



Ethical Considerations & Malpractice Risk Prevention in Client Communications

A Malpractice Insurance Company's Perspective

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MINNESOTA LAWYERS MUTUAL

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PROTECTING YOUR PRACTICE IS OUR POLICY.®

Ethical Considerations & Malpractice Risk Prevention in Client Communications

A Malpractice Insurance Company's Perspective

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INTRODUCTION

Your relationship with your clients are the foundation of your practice. Good relationships mean you will have happy clients; bad relationships mean unhappy clients, and unhappy clients won't refer you to friends or business associates. The profitable and sustained growth of your practice is reason enough to do everything in your power to keep your clients happy. There is a much more important reason: unhappy clients are far more likely to sue you for malpractice, bring an ethical complaint against you, or both.

Establishing good communications practices with your clients will go a long way to making happy clients. One of the most common types of errors leading to malpractice and ethical violation claims – failure to provide a client with sufficient information as to the status and/or development of the client's case – stems from a lack of diligence and less than satisfactory communication skills. Figure 1 shows the frequency of common types of law related errors. Communication issues are by far the most frequently complained of substantive errors. When a lawyer fails to keep the client informed, the client's perception is that neither the client nor the case is important to the lawyer. That perception, regardless of the quality of the legal work, often drives the client's behavior. While clients may not be able to readily judge the quality of the legal work provided, they are very adept at judging the difference between average and excellent customer service, and good communication is a key ingredient. By establishing good communications practices with your clients, many of these malpractice claims could be avoided.

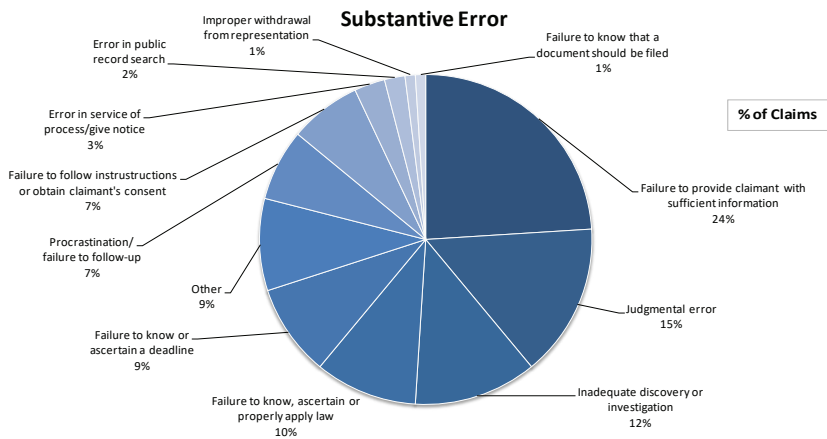


Figure 1

INTRODUCTION

Since even the best and brightest of the legal profession are not immune from malpractice exposure, it is important to utilize every resource available to create an environment in which client satisfaction is promoted. The ABA Model Rules of Professional Conduct provide a foundation on which procedures made to enhance attorney-client relations can be built. The following Rules underscore the importance of comprehensive communication with the client and highlight the need to respect the client's role in the legal process. Finally, bear in mind that Rules of Professional Conduct differ from state to state. Please be sure to check the rules and requirements specific to your jurisdiction.

- Rule 1.1 Competence
- Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.4 Communication
- Rule 1.16 Declining or Terminating Representation
- Rule 8.4 Misconduct

The rules can be found in full in **Appendix I: ABA Model Rules of Professional Conduct**.



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MANAGING THE PROCESS

Fundamental to the lawyer's practice is the ability to effectively manage the attorney-client relationship through its various stages. This point cannot be overemphasized as failure to effectively manage the attorney-client relationship can easily lead to client dissatisfaction, client's refusal to pay for services, disciplinary complaints, and a professional negligence claim.

Performing legal services for a client involves a number of different stages. Initially, you, as a lawyer, will have to decide whether it is appropriate for you to accept the new client or case. Assuming that you make the decision to proceed with the relationship, you must turn your mind to how it will begin and how it will be structured.

At some point, the relationship will come to an end because either your work has been completed or the relationship is in some way undermined, requiring early termination. At each stage, careful thought and planning will be required.

The importance of being able to listen and impart information to clients promptly, regularly, and effectively must be kept in mind through every stage of legal representation. Consider the points set out in **Appendix II: Checklist for Effective Communication**.



