The Ethics of Charging and Collecting Fees

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BAR COUNSEL'S HANDLING OF FEE COMPLAINTS

Lawyers' fees are a frequent cause for complaint to the Office of Bar Counsel. Bar counsel's Attorney and Consumer Assistance Program (ACAP) receives more than 300 inquiries each year involving fee disputes. ACAP is often able to resolve these complaints by contacting lawyers and having them provide written explanations and itemizations of the fees charged or advising the parties of the availability of fee arbitration or other forums for mediating the dispute. If the complaint alleges violations warranting discipline if true, or if minor disciplinary issues are not resolved by ACAP, a disciplinary file will be opened for investigation by bar counsel.

RULES OF PROFESSIONAL CONDUCT AND ETHICAL CONSIDERATIONS IN FEE CASES

Retainers

A "classic" retainer binds the attorney to employment for ongoing services and to the exclusion of adverse parties. The retainer is seen as payment for the establishment of this exclusive relationship. The advantage to the client is in securing the services of the lawyer of choice over a period of time, while the lawyer foregoes the possibility of employment by others whose interests might be adverse to the client. The payment is in return for the attorney's agreement to be bound to the client and is therefore "earned" when paid. *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333 (1906). Retainers may be considered as earned when paid when the attorney makes clear to the client that the attorney will have to forego other work to take on the case and the total fee is reasonable.

More typically, the word "retainer" refers to the payment of a fee in advance to the lawyer for a particular service or in a particular case. The fee is earned as services are provided. Retainers paid in advance are client funds and, under Mass. R. Prof. C. 1.15(b)(3), must be deposited to a trust account until earned by the lawyer. See *Matter of Sharif*, 459 Mass. 558, 564 (2011) ("where a client pays an attorney a sum of money for legal fees before the legal fees have been earned, the fees advanced, often referred to as a retainer, belong to the client until earned by the attorney and must be held as trust funds in a client trust account.") Also under Mass. R. Prof. C. 1.15(b)(3), expenses paid in advance similarly must be deposited to a trust account and withdrawn only as expenses are incurred. A lawyer's negligent or intentional mishandling of retainers and funds advanced for expenses may result in discipline including loss of license. *Matter of Sharif*, *supra* at 571 (three-year suspension, third year stayed, for intentional misuse of a retainer); *Matter of Pudlo*, 460 Mass. 400 (2011) (one-year suspension,

six months stayed, for negligent misuse of retainer and expenses, other violations).

Retainers and funds for expenses should be deposited to an IOLTA account unless the lawyer believes the retainer or expense funds will be held for a substantial period of time or unless the retainer is so large that it will generate significant interest. In that case, the advance fees and expenses should be deposited to an individual trust account. Mass. R. Prof. C. 1.15(e)(6). Since the lawyer may not commingle personal funds with client funds, the lawyer must promptly withdraw the fee from the client funds account as it is earned. Mass. R. Prof. C. 1.15(b)(2). *Matter of Karahalis*, 7 Mass. Att'y Disc. R. 130 (1991). "Where the client disputes the bill, the attorney may not withdraw the disputed funds from the trust account until the dispute is resolved. See Mass. R. Prof. C. 1.15(b)(2)(ii). If the attorney has already withdrawn the amount billed and the client within a reasonable time after receiving the bill disputes the bill, the attorney must restore the disputed amount to the trust account until the dispute is resolved." *Matter of Sharif, supra* at 564-565.

A lawyer may accept property or an ownership interest as a fee so long as Mass. R. Prof. C. 1.8(i) is not violated. See section of this article entitled "Fee Payment Other Than in Funds," *infra.*

Duty to Provide Notice to Clients as Fees are Withdrawn

Mass. R. Prof. C. 1.15 mandates detailed accounting and record keeping for client funds. Mass. R. Prof. C. 1.15(d)(1) requires that upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property. Trust property includes advance payments for fees and expenses. Mass. R. Prof. C. 1.15(d)(2) provides that, on or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing an itemized bill or other accounting showing the services rendered, written notice of amount and date of the withdrawal, and a statement of the balance of the client's funds in the trust account after the withdrawal. Because the definition of trust property in Mass. R. Prof. C. 1.15(a)(1) includes funds held in a fiduciary capacity, Comment 6A clarifies that lawyers who represent themselves as fiduciaries (such as personal representatives, executors, conservators, guardians or trustees) must create bills or accountings to justify the withdrawal of a fee prior to or contemporaneous with paying themselves.

