

COLLECTION ADVICE

By John M. Mulligan



LEGAL TOOLS

Learn to use the tools the law gives you to secure or assert your position. If you have provided services to repair or improve some item of personal property (e.g., you repaired an automobile), Minnesota law gives you a possessory lien which means that you can keep the property until paid in full. If you have provided service to improve real estate, you have a right to a mechanic's lien, which becomes a lien on the real estate. If you have provided creative services or work product as an independent contractor, you own the copyright until you transfer the copyright away in writing.



RISK REDUCTION

Give some attention to risk reduction in the manner in which you do business. For example, do you really want to either advance sums on behalf of the client, or to obligate your company for goods and services you ultimately expect this client to pay for (e.g. printing, freight) or can you arrange for payment directly from the client? Can you think of ways to secure the client's approval on a continuous basis, preferably in writing, so the client does not have grounds to argue about quality or the scope of services performed at such time as you present the bill? Can you investigate the credit standing of the client prior to performing the services?

THE ARENA OF CONFLICT

Set up your payment arrangement so that there are progress payments or installments while the work is in progress. This gives you i) the leverage of suspending work to enforce payment, and ii) some idea of the client's performance at paying its bills. When the work is completed, and the client has received the full benefit of your services, then your leverage against the client is to enforce payment is greatly reduced.

Also, the smaller the amount owing when the job is completed, the less incentive there is for the client to make an issue of quality, timeliness, or the like in the interest of receiving a discount. I call the amount owing when the services are completed the "arena of conflict." Your strategy should always be to make the arena of conflict as small as possible.

ARBITRATE, NOT LITIGATE

To save money on collection, have a separate written credit agreement or include in your services agreement a term that compels all parties to use binding arbitration, which is generally a faster and less costly approach than litigation in the court system.

PAYMENT PLANS

Set up installment payment plans early, particularly when you become aware the client has a cash flow problem. Installment plans have the following legal advantage: it makes it very difficult for the client to later dispute the obligation to pay the debt when the client has already made partial payments. Consider waiving interest or finance charges as an incentive if the installments are timely made.

WHO'S YOUR COLLECTOR?

Don't have the account representative/salesperson who is in charge of client relations be in charge of the collection process. Usually, this person is in charge of maintaining the goodwill of the client and therefore will be ineffective at collection. Collection is a management function and should be turned over to someone with the aptitude for collection work, and the time to give this matter the appropriate attention.

TIMETABLE

The most effective collection efforts involve a process of early intervention with consistent monitoring. A typical strategy would be:

- A phone call to the responsible person at the client's business at such time as the account is 60 days past due, with follow up calls every 10 days thereafter.
- A formal collection letter to the client notifying them of their past due status and the chosen consequences at 90 days.
- A referral to the attorney for a 10-day collection letter and collection suit, if necessary, at 120 days.

PURPOSE OF THE CALL

On collection calls, the object should be i) to establish a bona fide reason the client is not paying, and ii) to extract a definite promise of future performance. That promise ideally is a promise of payment (full or partial), or a promise to keep you informed of the debtor's situation. All client promises should be noted in a file as preparation for the next collection call. On the next call, the first thing to do is remind the debtor of the last promise made. If promises are either not made or not kept, the matter should be referred to the attorneys for collection as soon as possible. Most collection agencies will tell you that the key to success in collection on accounts is repetition and consistent follow up.

NONPAYMENT

There are many reasons for nonpayment, which include cash flow problems of the debtor, unhappiness with some aspect of the services performed, or an intent not to pay in the first place. The bona fide reason for nonpayment should be determined right away, in order to save time dealing with pretenses for nonpayment, or if there is a genuine problem, to find a remedy to make the client happy.

INTEREST AND RE-BILLING

Keep billing the client and adding finance charges on a monthly basis. This creates a legal advantage in the event the client disputes the amount later on, or wants to raise issues as to quality, timeliness and the like, months after the services were completed. Finance charges can be used to give the appearance of a discount in negotiating a settlement.

Start at the Beginning!

The best tools for collection are most easily obtained at the beginning of the relationship, when the client wants and needs your products or services. These tools are the signed credit agreement setting forth your terms (or a purchase or services agreement that has credit terms as part of the overall agreement), and a personal guaranty from one or more individuals who are in charge of the client. The terms to include in your credit agreement are:

- How you set your charges and the promise of the client to pay for them.
- The timing and form of the payment.
- An arbitration clause.
- An assertion of your legal rights, such as mechanic's lien rights or withholding copyright transfer until payment in full.
- A right to suspend performance if payments are not made.
- The right to add interest or finance charges if payments are not made. (Note: most courts will not give you interest as part of your claim unless there is documentation in some form which indicates an agreement on the part of the client to pay interest. Interest charged to consumers is subject to usury limits, which generally will be 8%).
- The right to add attorney's fees if the matter is turned over for collection.

Under Minnesota law, a personal guaranty must be in writing to be enforceable.



John M. Mulligan graduated from the University of Minnesota with a B.A. magna cum laude in American Studies in 1970 and with a J.D. cum laude in 1976. He was admitted to the MN and US bar in October of 1976. Mr. Mulligan was also a member of the Law Review at the University of Minnesota.

He has a broad range of experience in a number of areas, including general business law, trial work, family law, and intellectual property. Mr. Mulligan's community activities include historic preservation and youth baseball.

In the past few years, he has been named a "Super Lawyer" by several Minnesota business publications.