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What follows is a brief discussion on specific areas of sensitivity which gives rise to claims and how to approach each of the key stages in the attorney-client relationship.

Initial Client Communications: Choosing Clients Wisely

Client communications begin with your first client meeting. This is the time to assess how well you will be able to communicate with the potential client. If you do not have good communications with a potential client in the initial interview, it is very unlikely those communications will get better. In such a situation, you should think seriously about whether you actually want to take on that representation.

Even if you have good communications with a potential client, there are many reasons why you may decline to represent a potential client. You may be unfamiliar with the subject matter of the client's problem; you may have a conflict; you may just not like the client. A lawyer "should not accept representation in a matter unless it can be performed

MANAGING THE PROCESS

competently, promptly, without improper conflict of interest and to completion.”¹

Not every case is worth taking and it is generally the “problem” cases that create malpractice and ethical problems.

Conversely, be aware that in taking on any new matter, you have limited information. The prudent lawyer should not “oversell” the case to the client or create unrealistic expectations before the lawyer can analyze all the relevant evidence in the case.

If there is a common theme to cases that give lawyers problems with their clients, it is neglecting files. From the start, you should avoid matters that may tempt you to neglect them. That neglect causes malpractice suits when time deadlines, like statutes of limitations and court filing deadlines, are missed; it causes ethics complaints when attorneys fail to proceed diligently.

Accepting Representation of a Client

Consider the following before accepting representation of a client:

- ✓ Be careful accepting any case outside a field with which you are already familiar.
- ✓ Be careful accepting any case that has complexities – be certain you have the resources to adequately represent the client.
- ✓ Make sure that you have sufficient time and resources to properly handle the case before accepting.
- ✓ Check for conflicts of interest BEFORE accepting a case.
- ✓ Be careful accepting any case when you have concerns about the client – if you don’t like the client, you may neglect the case.
- ✓ The burden of determining whether you are ethically and legally able to accept representation is on the attorney.

If you decline representation, you must make certain that it is clear you are not representing the person. Declining representation is done in a written form. Similarly, if a representation is limited in scope in any way, that is also best done in written form. If you fail to do so, you may inadvertently have formed an attorney-client relationship for which you will have both ethical obligations and malpractice liability.

¹ Minn. R. Professional Responsibility, Rule 1.16, Comment.

Appendix III: Checklist for Client/Case Screening reviews other considerations before taking on a new client or case.



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Avoiding Inadvertent Representation

An attorney-client relationship is formed when the parties enter into an express or implied contract, or when the individual seeks and receives legal advice under circumstances which would lead a reasonable person to rely on the advice. If there is any question as to whether the client reasonably thought an attorney-client relationship was created, the issue is for the jury. If you fail to document, in writing, that you are declining representation, it is your word against the potential clients' word. One need not exercise a great deal of imagination to foresee, as between a lawyer failing to document and an aggrieved lay person, with whom the jury's sympathies will lie.

Avoiding Inadvertent Representation

Some practical suggestions to help avoid an inadvertent representation:

- ✓ Never agree in an informal setting to undertake representation.
- ✓ Never promise you will contact a person involved to complete the formalities of representation – have that person initiate the next contact (to come to your office or telephone you).
- ✓ If you do promise to contact someone, make sure you have their full name, telephone numbers, and address from the start.
- ✓ When you take calls from prospects, have a telephone log which requires you to obtain vital information such as name, address, telephone numbers, and an explanation of the purpose of the call.
- ✓ Be sure, whether you ultimately accept the case or not, that you inform any prospect of the existence of statutes of limitation and their time barring effect and note that you have done so in the telephone log or a non-engagement letter.
- ✓ Whenever possible, use non-engagement letters and keep a special non-engagement letter file for copies (do not open a separate file unless you are actually accepting representation).
- ✓ Many jurisdictions now have Rule 1.18 regarding prospective clients, which includes the important concept of not receiving confidential client information until after the conflicts check has been completed.

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Non-engagement letters will be your best evidence that you have declined representation. A non-engagement letter should include:

- A clear and unambiguous statement that you are declining representation.
- A statement indicating that while you are declining representation, that does not necessarily mean that the person does not have a claim or that other lawyers might not differ with your analysis.
- A statement indicating that if the person intends to pursue the claim, he or she should act quickly to seek other legal counsel.
- A statement indicating that acting quickly is necessary because statutes of limitation can bar the person's claim if he or she does not pursue the claim in a timely fashion.