Charging Illegal or Excessive Fees or an Unreasonable Amount for Expenses

Lawyers are prohibited from entering into an agreement for, charging, or collecting illegal or clearly excessive fees or an unreasonable amount for expenses. Mass. R. Prof. C. 1.5(a). When a fee becomes "clearly excessive" is not defined in the rule, although Comment 1A observes that a fee must be "reasonable to be enforceable against a client" under civil law. The rule lists eight factors considered in deciding whether a fee is "clearly excessive." These factors include the time and labor required, the fee customarily charged, the nature and length of the professional relationship, the reputation and ability of the lawyer, and whether the fee is fixed or contingent. These factors are also considered in deciding whether a fee is reasonable.

A fee may also take into account, in proper circumstances, the result obtained. When the client and the lawyer agree to payment on a time-charge basis, however, the lawyer may not unilaterally charge a bonus or premium on top of time charges for results obtained. *Beatty v. NP Corp.*, 31 Mass. App. Ct. 606 (1991).

Because they are fiduciaries, lawyers in civil cases have the burden of proof on entitlement to a fee regardless of whether the lawyer is the plaintiff seeking payment or the defendant resisting a claim for a refund. See *Landry v. Haartz*, 83 Mass. App. Ct. 1135 (2013), affirming a finding that a contingent fee on a sale of shares of a closely held corporation was unreasonable; *Matter of Landry*, 31 Mass. Att'y Disc. R. __.(2015) (9-month suspension arising from same situation as civil case).

A fee may be clearly excessive and in violation of Mass. R. Prof. C. 1.5 even where an attorney performed the work billed according to an agreement with the client, if the fee is grossly disproportionate to what was required in the case and customarily charged for such services. In *Matter of Fordham*, 423 Mass. 481 (1996), the court censured an attorney who charged $50,000 for an OUI case. The fee was calculated on an hourly basis. The time charged was expended in a conscientious and diligent manner, but some of it was spent in becoming conversant with such cases since the lawyer, although an experienced civil litigator, did not have experience in district court. The court found that the lawyer and his associates had devoted substantially more hours than would have been spent by a prudent experienced lawyer and the fee charged was much higher than the fee customarily charged for this type of bench trial. The court observed,

> It cannot be that an inexperienced lawyer is entitled to charge three or four times as much as an experienced lawyer for the same service. A client "should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine."

Consideration is also given to the type of work performed for the fee. It is generally improper to charge for nonlegal work at legal rates. See *Matter of Kliger*, 18 Mass. Att'y Disc. R. 350 (2002), where a public reprimand was imposed for inadequate record keeping and charging an excessive fee by charging legal rates for nonlegal services, including acting as caretaker for mentally ill but legally competent client; *Matter of Chignola*, 25 Mass. Att'y Disc. R. 112 (2009) (public reprimand for, among other violations, charging an impaired client legal rates for nonlegal services. But see *Matter of the Discipline of an Attorney*, Admonition no. 13-18, 29 Mass. Att'y Disc. R. __ (2013) (admonition for charging clearly excessive fees to an estate as executrix and attorney; hourly rate as executrix accepted but number of hours spent found to be excessive).

