

Intake of a Client Matter

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Most often, a lawyer-client relationship commences when a potential client contacts a law firm. The potential client may be responding to an advertisement, solicitation, or response to request for proposal,¹¹⁹ or the potential client may know the lawyer, but still the relationship is generally initiated by the client.

When potential client contact occurs, someone at the firm must communicate with the potential client about the matter to obtain some preliminary information. At a consumer-focused firm, particularly one that advertises, this contact may be a paralegal or other intake employee.¹²⁰ For other firms, including corporate-focused firms, often a new client or legal matter comes into a firm through or because of one of the attorneys. The intake person or the attorney, who

¹¹⁹See generally Business Development, *supra* at Chapter 30.

¹²⁰If the process will involve any determination as to whether the firm has interest in the case, ethics authorities may require that an attorney be involved in this process, or the evaluation may constitute the unauthorized practice of law.

is commonly referred to as the “originating attorney,” will typically take down certain information about the potential client and matter. In some firms, the initial information gathered may only be the identity of the prospective client, contact information, other parties involved in the matter (adverse or not), and the general nature of the matter. This provides enough information for a basic conflict check, without causing the firm to face likely disqualification under Rule 1.18 if the firm rejects the prospective client but then seeks to represent another party to the matter. In the matter many instances, this basic information is also virtually all the information the firm obtains before it agrees to the representation and starts working for the client.

Other firms may require much more detailed information about the potential client and engagement before a representation commences. Part of this information may be obtained—and in a more formal intake process will be obtained—prior to the running of the conflict check.¹²¹ Then, after a conflict check is run, a lawyer or intake employee and the prospective client will communicate a second time so the firm can learn enough about the client and matter to confirm that the firm should proceed with the representation. Information obtained through these two communications will likely include the client and its principals; the client’s objectives; how the client will pay and whether the client can pay; the client’s past handling of the matter, including identity and dealings with any former counsel; information regarding other parties, including adverse parties, and their counsel; information regarding potential conflicts; and other information. In some firms, satisfying client intake due diligence could take a significant period of time, perhaps an hour or two.

Once adequate information is obtained and assuming no conflict or other problem prevents the representation, the firm will be ready to accept the engagement, establish the terms of the representation, and start providing legal services to the client. Some firms impose additional requirements, however, including a review by one or more other attorneys (including perhaps a designated

¹²¹If client confidences are obtained at the outset, this may disqualify the firm from representing anyone else in the matter. See ABA Model Rule 1.18.

client intake attorney) to assess whether the firm should proceed with the representation.

A matter that may create greater reputational or financial risk for a firm may receive additional, more rigorous vetting. For example, when a matter will be taken on contingency, and will involve the fronting of significant funds (for experts, depositions, discovery, for example), firms often engage in a rigorous review of the potential matter. Such impediments are generally lower at the plaintiff's firms, where the risk of contingency matters is accepted as part of the practice. Corporate-focused firms that only periodically dabble in contingency fee matters, however, may require an extensive legal analysis of the claims, likely defenses, and potential recovery so the firm can better assess its risks and potential rewards.

Conflict Check

Once intake information is collected, the law firm generally will conduct a conflict check. Often this check is automated: an intake person or the lawyer's assistant will run a conflict check through a firm's computerized contacts or files. Often a conflict check also includes circulation of the intake information or client intake form to the lawyers (and sometimes all staff) at the firm, so the recipients can review the information and ensure that they do not identify a potential conflict.

Firms may involve a designated client-intake counsel early in this process, including to make sure that (a) the potential matter is one the firm is prepared (competent) to handle and interested in handling; (b) adequate information has been obtained to assess the matter and avoid potential conflicts; and (c) the firm would not cause any business or positional conflicts (*e.g.*, that a firm having an important relationship with Coke might jeopardize that relationship by representing Pepsi, or a firm that regularly represents insurance companies might jeopardize such relationships by representing a claimant against an insurance company).

After a conflict check is conducted, someone—ordinarily either the originating lawyer or the client-intake counsel or both—will review the results and determine whether there are any po-

tential disqualifying conflicts of interest. If any such conflicts are identified, the firm ordinarily must determine whether the conflict can be waived. If so, a waiver may be sought. If a firm does not secure a waiver or the conflict is not waiveable, the firm must decline the representation.¹²²

Sometimes a conflict of interest may be avoided or cured, or a waiver of a conflict obtained, by having the firm erect an ethical screen.¹²³ An ethical screen is a series of procedures and safeguards that prevent the taint of a conflict—usually obligations to a client or information about the client—from being spread from the screened lawyer to other lawyers at the firm. Screens also stop information and matter involvement from reaching the screened lawyer. Steps for erecting an ethical screen often include: notifying the screened lawyer of the screen’s existence, ensuring the screened lawyer cannot communicate or share access or share information outside the screen, notifying affected clients about the screen, and periodically reminding the screened lawyer and others at the firm about the existence of the screen.¹²⁴ Once the screen is erected, it may permit the firm to undertake a representation that otherwise would be prohibited under the ethics rules.