Non-engagement letters are easy to set up as a word processing form. They should automatically be sent each and every time you decline to represent someone. Non-engagement letters should be preserved for at least ten years.

There can be situations where a non-engagement letter must be handled with some delicacy or might, in rare instances, be inappropriate.

Refer to **Appendix VII** to view a sample **Non-Engagement letter**.



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Defining Your Representation

When you decide to accept representation, it is essential that the scope of your representation is clear. Once you have decided that you are prepared to represent the client in a particular matter, you are ready to begin building a relationship with that client. Even if you already have a relationship with the client, but are taking on a new case, it is essential that you communicate with him or her to establish a mutual understanding of the nature and scope of the matter to be pursued.

From the outset, you will need to think through the type of legal service you will provide and how you will provide it. **Appendix IV: Checklist for Engagement/Retainer Letter** lists points which

should be canvassed with the client and then confirmed in writing in an “engagement letter agreement,” also known as a “retainer letter agreement.”



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A good engagement agreement should include the following elements:

Scope of Representation and Client Identification - The agreement must clearly identify the client. For example, whether the firm represents a partnership or an individual partner. Likewise, it should clearly define the scope of the work you will do for the client. Clearly defining the scope of your representation of the client will alleviate later disputes as to the representation you thought you were accepting and what the client thought you were providing.

Fees and Expenses - The agreement should set forth the fee arrangement and billing procedures so there are no misunderstandings regarding the client’s responsibilities, including the payment of expenses. It should also provide for the withdrawal from representation upon the client’s failure to pay for services rendered, if allowable under law.

Retainers - Retainers should be discussed in detail. Specifically, whether the retainer is used for costs and/or fees, the retainer amount and replenishment requirements, and whether the retainer account is interest bearing or non-interest bearing.

Remember that the representation agreement is typically the first written communication between a lawyer and a client. What does the lawyer want that communication to look like? A six page, single-spaced representation agreement that sets forth in great detail all the ways in which the lawyer will ensure that the client pays his or her fees sends a message to the client about what lawyer considers most important – money. On the other hand, a brief representation agreement might not sufficiently explain the expectations of the lawyer and the client, which could lead to misunderstandings later on. Although hourly fee agreements by their nature tend to be longer than contingent or fixed fee agreements, the lawyer should consider the message he or she may send the client between the lines of the representation agreement.

MANAGING THE PROCESS

When defining the attorney-client relationship, the attorney should avoid creating unrealistic expectations or ever guaranteeing the success of a case. Before presenting the client with any opinion as to the outcome of the case, make sure all the necessary research is complete. Neither the attorney nor the client will benefit from the creation of unattainable goals or unrealistic outcome projections. In the experience of Minnesota Lawyers Mutual, numerous attorneys have been sued by clients whose expectations were unrealistically raised only to be disappointed. Taking a conservative approach to case projections benefits both attorney and client.

Since many communications problems stem from problems collecting fees, an engagement provision that includes the concept of the replenishing or “evergreen” retainer, is an important fee management tool.

←EXAMPLE

This representation requires that you provide an initial retainer fee of \$XXX before I begin work on this matter. The retainer will be deposited in my trust account and will be applied toward the fees and costs incurred in this matter. I will bill against the retainer as fees are earned or costs expended or on a monthly basis at my discretion but funds will not be withdrawn prior to sending you an invoice. **You also agree to replenish the retainer after each invoice so that the balance remains at \$XXX.** Should this matter be scheduled for trial, a retainer of \$ ____ will be required one month prior to the trial date. Upon completion of the representation, any excess will be refunded to you.

To the extent that any invoice exceeds the amount of the retainer held in my trust account, you agree to pay the invoices within 15 days of the date on the invoice and replenish the retainer to \$ _____. **I reserve the right to withdraw from representing you for nonpayment of fees and costs or if the retainer is not replenished as you have agreed.**

Refer to **Appendix V** to view a sample engagement agreement letter.



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Return Client Communications

If you want a surefire way to infuriate a client and cause an ethical complaint, don’t return phone calls or e-mails. A pattern of failing to return phone calls generates ill will and distrust. It is universally

interpreted by clients as neglect. Complaint after complaint to the Board of Professional Responsibility begins with “the attorney failed to return my phone calls.” Failure to respond to specific requests for information by clients is a sure way to encourage disciplinary sanctions. The Rules specifically require you to “promptly comply with reasonable requests for information.”

