

RESPONDING TO DEMAND LETTERS

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I. INTRODUCTION: THE CLIENT CALL

- ✓ The Client's Often "Urgent" Mindset - Force Deliberate Decision-Making; let cool heads prevail
- ✓ Investigation (Reviewing Relevant Documents, Contracts, and Interviewing Key Witnesses): EXPAND YOUR RANGE OF VISION (other work between these 2 companies about which you should be aware?)
- ✓ Managing Client Expectations: Costs, Ramifications, Publicity; Start with the End in Mind ("*Just explain it to them*" and other pitfalls)
- ✓ Walking Through the Decision Tree for Responding to a Demand Letter ("*Who the heck authorized THIS?!*" is an unhappy client meeting...)
- ✓ Cover Goals & Discuss "the Ask"
- ✓ Respond or "Return Fire"

II. DECISION TREE: WHETHER TO RESPOND AND WHO SHOULD RESPOND

The visceral reaction of any lawyer, and most clients, is to respond, point by point, in detail, to each allegation. Slow down.

- Maybe a response is warranted, maybe it is not.
- Is this David v. Goliath? Our firm mostly represents large companies, but we have some tech startups and small businesses, too. The meetings are, and should be, different:
 - Maybe a big firm is drumming up fees. ("Let's discuss the MSA between our clients, please" – 12 page response) ("your discovery is overdue" met with 37 page response, single spaced, from a lawyer who bills \$1,250/hour).
- Maybe your client is being "papered" and there is nothing to gain with the back-

and-forth.

- Maybe the adage about “arguing with fools” applies to your situation.
- Maybe ask, “DID YOU EVEN GET A DEMAND LETTER AT ALL?”
 - This week, “What demand letter? I sent you a notice of termination and legal hold. Is that what you mean?”
 - Reminder letters
 - Copy of complaint
 - TRO Situation
 - First filed rule

Let’s unpack that a bit:

A. WHAT DID WE JUST GET?

1. Notice Letters
2. Soft Demands
3. Cease-and-Desist Letters
4. The Collection Letter
5. Hard Demands/Threats of Litigation
6. Copy of Draft Complaint
7. Rule 408 Demands

B. IS A RESPONSE MANDATED/REQUIRED?

1. Demand Letters Required By Law

- a. Securities Law
- b. Forcible Entry and Detainer (Eviction) Actions
- c. UCC Demands (Presentment of a Negotiable Instrument)
- d. Collections Efforts & Fair Debt Collection Practices Act (FDCPA)
- e. Wage & Hour Demand for Payment of Wages
- f. Defamation & “Retraction Letters”
- g. Consumer Protection Laws

THERE WILL BE SITUATIONS WHERE FAILURE TO RESPOND MAY CONSTITUTE AN ADMISSION OF FAULT OR LIABILITY.

In that case: Answer!

IF THE LAW REQUIRES A DEMAND LETTER, BUT THERE IS NO CORRESPONDING OBLIGATION TO RESPOND, THE QUESTION BECOMES, “*HOW DOES IT LOOK NOT TO RESPOND?*”

In that case: Answer!

2. Demand Letters Required By Conventional Obligation (e.g., by contract)

Whether to respond, in what detail, should always turn on (1) the area of law; (2)

the type of demand; and (3) the likely audience, future audience (judge, jury, media, going viral)

- a. Insurance Tender: OBLIGATION TO RESPOND
- b. Demand for Indemnity: SMART TO RESPOND PROMPTLY (ESTOPPEL ISSUES MAY ARISE)
- c. Notice of Default: Failure to deny an event of default may be construed, either as a practical matter or as a matter of law, as some kind of admission. In that case, a response seems wise.
- d. Notice of Deficiency (supply contracts): RESPOND
- e. Opportunity to Cure: IF YOU'RE CURING, RESPOND.
- f. Employment Agreements defining "cause" I ALWAYS RESPOND. CURIOUS WHAT OTHERS ON THIS WEBINAR DO
- g. Demand for Arbitration: CAREFUL ABOUT WAIVER ISSUES. Maybe respond, maybe file your own demand, maybe do nothing.