Engagement Letters

After a firm agrees to accept a representation, ordinarily the firm will prepare an engagement letter or in some instances (such as when the client is plaintiff or a government entity) a retainer agreement. The engagement letter or similar document has a risk management function: it may clarify who the client is, what work the

¹²²For more information on conflict rules and waiver of conflicts, the relevant jurisdiction’s rules of professional conduct should be examined, in particular a state’s version of ABA Model Rules 1.7 through 1.13.

¹²³Ethical screens are defined in ABA Model Rule 1.0(k), which states “screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”

¹²⁴For details on ethical screens and their requirements, see the various Model Rules on conflicts of interest, in particular ABA Model Rule 1.10(a)(2).

firm has agreed to do for that client, and what the firm's expectations are for the client. Engagement letters also often contain financial and other contractual terms of the relationship between the lawyer and client, for example how payments and lawyer-client communications and disputes will be handled. Finally, the engagement letter serves as one of the first communications between the lawyer and client. It helps set initial impressions and also the tone of the relationship.

If a conflict has been identified and waived, the engagement letter may contain information about the waiver of conflict (including the written confirmation the conflict was waived, which writing is generally required under ABA Model Rule 1.7(b)). Alternatively, the engagement letter may simply refer to the waiver of a conflict, and the waiver may then be memorialized in a separate waiver letter. The waiver letter will likely detail any ethical screens or other safeguards established as conditions to obtain the waiver. Also, where two clients are being represented jointly in a matter, the letter may need to address the handling of client confidences—whether or not they will be shared—in addition to the fact that the clients have decided to continue with the joint representation.¹²⁵

Some engagement letters also contain language intended to affect the client's waiver of a future ethical conflict. The propriety and effectiveness of such waivers, which are referred to as "advance waivers of future conflicts," is discussed in ABA Model Rule 1.7 comment [22] and numerous other authorities.

¹²⁵ABA Model Rule 1.7 and its comment contain requirements for a conflict waiver and written confirmation of that waiver. The primary requirements are described in the comment to Rule 1.7 cmt. [18] as follows:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

Retainers

Another item often addressed at the outset of a representation is a retainer. The retainer agreement in many cases is included in the engagement letter or accompanies it. There are three major types of retainers, which the Illinois Attorney Registration and Discipline Commission described as follows:

(1) A *classic retainer*, also referred to as a *true* or *general retainer*, is paid by a client to the lawyer in order to secure the lawyer's availability during a specified period of time or for a specified matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client.

(2) A *security retainer* is where funds paid to the lawyer are not considered present payment for future services but are intended to secure payment of fees for the future services the lawyer is expected to perform. This type of retainer remains the property of the client and, therefore, must be deposited in a trust account and kept separate from the lawyer's own property until the lawyer applies it to charges for services that are actually rendered. Any unused portion of the retainer is refunded to the client under the Illinois Rules of Professional Conduct.

(3) An *advance payment retainer* consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment.¹²⁶

In other words, a *true retainer* is a payment that ensures the lawyer will be available as the client's lawyer for a specific period of time. For example, a municipality may pay a firm \$12,000 per year to be the municipality's attorney. The attorney is then avail-

¹²⁶Illinois Attorney Registration and Discipline Commission, *Dowling's New Standard for Retainers*, available at <http://www.iardc.org/DowlingOp.html> (italics added).

able to address legal matters, and will not take a matter against the municipality. The retainer may include legal services, or the client may pay additional funds for such services.

An *advance payment retainer* is effectively a type of fixed fee. The client pays the lawyer a payment—all or a significant portion of the fee—up front so that the lawyer will provide services in the future. For example, a criminal defendant may pay a lawyer \$100,000 to handle a felony defense through trial.

Ownership of the funds transfers to the lawyer upon payment. But the lawyer generally must refund unearned fees if the matter terminates early, because the ethics rules in many jurisdictions prohibit non-refundable retainers and collecting an unreasonable fee. Advance payment retainers are quite common in some consumer-focused practices, particularly bankruptcy and criminal defense, because it is very difficult to collect bills sent to clients who are incarcerated or insolvent. Some states impose serious limitations on the use of advance payment retainers, primarily due to concerns that the lawyer may try unreasonably to retain client funds after termination, when those funds should be refunded to the client.