Return Client Communications

Here are a few practical suggestions:

- ✓ Return calls promptly, usually between 24 and 72 hours, depending on your area of practice and client needs.
- ✓ If you cannot return the call or e-mail within 24 hours, have a secretary or legal assistant call and explain the delay.
- ✓ When clients call frequently or your schedule does not permit returning calls, try to get a message to the client by e-mail so that the client knows you have received their message and when they can expect a response.
- ✓ Be especially vigilant about returning the phone calls or e-mails of unhappy clients – return the calls of unhappy clients FIRST – ignoring an unhappy client only makes the client more unhappy – a prompt call to an unhappy client often goes a long way to solving the problem.

When dealing with unhappy clients it is very easy to try to sugarcoat unpleasant truths about the case. A number of lawyers have fallen into the trap of failing to pass on bad news about the case or actually lying to clients about the status of their cases. Doing so only makes matters worse for it is engaging in “dishonesty, fraud, deceit, or misrepresentation” under Rule 8.4(c) and “conduct that is prejudicial to the administration of justice” under Rule 8.4(d). If you make a mistake or things do not go as you anticipated, do not, under any circumstances, compound the problems you face by lying about it to your client.

Forward Documents

Unhappy clients very often complain that their lawyer kept them in the dark about the progress of the case. You may be doing a superb job moving a client’s case forward, but if you fail to keep your client informed of the progress, as far as your client is concerned, you are neglecting his file. You should be trumpeting the progress of the case to your client at every opportunity. It makes the client feel involved and assures the client that you have his or her best interests at heart. From a marketing perspective alone, the client you keep informed will be the client who sends you more business.

One of the chief ways you can keep your client informed is to routinely forward pleadings and other important papers. In addition to the engagement letter, send clients copies of all pleadings and correspondence concerning their case. Such documents need not be accompanied by a cover letter. Often a simple “cc:” to the client is sufficient. Some attorneys hand write a note or use a stamp (e.g., “Information Copy from [your name]”). It is more important that the client receive the documents promptly than get a detailed explanation of their meaning.

Report On Activities

After any event, meeting, or telephone call of substance, a short memorandum or letter should be sent to the client outlining what happened. You should do this even if the client was there. Situations demanding a report certainly include events such as depositions or offers to settle. Other situations will depend upon your relationship with your client but it is always safe to err on the side of keeping your client informed. This will insure that the client understands your perception of the meeting and its importance or lack of importance to the case.

There are some matters which you have an ethical duty to report to your client. The case is the client’s and you are ethically bound to “abide by the client’s decisions concerning the objectives of representation.” The client must, however, have sufficient understanding of the case and its progress to make informed decisions. Thus, you have an ethical duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Often those are easy matters to report to a client.

←EXAMPLE

Such a matter as conveying a settlement offer or discussing the ramifications of not pleading an affirmative defense are easy. Where matters become harder is when the news is not good.

The attorney has an absolute duty to convey to the client a dismissal. By hiding the dismissal from the client, an attorney only compounds the problems created by the dismissal itself with the commission of fraud and deceit in violation of **Rules 8.4(c)** and **(d)**.

Promptly, completely, and truthfully report all events going to the merits of the case to your client, both the good and the bad.

Many wise attorneys make a practice of regularly contacting their clients. Such a practice will avoid running afoul of Rule 1.4(a), which requires that you “shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” It is not uncommon to contact the client once a month or every other month to regularly update on the client’s condition, explain the progress in the case or if there has been none, explain why there has been no progress. Such a practice has a dual beneficial effect. First, it keeps your client informed, involved, and happy. Second, it is a motivating force for you to do the work needed on the file regularly since you have to report your progress every month. This will, of course, vary with the type of case.

Solicit Your Client’s Opinions

Because it is the client’s case you are working on, you are ethically obligated to consult your client on all matters of importance:

“A lawyer shall abide by a client’s decisions concerning the objectives of representation... and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. 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.”²

When soliciting your client’s opinions, you do not abdicate your role as an advisor:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”³

In the end, the decision is the client’s. However, the “independent professional judgment” and “candid advice” is meant to inform the client of all relevant considerations before decisions are made.⁴

² ABA Model Rules, Rule 1.2(a).

