



PROFESSIONAL QUANDARIES AND QUAGMIRES

Chuck Lundberg

The new Client Relations Deskbook

By Chuck Lundberg
Special to Minnesota Lawyer

In this month's column we interview Kent Gernander and review the new fourth edition of his masterful work, "Client Relations Deskbook with eFormbook" — which has now become even more valuable with the accompanying eFormbook.1

Kent is a well-known and respected icon in the Minnesota bar: a former MSBA president, chair of the Lawyers Board, and member of various committees appointed by the Supreme Court to review rules of professional conduct for lawyers and judges. He continues to engage in his favorite hobbies: hunting, cross-country bicycling, and playing hockey, including the annual International Barristers Cup tournament.

The Deskbook consists of eight chapters containing 96 forms and accompanying commentary and explanations. Each of the forms is described in the Table of Contents available on the Minnesota CLE website: <https://www.minncle.org/publication/60096100>

The accompanying eFormbook includes all forms in downloadable and editable format. The above link also allows access to a "sample page" demonstrating the unique contribution of this work — Kent's analysis of the law applicable to each paragraph of the form.

Q: Kent, tell us more about the Deskbook: How did it come to be? How might it be useful to our readers?

A: The book and forms origi-



SUBMITTED PHOTO

Among Kent Gernander's favorite activities is playing hockey, including the annual International Barristers Cup tournament.

nated as a project I undertook as a Scholar in Residence at Minnesota CLE during 2007-2008. I believe it is the only comprehensive analysis of lawyer-client relations in Minnesota with illustrative forms covering all aspects of the relationship.

For new lawyers and those without an existing library of forms, it explains in detail what communications are required and illustrates form contents. Lawyers who have already developed systems and forms for client communications will find the analysis and contents useful for comparison and updating their own forms. For many, simply having all the forms readily available for immediate download will be helpful.

The focus of the book is on client

relationships and communications: advising the client of matters related to the representation; obtaining the client's informed agreement / consent; and limiting the lawyer's duties and exposures. The areas covered range from initial contact with prospective clients through termination of an engagement, including engagement agreements, declining representation, conflict disclosures and waivers, and duties upon termination. Other chapters address file retention, attorney liens, and practice continuation.

Q: We need some examples. Walk us through the first couple of chapters.

A: Chapter 1 discusses and illustrates communications with those who are not clients. One of a lawyer's duties is to identify the client or clients represented; corollary responsibilities are to confirm the engagement and to deny representation of others who may assume a relationship.

Q: So, a *Togstad* letter?

A: Yes. Even though a lawyer-client relationship is ordinarily formed by agreement, such a relationship may also arise when an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice. In *Togstad*,² a lawyer's malpractice liability was based on opining — without adequate investigation — that there was no basis for a claim, and failing to advise of an applicable statute of limitations. A lawyer declining representation should do four things in writing:

clearly deny representation, disclaim any opinion on the merits of the matter, advise seeking other counsel, and advise that bringing the claim may be subject to time limits.

Moreover, duties may arise to prospective clients even if no engagement results. Rule 1.18 attempts to strike a balance between protecting the confidentiality of information necessarily disclosed in an initial consultation and avoiding unnecessary disqualification based on a brief encounter. A lawyer should communicate precautions to prospective clients, including instructions to limit disclosure of confidential information, and may condition the consultation on consent to use of information and to conflicting engagements.

Similar advice of non-representation may be warranted in other situations. For example, a lawyer representing a personal representative or trustee represents the fiduciary in that capacity, and should make clear to others that the lawyer does not represent the estate, trust, beneficiary, or any other interested party. Similarly, a lawyer representing an organization should inform constituents — owners, directors, officers, and employees — that although the lawyer may frequently communicate with them about the organization's affairs, they are not the lawyer's clients. One who pays for representation of another, including an insurer, should be informed that the payor is not a client and that duties are owed to the client only, except to the extent that the payer is a co-client or is authorized to share information or control the representation.

Q: What about client engagement letters?

