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Frequently Asked Questions

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✓ What do I do when I learn that a divorce client has lied on his financial statement?

The financial statements used by the probate court (Dom. Rel. Forms 301S, 301L) require a lawyer to certify that he or she has no knowledge that any of the information contained on the statement is false. The lawyer's certification of a client's financial statement implies that a reasonable inquiry as to the accuracy of the information provided has been undertaken. See [Admonition No. 99-45](#) (<https://www.massbbo.org/Files?fileName=admon.pdf>) (lawyer negligently certified that information on client's financial statement was correct even though the amount of debts and expenses did not conform to documents which the lawyer had filed in response to discovery requests; lawyer admonished for inadequate preparation and lack of reasonable diligence in violation of [Mass. R. Prof. C. 1.1](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) and [1.3](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>)). The inquiry made by a "reasonably prudent and competent lawyer" must be guided by all the information in the lawyer's possession.

If a lawyer learns that a client has made a material misrepresentation on a financial statement before the statement is filed with the court, the lawyer may not sign the financial statement and must refuse to file it. [Mass. R. Prof. C. 8.4\(c\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; [Mass. R. Prof. C. 3.3\(a\)](#) (4) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) prohibits lawyers from offering evidence they know to be false. (See [Mass. R. Prof. C. 9.1\(f\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) for definition of "knowledge".)

If a lawyer learns that a client has made a material misrepresentation on a financial statement that has already been filed in court, the lawyer should first attempt to persuade the client to correct the false information. See Comments [2A], [5] and [6] to [Mass. R. Prof. C. 3.3](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>).

If the persuasion is ineffective, [Mass. R. Prof. C. 1.6\(b\)\(3\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) and [3.3\(a\)\(2\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) combine to require the lawyer to disclose confidential information to the extent necessary to rectify the false statement, whether or not the lawyer decides to withdraw from the case. [Mass. R. Prof. C. 3.3](#),

[comment \[2A\]](https://www.massbbo.org/Files?fileName=RPC.pdf) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). This duty to rectify client fraud continues to the conclusion of the proceeding, including all appeals. See [Mass. R. Prof. C. 3.3\(b\)](#).

It should also be noted that a lawyer who withdraws from a case may disclaim an affirmation or opinion or document issued based on the false statement. [Comment \[16\] to Mass. R. Prof. C. 1.6](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>).

✓ My client says he is going to commit a crime or take violent action against someone. What may I do? What must I do?

One of the primary obligations of a lawyer is to maintain the confidentiality of information received in the course of the representation. This obligation is imposed to encourage clients to confide in persons trained in the law with the expectation that their secrets will be preserved. When a client states that he is going to commit a crime or take violent action against someone, the lawyer should attempt to dissuade the client from taking illegal or otherwise improper future conduct. [Mass. R. Prof. C. 1.6, comment \[14\]](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). If the lawyer is unable to do so, then the lawyer must decide whether or not disclosure is permitted or required.

[Mass. R. Prof. C. 1.6\(b\)\(1\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) gives a lawyer discretion to choose to disclose confidential information to the extent necessary to prevent the commission of a criminal (or fraudulent) act that the lawyer reasonably believes "is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another.") While the rule prohibits disclosure of an intention to commit a crime that will result in "trivial" or "small" harm, actual bodily injury is not necessary. For example, "statutory rape" is included in the types of harm that authorize, but do not mandate, disclosure. [Comment \[9A\]](#)

Disclosure is required under more restrictive circumstances. See [Rule 1.6\(b\) and comments \[14\] and \[21\]](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). In civil proceedings ([Rule 3.3\(e\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) governs the lawyer's obligations in criminal cases), [Mass. R. Prof. C. 3.3\(b\)](#)

(<https://www.massbbo.org/Files?fileName=RPC.pdf>) requires disclosure of confidential information to a tribunal if disclosure is necessary to avoid "assisting" a criminal (or fraudulent) act, such as perjury, affecting the tribunal and if disclosure is the only means available to rectify the fraud. Note that "assistance" has a "special meaning" in this rule. [Mass. R. Prof. C. 3.3, comment \[2A\]](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). Even when not before a tribunal, [Mass. R. Prof. C. 4.1\(b\)](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) requires a lawyer to disclose material facts to a third person if disclosure is necessary to avoid assisting a criminal (or fraudulent) act by the client, unless disclosure is prohibited by [Mass. R. Prof. C. 1.6](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). Note that in this rule, "assistance" is defined under the more usual and narrow principles of tort, agency, and criminal law. See "Lies My Client Told Me" for additional discussion of [Mass. R. Prof. C. 3.3](#) and [4.1](#). Finally, [Mass. R. Prof. C. 8.3](#) requires a lawyer to disclose a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, unless disclosure is prohibited by [Mass. R. Prof. C. 1.6](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>).