A flat fee or nonrefundable fee, as with all other fees, must be reasonable. The fee may not interfere with client's right to discharge the attorney at any time. Mass. R. Prof. C. l.16(a)(3). In *Smith v. Binder*, 20 Mass. App. Ct. 21 (1985), the clients paid the attorneys a retainer of $8,500 for representation in criminal case. The clients sued the attorneys for an accounting and refund after they discharged the attorneys three weeks later. The attorneys claimed the fee was nonrefundable and asked the court to take judicial notice that it is an accepted custom and practice among attorneys of the criminal bar that retainers taken in connection with

representation of criminal defendants are nonrefundable. The trial judge found that the plaintiffs knew the fee was nonrefundable. The Appeals Court reversed, finding no evidence to support that finding. In a footnote, the Appeals Court noted authority that requiring a client to agree to a nonrefundable fee was unethical. In its opinion, the Appeals Court observed that the right to change lawyers at any time was "[e]ssential to the lawyer client relationship" and that, if the lawyer were permitted to keep the unearned portion of the fee, the right to change lawyers would be of little value. See also *Matter of Cooperman*, 633 N.E.2d 1069 (N.Y. 2d. 1994), holding that nonrefundable special retainers are unethical and unconscionable, and MBA Ethics Op. 95-2, advising that an attorney may not enter into a fee agreement with a client for a particular case or service if the agreement requires the client to pay a nonrefundable retainer, citing the *Cooperman* decision.

Duty to Explain the Fee in Writing

Effective January 1, 2013, Mass. R. Prof. C. 1.5(b) requires a lawyer to communicate to the client *in writing* the scope of the representation and the basis or rate of the fee and expenses before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses must also be communicated in writing to the client. The only exceptions to the requirement of a writing are: (1) when the lawyer will charge a "regularly represented client on the same basis or rate," (2) when the fee is charged for a "single-session consultation," or (3) when the lawyer reasonably expects that the total fee will not exceed $500.

The writing requirement may be satisfied by furnishing to the client a "simple memorandum or copy of the lawyer's customary fee schedule" so long as the memo or copy sets forth the scope of representation and the basis of the fee. A prudent lawyer will have a fee agreement signed by the client to prevent any misunderstanding as to whether the client was furnished with the required writing.

A lawyer's ability to modify a fee agreement during the course of the representation is limited by the provisions of Mass. R. Prof. C. 1.8(a), concerning business transactions with clients. *Matter of Weisman*, 30 Mass. Att'y Disc. R. __ (2014). Rule 1.8(a) requires, among other matters, that the transaction be fair and reasonable to the client, that the client be advised in writing of the desirability of seeking advice of independent counsel, and that the client give informed consent, in a writing signed by the client, to the essential terms of the transaction.

Mass. R. Prof. C. 1.5(c) provides that a fee may be contingent on the outcome of the matter for which the service is rendered, except where a contingent fee is prohibited by Mass. R. Prof. C. 1.5(d) or other law. The use of a percentage by an attorney to calculate his reasonable fees at the conclusion of a case does not automatically constitute a contingent fee, although it is a strong indication that a contingent fee is being collected. See *Matter of Saab*, 406 Mass. 315, 320 (1989). The question is whether the collection of all or part of the fee is contingent by agreement of the lawyer and the client upon the outcome of the case. A percentage fee might be excessive if the client was bound to pay it regardless of the outcome, since a lawyer is not entitled to collect for the risk factor associated with contingent fees in such circumstances. See *Matter of the Discipline of an Attorney*, 2 Mass. Att'y Disc. R. 115 (1980). In addition, quantum meruit is generally not recoverable when the contingency does not occur. *Liss v. Studeny*, 450 Mass. 473,

481 (2008).

Contingent Fees

Mass. R. Prof. C. 1.5(c) requires a contingent fee agreement to be in writing and to meet specific requirements set forth in the rule. The contingent fee agreement must be signed in duplicate by both the client and the lawyer, and the lawyer must provide a signed duplicate copy to the client within a reasonable time after making the agreement. The lawyer must also retain a copy of the contingent fee agreement for seven years after the conclusion of the contingent fee matter. There are two exceptions to these requirements: contingent fee agreements for collection of commercial accounts and insurance subrogation claims need not be in a writing as defined by Mass. R. Prof. C. 1.5(c).

