



## Five Things to Consider

# Responding to a Demand Letter

By Karl A. Schulz

**A** client calls you and says that he has just received a letter from a plaintiff's lawyer that demands payment for alleged wrongdoing by your client. Otherwise, the lawyer will file a lawsuit. What do you do? And how does your client respond? For some clients, such demand letters are routine. For others, vague demands for payment accompanied by threats of punitive damages may be a nerve-racking novelty. In any event, how you respond to the demand letter on behalf of your client can set the tone for the case and influence the resolution. Here are five points to consider when drafting a response to a demand letter.

First, what is the posture that your client wants to take in response to the demand? Discuss the demand with your client thoroughly, including legal, strategic, and ethical issues. What happened? Is this a matter that your client should settle quickly? Does your client want to pay the demand or make a counterproposal? Is this a shakedown attempt that your client wants to fight, even at the risk of litigation? Establish your marching orders and then advocate for your client. The potential plaintiff may read your response but more likely the potential plaintiff's lawyer will explain it to him or her. Make your client's posture clear, concise, and strong.

Second, a number of states have statutory requirements for certain types of demand letters. For example, consumer protection statutes and professional malpractice statutes sometimes include prelawsuit notice requirements to promote settlement and discourage litigation. Does the demand letter meet those requirements? Check the relevant statutes and case law. In your response, point out all shortcomings and deviations from the requirements. Also point out the consequences for the potential plaintiff for failing to meet the requirements, such as abatement until the plaintiff provides proper notice. Including this discussion in your response puts the burden back on the potential plaintiff to pursue the case. It also creates an exhibit that you can attach to a challenge to the potential plaintiff's notice and lawsuit.

Third, consider that the response you draft may become an exhibit in a deposition and during a trial. Do not exaggerate. Avoid threats and sarcasm. Are your facts accurate? Are you being reasonable? Are you taking the high road? Are you being consistent? Are you putting your client in a box by making representations and commitments? You should exercise caution and consider having your client review and approve the response letter to avoid snares.

Fourth, consider what other information your client may need to evaluate the veracity and gravity of the potential plaintiff's claims. Perhaps the potential plaintiff has the sole copy of a disputed agreement, a video of the incident, or an allegedly defective product. The potential plaintiff's attorney may or may not give these up without a fight.

The potential plaintiff has asserted claims against your client. Put his or her attorney on the defensive by showing that you will hold the plaintiff to his or her burden of proof. What documents does he or she have that supports these claims? What alleged statements were made? What is his or her timeline of events? The potential plaintiff will look bad and risk having the case dismissed without support for the claim. In addition, your requests may also restart certain statutory deadlines by which a potential defendant must act on claims.

Fifth, ask yourself whether the demand letter is part of a scam. Scams, such as identity theft, take many forms. One common trick that scammers use is to design their communications to provoke a response that includes sensitive information. Accordingly, a cleverly worded demand letter may merely seek to entice a client to hand over a cancelled check as proof of payment. The scammer really may want to target your client's bank account number and endorsement signature on the check. If your client is not familiar with the party that sent the demand letter, this is a red flag. Similarly, if your client received the demand letter through e-mail or facsimile, this is potentially suspicious, and you should investigate the sender.

Finally, consider the possibility of taking preemptive action in response to the demand, such as a filing a declaratory judgment action or invoking a contractual arbitration provision. Your client will get to choose the forum and take the initiative away from the potential plaintiff by framing the issues with the first pleading.

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Moreover, taking preemptive action may head off or weaken later arguments by the demanding party that your client waived any such contractual rights.

Impress upon your clients the poten-

tial seriousness of demand letters and that they should not ignore such letters in hopes that the problem will “go away.” Further, encourage your clients to forward demand letters to you as soon as they receive them.

A response to a demand letter is likely

the first counter-move that a potential plaintiff will see. Accordingly, make it a good move. At the same time, begin to develop your theory and strategy of how a case will unfold, as well as your endgame.