A *security retainer*, meanwhile, is not a fee payment. It is an arrangement where the client transfers money to the lawyer and the lawyer then holds the money to ensure that the client will pay for legal services received. Usually a security retainer is used in one of two ways. First, the lawyer may require the retainer to begin work, and charge fees—usually once the monthly bills are prepared—against the retainer. In other words, the lawyer works, prepares a bill, then gives the client notice that funds are being deducted from the retainer and deducts those funds. When the retainer is significantly reduced or almost extinguished, the lawyer may ask the client to provide additional funds to be held in trust. Future legal fees will then be charged against the new funds until those funds are exhausted or almost exhausted, at which time they will again be replenished. At the end of the representation, any remaining funds are refunded to the client.

Alternatively, instead of billing against the retainer, the lawyer may hold the security retainer to ensure the final bills are paid. Bills for legal services provided are sent to client, who pays

those bills from other funds. At the end of the representation, as long as the client has stayed current on paying the bills, final bills are charged against the retainer and the excess is refunded to the client. A security retainer used in this fashion is quite similar to a security deposit on an apartment. The security deposit is not used to pay monthly rent, but rather to make sure that the tenant pays their bills and that the relationship ends with all financial arrangements having been addressed. If that is the case, the lawyer will refund the remaining security retainer to the client.

Such a security retainer generally must be placed in a trust account so that it is segregated from the lawyer's own property.¹²⁷ Ethics rules generally regulate the handling of retainer funds. Ordinarily, moneys that are likely to generate significant interest must be placed in an interest-bearing account where the client receives the interest. For funds not expected to earn significant interest (due to amount and duration of holding), a jurisdiction's rules may require that the funds be placed in a special Interest on Lawyers' Trust Accounts (IOLTA) account, where funds are combined and the resulting interest goes to help provide legal aid.

As a final note, the nature of the retainer must be specified clearly and in writing. Failure to do so may result in disputes with clients, ethical violations, or possible loss of funds should a client declare bankruptcy, have judgment entered against it, or the like.¹²⁸

Prohibition on Commingling the Lawyer's and Client's Property

Note that the Illinois Supreme Court's descriptions of retainers refer several times to whose money the retainer is and where the funds must be deposited. Lawyers are normally required to keep client property, including client funds, separate from their own property and funds. The ethics rules impose very strict requirements that a lawyer to keep all clients' funds in a trust account,

¹²⁷See generally ABA Model Rule 1.15(a).

¹²⁸See, e.g., *Dowling v. Chicago Options Associates, Inc.*, 875 N.E.2d 1012 (Ill. 2007).

and to withdraw funds from that account only when the funds are earned by the lawyer.

Mixing lawyer and client funds (also referred to as commingling) or withdrawing client funds early—often to pay the lawyer’s expenses—may result in imposition of the most severe disciplinary sanctions, including disbarment. As one legal ethics textbook explains, “Once you have a license to practice law, one of the quickest and surest ways to lose it is to put funds that belong to a client into your own account (not the client trust account) or to “borrow” funds from a client trust account that you have not yet earned.”¹²⁹

To protect client funds and ensure proper conduct by lawyers, many jurisdictions adopt special rules to govern client trust accounts. Some states limit who may serve as signatories on such accounts, and impose strict record-keeping requirements for such accounts.¹³⁰ Others require that trust funds be deposited only in certain banks, and that those banks provide notice to disciplinary authorities as soon as a trust account is overdrawn.¹³¹ Such efforts may result in swift investigation and possible discipline for lawyers, including newer lawyers, who have trust account issues. Bar counsel in several states report receiving notice that a trust account is overdrawn quickly—sometimes less than a month—after a lawyer has learned he or she had passed the bar and opened his or her practice. As these anecdotes suggest, trust fund rules should be studied and followed carefully by any lawyer who receives money from clients.

¹²⁹Lisa G. Lerman & Philip G. Schrag, *Ethical Problems in the Practice of Law* 469 (2005).

¹³⁰See generally Indiana Supreme Court Rule 23 § 29.

¹³¹The American Bar Association even has prepared Model Rules on Trust Account Overdraft Notification, as well as similar rules for financial record-keeping and handling funds in such accounts. See <http://www.abanet.org/cpr/clientpro/contents.html>.