³ ABA Model Rules, Rule 2.1.

⁴ ABA Model Rules, Rule 1.4. The ABA study found that nearly ten percent of malpractice claims resulted from failure to receive informed client consent.

Terminate Client Relationships In Writing

Finally, confirm the end of the representation through a file closing letter. Explicitly state that your representation of the client is ending. If all matters in the case have been resolved, say so in the letter.

In many jurisdictions, the file belongs to the client. Do not withhold it for any reason other than to make copies of materials that you will need for your own protection. If copies are made, the client should not be charged unless there is an explicit provision to that effect in your engagement letter or retainer agreement with that client. You absolutely cannot withhold the file for payment of legal fees or copying costs, and to do so is an unequivocal ethics violation.⁵

The easiest way to manage client files is electronically. Then at the conclusion of the case, the attorney can provide an electronic copy of the full file quickly and with minimal expense. It makes storage of a closed file far cheaper and easier for the attorney, too.

Appendix VIII: Checklist for Disengagement/Termination Letter outlines the matters to be addressed in such a letter.



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Withdrawal

Sometimes, an attorney must withdraw from representation. This must be done in a way that does not prejudice the client.

It is prudent to advise the client to seek other representation and inform them that their action may be affected by statutes of limitations. If the file is being taken over by another attorney, cooperate with your successor. Promptly turn over the file. Whatever you do, do not obstruct efforts by successor counsel to represent your former client effectively. You may feel abused by your former client, and you may feel that the successor counsel stole the case from you. But the worst thing you can do is give your former client and successor counsel some basis for arguing that improper conduct on your part justifies either forfeiting your fee or holding you responsible for a less than satisfactory outcome that really is their fault.

⁵ Opinions of the Minn. Lawyers Professional Responsibility Board, Opinions 11 & 13; see Minn. State § 481.13 & .14 (1996).

When withdrawing, lawyers should advise the client of the:

- ☑ **Facts or circumstances which may result in termination or withdrawal of services by the lawyer, including:**
 - Client's failure to pay retainers or accounts in accordance with retainer agreement;
 - Existence of a conflict of interest which cannot be resolved;
 - Other facts or circumstances contemplated by of the Rules of Professional Conduct (i.e., optional withdrawal, mandatory withdrawal).
- ☑ **Ownership of file contents:**
 - File documents or contents that must be returned or provided to the client or other counsel at termination of the representation.
- ☑ **Charges for file transfer in the event the file is transferred to the client or other counsel:**
 - The client may be charged for time and effort in preparing the file for transfer, additional photocopies of file documents, only if allowed in the retainer agreement.

If the client's matters are not fully resolved, set guidelines on when you are allowed to withdraw.

You may also be limited in your ability to withdraw by the rules of the tribunal. Determine first if you may withdraw and whether you will have to request permission to withdraw. In such instances, you cannot withdraw "without permission" from the tribunal. If allowed to withdraw, you are ethically obligated to protect the client's interests. *See Rule 1.16 [Appendix I].*

Conclusion

In the end, establishing and maintaining strong, effective attorney-client relations will reduce the risk of malpractice. By providing open lines of communication and showing clients respect, an attorney creates an environment conducive to client satisfaction. Although no one procedure can completely eliminate the risk of legal malpractice claims, the creation of positive attorney-client relations does limit malpractice exposure significantly.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. 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.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4 Communications

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in **Rule 1.0(e)**, 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.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.16 Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud.
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
 - (d) 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. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.18 Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

APPENDIX I (continued)

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

CHECKLIST FOR EFFECTIVE COMMUNICATION

A Client-Centered Approach

- Address the issue from the client's point of view.
- Show an interest in the client as a person.
- Do not be late for appointments and arrange some meetings at the client's office.

Active Listening

- Observe the client while listening to assess his/her credibility and emotional state.
- Listen for what the client is not telling you.
- Do not assume that you know the problem.

Direct Questioning

- Keep the client focused on the issues.
- Enquire about the client's affairs that may affect the issues in the case at hand.

Helpful Explaining

- Use clear and simple language, be succinct and avoid legal jargon.
- Use headings in any lengthy report.

Keeping Clients Informed and Involved

- Execute a clear engagement letter.
- Copy the client with work product and arrange for regular reporting.
- Return phone calls and e-mails promptly.
- Do not proceed on any key matter without the client's consent.

