subject of the communication does not involve the matter in which the witness has representation. Comment [8] states "[t]he prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed."[6]

In one common real-life scenario, the co-defendant in a matter (D2, represented by counsel), expresses a desire to provide the lawyer's client (D1) with statements exculpating D1. Even if D2 unilaterally contacts D1's lawyer and states that he does not need his lawyer's consent to speak with D1's lawyer, any communication by D1's lawyer without the consent of D2's lawyer is a violation of the rule. *See Matter of Parlow*, 39 Mass. Att'y Disc. R. 356 (2023).

Representing a Client with Competency Issues

In addition to the law regarding the competency of a criminal client, *see* G.L. c. 123, sec. 15, Mass. R. Prof. C. 1.1 (competence) and Mass. R. Prof. C. 1.3 (diligence) require the lawyer to investigate and litigate the issue of the client's competence. In dealing with a client with competency or other cognitive issues, the lawyer should review Mass. R. Prof. C. 1.14 ("Client With Diminished Capacity"). Rule 1.14(a) provides that "(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably

[6] Of course, just because the rule allows communication in these circumstances, where L2's client is unrepresented in regard to the matter that L1 is handling, does not entitle the lawyer to give L2's client any legal advice. Pursuant to Mass. R. Prof. C. 4.3, a lawyer's only proper advice to unrepresented persons is that they should consider getting their own counsel.

possible, maintain a normal client-lawyer relationship with the client." Section (b) provides: "When the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." In this situation, the lawyer may reveal confidential information about the client, "but only to the extent reasonably necessary to protect the client's interests." Mass. R. Prof. C. 1.14 (c).

Concluding the Attorney-Client Relationship

Whether the relationship with the client ends due to the conclusion of the case or whether the lawyer withdraws, the lawyer has ongoing obligations to the client. In addition to returning any unearned fees, the lawyer must provide the client with a copy of the file upon request of the client. Mass. R. Prof. C. 1.15A. Rule 1.15A(a) defines the materials that comprise a lawyer's "file." This provision should be consulted when responding to a client's turnover request, as some lawyers mistakenly assume that the file consists of only discovery and pleadings. Under Rule 1.15A(a), the file includes all correspondence (which includes email) and the lawyer's work product. The rule also extends to any "file" materials kept in electronic form. A lawyer cannot withhold the file for any reason, and the file cannot be withheld on the grounds that the client failed to pay some or all of the lawyer fees (although certain unpaid-for items within the file may be exempt from turnover on that basis). The file must be provided within a reasonable period of time, although the lawyer may charge the client for actual costs of copying and delivery of that portion of the file that consists of pleadings and the lawyer's work product.

Mass. R. Prof. C. 1.15A also addresses file retention issues, specifically, the number of years following the conclusion of the representation a lawyer must keep the client's file. Pursuant to Rule 1.15A(f), the relevant file retention for criminal defense lawyers may depend on the type of matter and the client's incarceration status. However, lawyers may elect to keep only electronic copies of client files except to the extent that preserving a client's documents in their original form is important. *See* Mass. R. Prof. C. 1.15A, Comment [4].

Withdrawal

Withdrawal from a case is governed by Mass. R. Prof. C. 1.16. "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred." Mass. R. Prof. C. 1.16 (d). The motion to withdraw and any corresponding affidavit should be drafted in a manner to protect the client's interests. The rule prohibits what is known as a "noisy withdrawal," which contains facts and client statements whose disclosure to the court and prosecutor could be harmful to the client's interests. The lawyer should be mindful to include in the motion only a general statement of the reason for withdrawal, such as irretrievable breakdown in the attorney relationship, without providing specific facts and statements. *See Admonition* No. 20-11, 36 Mass. Att'y Disc. R. 501 ("In filing his motion to withdraw, the respondent revealed the content of the

communications from the client, characterizing those communications as "intense" and "violent in nature" and "escalat[ing] in nature.")

Conclusion

Representing clients in criminal defense matters is both challenging and rewarding. Knowledge and application of the ethical rules not only helps attorneys avoid ethical violations but will also help strengthen their criminal practice.

For additional guidance on the issues covered by this article, lawyers are encouraged to call the Office of Bar Counsel's Ethics Helpline at 617-728-8750. The Helpline is open Mondays, Wednesdays, and Fridays from 2:00 p.m. to 4:00 p.m.

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