A: Chapter 2 discusses and illustrates engagement considerations for representation of individuals, entities, fiduciaries, multiple parties, insurers and pro bono clients. Fee arrangements include hourly, flat, and contingent fees, as well as availability fees, advance payment, and fee divisions. In all engagements, a lawyer is required to communicate the scope of the engagement and the basis or rate of fees and expenses. With a couple of exceptions, the rules do not require engagement agreements to be in writing (although that is certainly a wise idea). The exceptions are



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Quandaries

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an arrangement for a contingent fee, an availability fee, or a flat fee paid in advance and treated as the lawyer's property, all of which must be in a writing signed by the client. (See Sidebar for an excerpt from Form 3.15 – Advance Flat Fee.) Additional writing requirements apply to fee divisions and fees paid in securities or property. The forms in this chapter address required terms and disclosures as well as other areas of agreement concerning the relationship and obligations of the parties.

Q: What about conflict-of-interest disclosures?

A: Chapter 3 discusses and illustrates various conflicts of interest, including representation of adverse parties in related and unrelated matters, representations adverse to former clients, including those of former and new firm

members, personal interests of the lawyer, third-party payment or control of the representation, business transactions between lawyer and client, lawyers serving as client directors, lawyers serving as fiduciaries, and settlement of multiple claims. A client's consent to a conflict of interest must be informed, meaning the client has agreed to a course of conduct after the lawyer has explained risks and advantages. The consent must be confirmed in writing, and in some cases — business transactions and aggregate settlements — the writing must be signed by the client. The forms in this chapter illustrate the kind of disclosures that should be made in various situations.

Q: Are there forms for concluding the relationship?

A: Chapter 4 addresses terminating representation. A lawyer is required or permitted to withdraw from a representation under certain circumstances, sometimes upon notice to or approval of a tribunal. Upon

termination, a lawyer has duties, including returning client papers and property, refunding unearned payments, and protecting a client's interests. It is important that a lawyer communicate the termination to the client, making it clear that the lawyer no longer represents the client and will not be providing services or monitoring developments for the client. The communication should address file return, retention, and destruction, which should be consistent with the lawyer's policies and procedures, as illustrated in Chapters 5 and 6.

Finally, Chapter 7 deals with attorney liens — their creation, perfection and enforcement. And Chapter 8 deals with arrangements for continuing a practice upon a lawyer's disability or retirement.

Notes

1. The Client Relations Deskbook with eFormbook is published by Minnesota CLE in both hard copy and electronic formats; the accompanying eFormbook is

included and comes with both the hardcopy and electronic versions of the Deskbook.

2. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics. (www.lundberglegalethics.com).

Discount offered

Buy the Client Relations Deskbook with eFormbook (in digital or print) at a 25% discount until March 30. Go online to <https://www.minncle.org/publication/50096125> and use code MNLAW-25CR at checkout.

Excerpt from Form 3.15 – Advance Flat Fee

Our Fee. Our fee for this representation is \$[AMOUNT]. This is a flat fee and constitutes complete payment for the representation. It is not dependent on the course or outcome of the proceedings or upon the time we spend on the matter. You have paid the full fee in advance. The fee will be considered our property upon receipt, subject to refund. You are hereby notified:

- (i) the nature and scope of the services to be provided is stated above;
- (ii) the total amount of the fee and the terms of payment are stated above;
- (iii) the fee will not be held in a trust account until earned;
- (iv) you have the right to terminate the lawyer-client relationship; and
- (v) you will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

When Fee Is Earned. Our fee will be earned when the agreed services are performed. Portions of the fee will be considered earned by us as follows: [DESCRIBE BREAKDOWN OF FEE AGREEMENT, e.g., 10 percent after initial interviews and investigation; 15 percent after pre-trial motions and hearings; 25 percent after trial of implied consent appeal; 50 percent after trial of DUI charge. The full fee will be considered earned upon termination of proceedings by trial or settlement, regardless of whether all proceedings have occurred and regardless of time expended or outcome.] If our representation is terminated before completion of the engage-



ment, we will be entitled to the portions of the fee then earned and to the reasonable value of our services for the unearned portion of the engagement, and any remaining balance will be refunded. If you dispute the amount of the fee that has been earned, we will take reasonable and prompt action

to resolve the dispute.

Expenses. You will be charged separately for expenses incurred and disbursements made by us on your behalf, such as filing fees, long-distance phone calls, copying, postage, delivery, travel, and use of other service providers such as investigators or experts.

In some cases, outside service providers may bill you directly. We do not charge for our use of library and legal research materials, except for resources specific to your work for which we are separately billed. We do not add a surcharge to the disbursements billed to you.