Encouraging Realistic Expectations

- Avoid taking too sympathetic a view of the client's situation with the result that your opinion on the merits is compromised or diluted.
- Put your opinions and recommendations in writing from the outset.
- Instructions from an unrealistic client are generally difficult to obtain.

Dealing with Unpleasant Relationships

- Pay attention to what makes the relationship unpleasant and deal with those factors immediately.
- Consider terminating the relationship on the basis of a lack of confidence by the client. However, if you must continue the relationship, be sure to put your advice in writing in every instance.
- Involve another lawyer in the firm who may have a better relationship with the client.

CHECKLIST FOR CLIENT/CASE SCREENING

In the case of a new client, identify through independent means the client for whom you are going to act. Don't get caught with an imposter on your hands.

First impressions often provide a helpful signal about the potential relationship. Trust your instincts.

You owe a duty of loyalty, independent judgment and confidentiality to every client. Is there any apparent or potential conflict of interest which would require you to decline?

- Consider whether acting would pose a conflict vis-à-vis another current client, a former client or lawyer in your firm.
- Do not enquire about confidential information until the issue of potential conflict has been addressed.
- If there is a conflict, consider whether it can be waived by consent.
- If consentable, have the consents been documented and validated?
- Consider occasions when representation would be inappropriate regardless of the parties' consent.

You must have the requisite knowledge and skill so as to avoid undue risk or expense to the client.

- Do not pretend to know every area of the law.
- Consider the type of research that may be necessary.
- Consider the use of expert witnesses or need for legal specialists.

Timeliness is always important to clients. Will you be diligent and prompt in meeting time deadlines imposed by either the client or the law (limitation periods)?

Cost considerations, including legal fees and other expenses, must be addressed to allow the potential client to make an informed decision on the suitability of you as his/her lawyer.

- Consider the client's ability to pay.
- Review with the client your ability to withdraw for non-payment of fees.

Do not ignore your suspicions or actual knowledge of a client's unlawful objectives or conduct.

- Avoid assisting client in criminal or fraudulent activities.

APPENDIX III (continued)

- Have regard for the Code of Professional Conduct and your concurrent duties to courts, other lawyers and members of the public.

Identify whether client expectations are achievable.

- Are the client's expectations realistic?
- Consider your ability in the future to obtain instructions if the client demonstrates significant emotional or erratic behavior or has unrealistic expectations.

Acting for friends and relatives is a risky business.

- Think twice before doing so.
- Bring the usual discipline of practice to these clients as well.
- Avoid acting outside of areas of expertise, cutting corners, failing to obtain consents or written instructions.

Beware the phantom client.

- People you speak to socially or casually or who make limited inquiries may believe that you are acting as their lawyer. Be sure to dispel the myth.
- Consider also the multiple hidden clients who are family members or commercially related. What appears to be common interests at the start can soon turn into conflicting ones.

Was previous counsel involved?

- Ask the question – Why is the client changing lawyers?
- Have other lawyers/firms rejected the representation?

If so, why?

- Consider the client who is eternally unsatisfied.
- Satisfy yourself that the claim or allegations being made are well-founded.
- Be wary of the client who cannot easily agree on your fee and any necessary financial up front commitment.
- Don't be satisfied with the assumptions made by previous counsel. Make your own factual investigation and analyze all legal issues so that you can avoid any erroneous assumptions of previous counsel and address possible new developments.

CHECKLIST FOR ENGAGEMENT/RETAINER LETTER

Document

- Language of retainer must be clear and understandable.
- Document should provide for acknowledgment and acceptance of all of the terms by the client.
- Specify that any changes to the terms of the letter agreement must be in writing.

Parties to be Represented

- Identify the client – obtain proper legal names for all persons and business entities.
- Identify all other parties in matters.
- If there are multiple clients, explain that the effect of attorney-client privilege does not apply as between them.
- If conflict is being waived on consent, set out terms regarding consent.

Client's Objectives and Strategy

- Identify the client's objectives and propose strategy to meet the objectives.
- Outline the scope of representation and identify specificity of the retainer where it is limited.
- Identify nature and degree of factual investigation to be made.
- Explain ambit of legal analysis to be performed.
- Outline key steps in the representation.
- Provide an estimated time frame for all major work and identify critical points in time.