Any disclosure adverse to the client's interests must be no greater than that reasonably necessary to achieve the prevention of the crime. Whether the lawyer should give advance notice to the client that confidential information will be disclosed in order to prevent the commission of a crime depends on the circumstances. Under [Mass. R. Prof. C. 3.3](#) (<https://www.massbbo.org/Files?fileName=RPC.pdf>), the lawyer must first call upon the client to rectify the criminal or fraudulent act, and, if possible, warn the client in advance as to the lawyer's obligations to the tribunal, before disclosing any confidential information. When disclosure "might hasten the commission of a dangerous act by the client [,]" advance notice would defeat the purpose of the exception. [Rule 1.6](#),

[comment \[19A\]. \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf). The lawyer has to use reasoned judgment that evaluates the competing concerns in order to decide in such circumstances whether to give notice to the client.

✓ My client hasn't paid my fee. What do I have to do before I can sue?

A lawyer cannot bring suit against a client until the lawyer's representation of that client has ended. See [Mass. R. Prof. C. 1.7\(b\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf). Thus, the first thing that the lawyer must do is withdraw. See [Mass. R. Prof. C. 1.16\(a\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf). After withdrawal, the lawyer should consider submitting the matter to mediation or fee arbitration. [Mass. R. Prof. C. 1.5, comment 5 \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf). Filing suit against the client should be the last resort. The lawyer should bear in mind that a suit against a client will often prompt the client to take reciprocal action against him, usually by filing a counteraction for malpractice or a grievance at the Board of Bar Overseers.

If a lawyer is representing a client before a tribunal, permission of the tribunal may be required before the lawyer may withdraw. See [Mass. R. Prof. C. 1.16\(c\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf). If the tribunal does not grant permission, the lawyer must continue to represent the client diligently and zealously and must delay action to collect the fees until after the representation is terminated. "The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client." [Mass. R. Prof. C. 1.7, comment 6 \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf).

✓ Can a lawyer charge interest on unpaid fees?

The ethical rule governing fees, [Mass. R. Prof. C. 1.5 \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf), does not address the question of charging interest on unpaid balances for legal services previously rendered. Bar Counsel's view is that a lawyer may charge interest provided that the client has notice and a reasonable opportunity to pay the balance due without interest. Like the fee itself, the rate of interest must be reasonable to be enforceable. See [Comment \[1A\] to Mass. R. Prof. C. 1.5 \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf), and [MBA Opinion 83-1 \(https://www.massbar.org/publications/ethics-opinions/ethics-opinions-1983-opinion-no-83-1\)](https://www.massbar.org/publications/ethics-opinions/ethics-opinions-1983-opinion-no-83-1).

[Rule 1.5\(b\)\(1\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf) states that, with a few exceptions spelled out in [Rule 1.5\(b\)\(2\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf), the scope of the representation and the basis or rate of the fee and expenses shall be communicated to the client in writing except when the lawyer has regularly represented the client on the same basis or rate. The lawyer should give advance written notice to the client that there will be interest charged on late payments, whether or not the lawyer-client relationship is well established.

✓ The insurance company is offering to settle, and I can't find my client. What can I do?

The ethical rules are clear that a lawyer cannot settle a client's case without the client's consent. [Mass. R. Prof. C. 1.2\(a\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf). The lawyer also cannot endorse a check with the client's name, pay himself a fee, or dismiss the case without the client's approval. [Mass. R. Prof. C. 1.15\(b\), \(c\). \(https://www.massbbo.org/Files?fileName=RPC.pdf\)](https://www.massbbo.org/Files?fileName=RPC.pdf).