Mass. R. Prof. C. 1.5(c) was substantially amended in 2011 to conform to three Supreme Judicial Court decisions, *Malonis v. Harrington*, 442 Mass. 692 (2004); *Liss v. Studeny*; and *Matter of an Attorney*, 451 Mass. 131 (2008). In particular:

- Section (c)(4) provides that the fee agreement must state the contingency upon which compensation will be paid and the extent to which the client is liable to pay compensation other than from amounts collected by the attorney. In addition, if the lawyer intends to charge a fee other than the contingent fee, the lawyer must describe in the fee agreement how that fee will be calculated.

- Section (c)(7) addresses the client's liability when the attorney-client relationship terminates prior to the end of a contingent fee case. This section, in addition to Section (c)(4), requires the lawyer to specify in the agreement that he or she intends to pursue a claim for fees and expenses in the event that the attorney-client relationship ends before the conclusion of the case; detail the basis on which the fees and expenses will be claimed; and, if applicable, explain how the fee will be calculated. Comments 3A and 3B further expand on these requirements and on the nature of a quantum meruit recovery. Comment 3B expressly states that, unless otherwise agreed in writing, the lawyer ordinarily will not be entitled to receive a fee unless the contingency has occurred, nor is there a presumption that the lawyer would be entitled to quantum meruit.

- Section (c)(8) is directed to successor counsel and requires the fee agreement between successor counsel and the client to state whether the client or the successor lawyer is to be responsible for payment of former counsel's fees and expenses, in accordance with the court's holding in *Malonis v. Harrington*.

Rule 1.5(c) also contains an unnumbered paragraph following 1.5(c)(8). At the conclusion of any contingent fee matter for which a contingent fee agreement is required, the lawyer is obliged to provide a writing to the client explaining the outcome and showing how the client's remittance was calculated. (In any type of case, not just contingent fee matters, a lawyer must account for the receipt, maintenance, and distribution of trust funds under the trust account rule, Mass. R. Prof. C. 1.15(d).) In addition, within 20 days after termination of the attorney-client relationship or after receipt of the client's demand for an accounting, the lawyer must provide a written statement of the services rendered and expenses incurred unless the lawyer does not intend to

claim entitlement to a fee or expenses if the lawyer is discharged before the end of the contingent fee matter. Comment 3C explains that, if the lawyer is unable to determine the precise amount claimed because the case has not been resolved, the lawyer nonetheless must identify the amount of work performed and the basis employed for calculating the fee due.

Mass. R. Prof. C. 1.5(f) suggests two model contingent fee forms, Form A and Form B. If the lawyer includes terms in a contingent fee agreement that materially differ from, or add to, those in the model fee agreements, the lawyer is required when representing individuals (but not entities) to explain those terms specifically to the client and obtain the client's informed consent to the terms in writing. Mass. R. Prof. C. 1.5(f)(3); *Matter of an Attorney*, *supra* at 132.

The differences between Form A and Form B are explained in comment 11 and are summarized as follows:

- Form A is an off-the-shelf version that can be used without any special explanations by the lawyer to the client beyond those otherwise required by Rule 1.5. Form B contains certain alternative provisions that must be explained to the client and to which the client must give informed consent confirmed in writing. Confirmation in writing, where required, may be satisfied by the client's initialing the option elected.

- Form A, paragraph 2, contains a standard provision that the contingency is the recovery of damages. Paragraph 2 of Form B, on the other hand, provides a blank space (to be filled in) as to the nature of the contingency. The use of paragraph 2 of Form B, however, does not require any special explanations to the client.

- Paragraph 3 of Form B contains two options for advances and payment of expenses. The first option applies if the lawyer agrees to advance expenses and the client is not liable for those expenses other than reimbursement from amounts collected for the client. (Note that Mass. R. Prof. C. 1.8(e) permits repayment by the client of court costs and expenses of litigation to be contingent on the outcome of the matter.) The second option applies if the client is liable for any expense other than from amounts collected for the client and requires the lawyer to explain these options to the client and specify those expenses and how they will be paid. The client must assent in writing and may do so by initialing the option selected.