Client Communications

- Set out line of communication and need for instructions. If there are multiple clients, set out the process for instructions and disclosure or need for ILA.
- Confirm type of reporting needed by the client.

Responsibilities of Lawyer, Staff and Client

- Identify significant areas of responsibility vis-à-vis you, the law firm, the client or a third party, and include permission from the

client before incurring significant expenses with third parties such as experts or other service providers.

- Define your level of authority and identify matters which specifically require the client's consent.
- Explain and confirm delegation within your firm.

Safeguarding Client Property/Investment of Funds

- Identify property being held at your law firm, confirm arrangements for safekeeping, and maintain detailed documentation of any transfers.
- Confirm investment of any funds being held in trust.

Fees and Expenses

- Identify the basis for the fees to be charged (e.g., fixed fee, hourly rates, blended option). If charges are on an hourly rate basis, the current rate for each lawyer and other time keeper assigned to the matter should be described along with an indication of whether rates are subject to change in the future.
- Review the nature of the out-of-pocket disbursements to be billed and distinguish between internal expenses such as photocopying and long distance charges as opposed to charges from an outside vendor such as court fees, government searches and agency fees.
- Set out the timing of rendering of accounts and period within which accounts are to be paid.
- Identify the need for any financial commitment in advance (referred to as a financial retainer) and terms upon which funds are to be held/invested and drawn upon and replenished in the future.
- Describe billing format and elicit any particular billing format requirements of the client, e.g., detailed statements – identify time keeper rates, tasks undertaken.
- Outline consequences, if any, of late payment of accounts and circumstances under which the retainer will be terminated for non-payment.

Grounds for Termination or Withdrawal of Services

- Set out grounds for your termination/withdrawal (e.g., failing to receive instructions or any other grounds).

APPENDIX V

ENGAGEMENT AGREEMENT LETTER

NOTE: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will MINNESOTA LAWYERS MUTUAL be liable for any direct, indirect, or consequential damages resulting from the use of this material.

[Date]

[Name and Address of Client]

Re: Consultation of [date of consult]

Dear _____:

I enjoyed meeting with you on _____ to discuss your representation by this firm. This letter will confirm our agreement and if after reviewing it you have no further questions about the terms of my representation, please sign the extra copy enclosed and return it to my office in the postage-paid envelope enclosed for your convenience. Our work will begin when we receive the signed copy of this letter [and required deposit].

I will undertake the following work on your behalf: [set forth the scope of the representation]. [My work will not include {set forth specific matters excluded from the representation if appropriate}].

You will receive an itemized monthly statement of fees and expenses associated with our services. [Payment is due upon receipt.] [The fees and expenses will be deducted from your deposit, and we will advise you from time to time if an additional amount is needed to maintain a sufficient deposit to cover anticipated fees and expenses.] My rate per hour for work is \$ _____. Often, from time to time, other members of the firm, as well as our staff may engage in work on this matter, and their rates are as follows: partners, \$ _____ per hour; associate attorneys, \$ _____ per hour; legal assistants, \$ _____ per hour.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests. Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

APPENDIX V (continued)

In addition to the fees set forth above, you will be responsible for expenses incurred in connection with this matter. Such expenses may include, among others, copying, delivery, telephone charges, fees for professional services, and travel expenses. If the firm makes payment for you, you will need to reimburse us promptly.

[If we have to bring suit against you to collect any balance owed, you agree to pay us an additional amount of ____% of the balance owed as attorney fees. To secure any balance you owe us, you grant us a security interest in any property that may come into our possession in the course of our representation and any claim or cause of action on which we are representing you.]

To achieve the best possible representation, you will need to cooperate with us fully and provide us all the information we need to assist you. I encourage you to keep detailed notes of questions that may arise and of any new information, witnesses, or other important matters that come to your attention. Please call me if something is truly urgent, but otherwise it is best to schedule an appointment to discuss your accumulated questions and concerns. So that we may maintain continuous contact with you throughout the representation please notify us immediately if there is any change in your address or telephone number.

If at any time you become dissatisfied with our handling of this matter, you should not hesitate to tell me immediately so we can discuss and resolve the problem. It is essential to your representation that we maintain a good relationship throughout. You may terminate our representation at any time. In the event of termination, you will be responsible for payment of any fees earned or expenses incurred. We may terminate this representation only as permitted or required by laws and regulations. Failure to pay [fees or]¹ expenses or make deposits when due will be cause for such termination.