A lawyer has an obligation to undertake all reasonable efforts to locate a client who is missing. These and other ethical obligations of lawyers who have lost contact with their clients are described in more detail in "[VANISHED! What To Do When A Client Goes Missing. \(https://www.massbbo.org/Files?fileName=vanished.pdf\)](https://www.massbbo.org/Files?fileName=vanished.pdf)" (9/20). The article also discusses the steps a lawyer can take to protect a client's case, the option of withdrawing, and the difficulties to be expected.

The article also has a helpful discussion of steps which can be taken at the outset of the representation to avoid some of these problems.

- ✓ I represented a husband and wife a few years back. Now they have split, and one has asked me to file a divorce. Do I have a conflict?

The lawyer is being asked to represent one spouse in a divorce against a former client. The question of whether a conflict exists is governed by Mass. R. Prof. C. Rule 1.9(a) (<https://www.massbbo.org/Files?fileName=RPC.pdf>), which provides:

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 consents after consultation.

There is no doubt that representation of one spouse in a divorce involves representation of interests "materially adverse to the interests" of the other spouse. Regardless of how amicable the divorce may appear to be, given the potential rights and interests involved, particularly if there are children or property involved or if one spouse does not work, there are interests that are materially adverse between the parties.

Whether a divorce is substantially related to a matter on which the lawyer represented both spouses depends on the particular facts of the prior representation, the issues that are likely to arise in the divorce, and the amount of time that has passed since the prior matter concluded. If the prior representation of the parties involved any issues or facts that may be involved in the divorce, there is a risk that the divorce and the prior matter could be considered substantially related. That risk is increased the closer the matters occur in time.

If there is a conflict, Rule 1.9(a) (<https://www.massbbo.org/Files?fileName=RPC.pdf>) specifies that the lawyer can nonetheless undertake the representation if the former client consents after consultation. See Comment 12 to Rule 1.9 (<https://www.massbbo.org/Files?fileName=RPC.pdf>), as well as Comment 5 to Rule 1.7 (<https://www.massbbo.org/Files?fileName=RPC.pdf>), for guidance on obtaining informed consent.

- ✓ My client has asked me to advance funds to help her out of a family crisis. I anticipate receipt of the settlement check within a few days. What, if anything, can I do?

No matter how compelling the client's situation, no matter how sympathetic the lawyer may be with that situation, any lawyer who advances funds to a client for anything other than court costs and expenses of litigation violates Mass. R. Prof. C. 1.8(e) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). This prohibition is absolute; it leaves no wiggle room.

For additional discussion of this topic, see "Neither a Borrower Nor a Lender Be." (<https://www.massbbo.org/Files?fileName=lender.pdf>).

- ✓ What May or Must be Done when a Lawyer Leaves a Firm?

Lawyers who decide to leave their law firms have fiduciary obligations to their remaining colleagues as well as ethical obligations to their clients stemming from the client's right to choose his or her own lawyer. See Pettingell v. Morrison, Mahoney & Miller, 426 Mass. 253 (1997); Meehan v. Shaughnessy, 404 Mass. 419 (1989) (<https://www.massbbo.org/Files?fileName=fifty.pdf>). Among other things, the departing lawyer must disclose the departure to the firm before any notice is given to clients, and the departing lawyer and the firm must identify the departing lawyer's clients. Clients must then be given fair, timely notice of the departure and full opportunity to decide whether they wish to follow the departing lawyer, remain with the firm, or retain a different lawyer altogether. The remaining lawyers cannot obstruct the exit of clients who leave with the departing lawyer, and they must withdraw from representation in compliance with the ethical rules. Mass. R. Prof. C. 1.16(a)(3), 5.6(a) (<https://www.massbbo.org/Files?fileName=RPC.pdf>). Departing lawyers who want to

terminate representation must also withdraw. All withdrawing lawyers must notify the clients, take reasonable steps to safeguard the clients' interests, refund any unearned fees, and, for cases in litigation, comply with the rules of the tribunal on withdrawal. [Mass. R. Prof. C. 1.15\(b\)](https://www.massbbo.org/Files?fileName=RPC.pdf) (<https://www.massbbo.org/Files?fileName=RPC.pdf>), 1.16 (<https://www.massbbo.org/Files?fileName=RPC.pdf>). These and other ethical obligations of both departing and remaining lawyers are described in more detail in "[Fifty Ways to Leave Your Law Firm](https://www.massbbo.org/Files?fileName=fifty.pdf)" (4/00) (<https://www.massbbo.org/Files?fileName=fifty.pdf>).

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