- Paragraph 7 of Form B applies when the lawyer is successor counsel in a contingent fee case and also provides two options. The first option, which also appears in Form A, provides that the lawyer will be responsible for paying former counsel's fees and expenses and for resolving any disputes regarding these matters. The second option imposes the responsibility for these matters on the client. The lawyer must explain these options to the client and have the client initial or otherwise confirm in writing the option selected.

A lawyer's failure to have a properly executed contingent fee agreement ordinarily results in discipline.

Mass. R. Prof. C. 1.5(d) prohibits charging a contingent fee in a criminal case and in a "domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof." Comment 6 explains that contingent fee agreements are not prohibited in connection with

collecting post-judgment balances in domestic matters.

Lawyers settling contingent fee cases through structured settlements cannot collect the fee by calculating the agreed-upon percentage on the total settlement figure. Instead, the lawyer must either take the applicable percentage from each installment payment as it is received or calculate the total contingent fee based on the present value of the total settlement or the cost of the annuity purchased by the insurer to fund the settlement. (See, however, *Doucette v. Kwiat*, 392 Mass. 915, n.1 (1984), which cited decisions from other jurisdictions invalidating contingent fees calculated on a present-value basis without reaching whether such calculations are permissible in Massachusetts.) *Matter of Callahan*, 11 Mass. Att'y Disc. R. 23 (1995), and Private Reprimand 90-34, 6 Mass. Att'y Disc. R. 439 (1990), are two excessive fee disciplinary cases involving attorneys who took their fees upfront on the total of the installment payments rather than the present value, thereby collecting a clearly excessive fee in violation of former DR 2-106. When the possibility of a structured settlement is foreseeable, lawyers should set out the method by which the lawyers' fees will be calculated in the event of a structured settlement in the written agreement.

Settlement or discharge of outstanding liens is ordinarily part of the services provided in return for a contingent fee. A lawyer who retained additional funds from a structured settlement as a fee for settling liens violated G.L. c.221, §51, and was required to pay the amount withheld plus interest at five times the lawful rate from the date of the client's demand for payment. *Doucette v. Kwiat*, 392 Mass. 915 (1984). See also *Delano v. Milstein*, 56 Mass. App. Ct. 923 (2002), requiring a lawyer who wrongfully withheld trust funds to repay the funds plus two times the lawful rate of interest. The Appeals Court ruled that the multiplier of five is mandatory, not discretionary. A contingent fee for collecting a routine PIP payment is likely clearly excessive. MBA Ethics Op. 77-7. To the extent that the lawyer intends to charge a fee for collecting PIP, Mass. R. Prof. C. 1.5(c)(4) requires that the contingent fee agreement set forth the method by which this fee will be determined.

Fee Payments Other Than in Funds

A lawyer may accept property instead of money as a fee, so long as the lawyer is not acquiring a proprietary interest in the subject matter of the litigation in violation of Mass. R. Prof. C. 1.8(i). A fee paid in property may constitute a business transaction with a client and be subject to Mass. R. Prof. C. 1.8(a). See Comment 4 to Mass. R. Prof. C. 1.5. If an attorney takes a security interest in client property after the representation commences or changes the fee agreement, this is a business transaction with a client and the lawyer must comply with the requirements of Mass. R. Prof. C. 1.8(a), including that the transaction must be fair and reasonable and understood by the client, the client must be given an opportunity to consult independent counsel, and the client must give informed consent in writing. *Matter of an Attorney*, 451 Mass. 131, 139 (2008).

Division of Fees

Mass. R. Prof. C. 1.5(e) governs division of fees among lawyers. Lawyers are permitted to divide fees with members of their firms or with former members pursuant to a retirement or

settlement agreement without client consent. Mass. R. Prof. C. 1.5(e) provides that a lawyer may divide a fee with a lawyer who is not a partner or associate in the same firm only if the client has been informed that a division of fees will be made, consents to the joint participation, and the total fee is reasonable. The rule requires that the client's consent be in writing and given before or at the time that the client enters into the fee agreement. See also *Saggese v. Kelley*, 445 Mass. 434 (2005). The client therefore must consent at the outset of the representation and in writing to the lawyer's payment of a referral fee. Further, the comments to the rule note that, although the lawyer is not required to volunteer the specific fee division between counsel, the lawyer must provide the information if the client requests it.