[Optional]² In this joint representation, I must and will treat you [both] equally in all regards, including all communications. I will communicate all matters to both of you and will share all communications from each of you with the other.

While the agreement is intended to prevent any confusion of the terms of my representation, should a fee dispute arise you are agreeing pursuant to this paragraph to submit any fee dispute between us to _____ arbitration with [your bar's program name]. You understand that you have the right to use other court forums to address fee disputes but we are both agreeable to compromising those rights to submit to binding arbitration. Any decision made by the arbitration

¹ Do not use this phrase if this is a contingent fee agreement.

² Use if joint.

APPENDIX V (continued)

panel whether for you or me will be final and non-appealable. It has the same effect and enforceability as if rendered by a court of law. The arbitration panel would hear us in [locality] and would be composed of those individuals, two attorneys and one layman. The [local bar organization] selects the panel from among a list of volunteers who have agreed to hear fee disputes. There are no costs associated with the panelists. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.

We will use our best efforts in representing you in this matter, but you acknowledge that we can give no assurances as to the final outcome.

If the above terms are acceptable, please sign and return one of the enclosed copies of this letter. I look forward to working with you.

Sincerely yours,

[Name of Firm]

By _____

[Name of Attorney]

[Name of Client]

Date of Acceptance

CHECKLIST FOR NON-ENGAGEMENT LETTER

Guidelines

- Clearly confirm that the representation is declined and that there is no attorney-client relationship. You need not set out your reasons for your decision.
- Return any documentation or other property obtained during the consultation.
- Refer to the fact that statutes of limitations may apply to bar recovery if steps are not taken promptly to pursue rights or remedies. If a specific statute of limitations poses an immediate problem, specific reference should be made to a need for urgent action on the part of the client.
- Advise the client to seek other legal counsel as soon as possible to pursue his/her rights.
- Take care not to express an opinion on the merits of the claim unless careful research has been conducted to support the position.
- Confirm acknowledgment of receipt of the non-engagement letter by the client and document his/her receipt.

APPENDIX VII

NON-ENGAGEMENT LETTER

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[Date]

[Name and Address of Client]

Re: Consultation of [date of consult]

Dear _____:

Thank you for [meeting with me]/[speaking with me by telephone] on _____ to discuss _____. I greatly appreciate the confidence you have expressed in our firm, but we are not in a position to represent you on this particular matter.

[Please be advised that your claim may become barred by the passage of time as a result of the applicable statute of limitations. Therefore, you should consult another attorney immediately about your claim.]

[Please be advised a default judgment may be entered against you if an answer or other action is not taken in a timely manner. Therefore, you should consult another attorney immediately about responding to this claim.]

I would also like to emphasize that in declining to represent you, the firm is not expressing an opinion on the merits of your case. We neither had an opportunity to investigate the facts in this matter nor to research the applicable law.

[Since we did not undertake to provide you with any legal advice regarding this matter, no charge is being made for any legal fees or expenses.]

[I am enclosing all the original documents and materials you left with me following our meeting.]¹

In the future should you require legal assistance regarding some other matter, I hope you will contact me.

Sincerely yours,

[Name of Firm]

By _____

[Name of Attorney]

¹ Keep a copy of any documents which establish basic information on the case including the statute of limitations.

CHECKLISTS FOR DISENGAGEMENT/TERMINATION LETTER

The Engagement Has Been Completed

- Confirm that the particular matter has been completed.
- Specify steps taken to complete the matter (e.g., executed mutual releases, orders dismissing action or for non-litigation, closing book, share transfers).
- Specify what, if any, additional steps are to be taken by the client in the future to protect interests (e.g., renewal of execution); provide copies of documents to third parties such as a bank or insurance company.
- Enquire whether client desires further services if any new developments arise.
- Return client documents and identify destruction policy regarding your file records.
- Include the final account and a trust statement reconciling funds received and dispersed if appropriate.
- Thank the client for the opportunity of working on the matter.

Before The Engagement Has Been Completed

- Confirm why the relationship is ending.
- Address any final account or outstanding account.
- Explain the conditions under which you and your staff will consult with successor counsel and provide access to work product although payment not yet received.
- Outline important deadlines and uncompleted activities so as to bring to the attention of the client the status of the matter and avoid prejudicing their interests.
- Confirm receipt of the disengagement letter by the client (e.g., registered mail or process server).



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