In *Matter of Kerlinsky,* 406 Mass. 67 (1989), the attorney violated former DR 2-107(A)(1) by withholding an additional 15% of a tort recovery to pay for services of an out-of-state attorney when the client did not receive full disclosure and did not give his prior consent to the arrangement. See also *Matter of Fine,* 12 Mass. Att'y Disc. R. 149 *(*1996), a public reprimand holding that a lawyer who divides his fee with another lawyer is obligated to assure himself that the client has consented to the fee split.

A lawyer has special responsibilities if someone other than the client is paying the fee. Mass. R. Prof. C. 1.8(f) provides that the client must be consulted and give informed consent in advance if the lawyer's fee is to be paid by a person other than the client, and, of course, there can be no interference with the lawyer's independent professional judgment or with the client-lawyer relationship. The client does not surrender any rights or privileges because he or she is not paying the fee. It is the client, not the person paying the fee, who directs the lawyer's actions.

<u>Fees and Withdrawal from Representation</u>

An attorney may not withdraw from representation if withdrawal will have a "material adverse effect on the interests of the client" unless withdrawal is mandatory under Mass. R. Prof. C. 1.16(a) or one or more of the conditions for permissive withdrawal set forth in Mass. R. Prof. C. 1.16(b) applies. In hourly fee cases, the lawyer may seek to withdraw if the client does not pay bills and thus "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services" under Mass. R. Prof. C. 1.16(b)(5). But see Rule 1.16(c), making it a disciplinary violation to withdraw without permission of the court where the rules of the tribunal require permission to withdraw, and *Matter of Dembrowsky*, 8 Mass. Att'y Disc. R. 75 (1992) (public censure for withdrawal without leave of court.)

In *Kiley, Petitioner*, 459 Mass. 645 (2011), the Supreme Judicial Court discussed the application of Rule 1.16(b) to contingent fee cases. One of the conditions listed in Rule 1.16(b) is that "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client." *Kiley* was a contingent fee case where the lawyer handling the matter left the firm and the firm sought to withdraw on grounds including that the damages would be insufficient to warrant continued representation. The court made clear that a simple miscalculation of the value of a case does not qualify as an "unreasonable financial burden" on the firm justifying withdrawal when withdrawal will have a material adverse effect on the client. The court warned that attorneys who represent clients on a

contingent fee basis "must choose their cases carefully, because the law does not allow them easily to jettison their mistakes, especially after a complaint has been filed."

Fee Disputes

Ambiguities in any fee agreement are construed against the lawyer who drafted it. In *Matter of Kerlinsky*, 406 Mass. 67 (1989), an attorney was publicly censured for, among other things, increasing the one-third percentage fee provided for in the contingent fee agreement to one-half of a tort recovery for handling a successful appeal from a defendant's verdict when the fee agreement did not specify that an increased percentage of the recovery would apply in the event of an appeal. Kerlinsky was required to make restitution pursuant to G.L. c.221, §51, which provides that a lawyer who unreasonably neglects to pay over money collected for the client shall forfeit five times the lawful rate of interest on the money from the time of demand. See also *Grace & Nino, Inc. v. Orlando*, 41 Mass. App. Ct. 111 (1996), construing an "obscurity" in a contingent fee agreement against the attorneys who drafted it.

"[W]here a contingent fee agreement is ambiguous or silent as to how attorney's fees are to be treated, the contingent percentage must be calculated on the total amount minus the court-awarded fees, with the attorney awarded the greater of the two amounts." *Cambridge Trust Company v. Hanify & King*, 430 Mass. 472, 479 (1999). Both form contingent fee agreements in Mass. R. Prof. C. 1.5(f) reflect this default rule.

A lawyer may not pay himself or herself a fee from funds received on behalf of a client unless the client has agreed that the lawyer may do so. If the client has agreed that the lawyer may be paid from funds collected on behalf of the client, the lawyer may not pay himself or herself a fee if the client objects to the amount and leave resolution of the dispute to the client. See Mass. R. Prof. C. 1.15(b)(2)(ii). Mass. R. Prof. C. 1.15(d)(2) requires the lawyer to notify the client in writing on or before the date funds are withdrawn from trust to pay the lawyer or law firm a fee. In addition, Mass. R. Prof. C. 1.5(c) requires lawyers to provide to the client at the conclusion of a contingent fee matter a written statement showing the recovery and how the remittance to the client has been calculated. If the client disputes the fee within a reasonable time, the disputed portion must be restored to a trust account until the dispute is resolved. Mass. R. Prof. C. 1.15(b)(2)(ii).

Comment 3 to Mass. R. Prof. C. 1.15 explains that lawyers may not withhold funds from a client to "coerce" agreement to the lawyer's fee and that they should instead "suggest means for prompt resolution of the dispute, such as arbitration." Lawyers should attempt to avoid fee controversies with clients and should not lightly sue a client. A lawyer may sue a former client to collect a fee, and Mass. R. Prof. C. 1.6(b)(5) permits a lawyer to reveal confidences or secrets necessary to establish a claim on behalf of the lawyer in a controversy between the lawyer and the client. Comment 11 to Rule 1.6. However, disclosure of information must be restricted to that information and those persons essential to collect the fee and must not unduly prejudice the client. See Private Reprimand 94-2, 10 Mass. Att'y Disc. R. 309 (1994) (lawyer revealed confidences and secrets beyond those "necessary" to collect the fee). See also MBA Ethics Op. 00-3, advising that a lawyer may not report a client's debt to a credit reporting agency. Ethical concerns aside, a lawsuit against a client for fees is an invitation to a counterclaim for

malpractice. See *Fishman v. Brooks*, 396 Mass. 643 (1986).

G.L. c. 221, §50, is the only statute that establishes an attorney's lien ("charging lien"). The lien covers reasonable fees and expenses and commences upon an authorized commencement of or appearance in an action, counterclaim, or other proceeding in any court or before any state or federal department, board, or commission. The lien is upon the client's cause of action, counterclaim, or claim and upon the proceeds derived therefrom. *Ropes & Gray v. Jalbert*, 454 Mass. 407, 413-414 (2009) (law firm's statutory lien applied to patent); *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241 (1993).

Attorneys sometimes send notice to successor counsel or an insurer regarding fees owed. There is no authority for requiring an insurance company or successor counsel to honor such notices. It is deceptive and misleading on the part of the attorney to suggest otherwise. The former client's directives must take precedence. A notice sent to either successor counsel or an insurance company must not imply that the attorney has an enforceable lien unless a statutory lien has been filed under G.L. c.221, §50. See *Matter of an Attorney*, 451 Mass. 131, 144-145 (2008), imposing an admonition for improper assertion by a discharged lawyer to an insurer of a statutory lien against a former client's potential settlement.

An attorney may not withhold the file from the client to collect a fee. Mass. R. Prof. C. 1.16(e) requires an attorney to make available to a former client all papers and documents that the client supplied and all pleadings and other court papers. The lawyer can require reimbursement for out-of-pocket expenditures for items such as depositions, photographs, reports, or medical records before turning them over and, if the lawyer and client have not entered into a contingent fee agreement, may withhold work product for which the client has not paid. Payment for these expenditures and work product may not be required as a condition of turning over the documents if withholding the materials would prejudice the client unfairly.

In *Torphy v. Reder*, 357 Mass. 153 (1970) the court held that the attorney may not assert a possessory lien upon client property (stock certificates and bankbooks) held for a special purpose or as escrow agent. Where otherwise appropriate, an attorney under Mass. R. Prof. C. 1.8(i) may acquire a lien granted by law, including pre-judgment attachment or trustee process, to secure the collection of fees. See also BBA Op. 93-2.

For further guidance about the ethics of charging and collecting fees, please visit the Office of Bar Counsel website, *www.massbbo.org*.