C. IS A RESPONSE OPTIONAL?

1. Assess the **Credibility of the Demand** (e.g., the sender's identity (the party and their counsel, if known), and the sender's relationship(s) to your client, if any) (*i.e.* a trademark troll might hit the circular file)
2. Assess **Implications of the Demand** Letter
 - Does the demand letter trigger a preservation duty as to your client (internally)?
 - Should your client issue a legal hold notice to third parties?
 - Should you/must you notify insurers, credit facilities or regulators of a threatened demand, demand, or litigation (*recall the "what kind of letter is this" thing? It's important here!*)
 - Does the demand assert potentially viable legal and factual claims?
 - Are you obligated to notify your insurer(s) of potential claim(s)?
 - Is the demand letter likely to be deemed a protected activity under a state or federal statute or regulation?
 - Does the demand trigger a contractual, statutory, or administrative process or time period?
 - Is the demand letter sent for settlement purposes under Rule 408?
3. Assess Prospect of Future Class or Collective Litigation

4. Would a Phone Call Response Be Better? B2B Solutions?
5. Evaluate Timing Issues (including for potential Counterclaims)
6. Particular Areas of Law Impacting Analysis
DOES THE ISSUANCE OF A DEMAND LETTER TRIGGER RIGHTS OR DEFENSES AVAILABLE TO YOUR CLIENT?
 - Collection letter that does not comport with FDCPA
 - Social Security and Medicare Overpayment Demands (create time and legal triggers)
 - Prior to filing a derivative action, a shareholder generally must demand that the corporation's board of directors cause the corporation to pursue the alleged claim. Fed. R. Civ. P. 23.1; Model Business Corp. Act § 7.40(b). A function of the **business judgment rule**; must show that REFUSAL OF THE DEMAND WAS WRONGFUL
 - Demand letter (or response) that violates the Texas Citizens' Participation Act. The TCPA is an anti-SLAPP statute designed to discourage "Strategic Litigation Against Public Participation" lawsuits. These suits target and attempt to silence public participation either by intimidating individual defendants or ruining them in litigation expenses. There is mass chaos as to what a demand letter, or a response to a demand letter, is, under TCPA. (see, DISMISSALS UNDER THE TEXAS CITIZENS' PARTICIPATION ACT, 2016 WL 10608134)
 - Intellectual Property (Trademark v. Patent litigation)
 - Misappropriation (Trade Secret/Confidentiality)
 - Tortious Interference
 - Competitor's Privileges
 - Non-Compete/Non-Solicit
 - Consumer Protection or Construction Defect
 - Wage and Hour, Wage Theft
 - Discrimination (Employment, Disability, Housing, Education, Public Accommodations)

- Eviction
7. Assess Preemptive Strategies and Potential Counterclaims
 8. Assess How Much of Your Case to Reveal
 9. Review Emergency Injunctive Relief Practice Standards (Notice Issues)
 10. “First to File” and Forum Shopping Pitfalls
 11. Factors Favoring Early Resolution (Will this Work?)
 - a. Contingency Fee
 - b. Individual v. Commercial Defendant
 - c. Ability to Create or Diffuse a Sense of Urgency
 - d. Both Sides of the Cost-Benefit: “Pigs Get Fat and ...”
 - e. **Cost, Consequences, Goal**
 12. Managing the Tone
 13. Exculpatory Clauses, Indemnities & Insurance: Who’s Paying for What?
 14. Setting Precedent (e.g., for departing employees, demand letters can enhance claims of discrimination/disparate treatment, selective enforcement of trade secrets, and/or impact recruiting efforts and morale)
 15. Statute of Limitations Issues: What triggers the limitation period for the claim, demand, arbitration or suit? Note manifestation, continuing harm, discovery rules, and injury-in-fact triggers and whether the demand starts a clock (especially in intellectual property litigation).
 16. Waiver Issues: Similar to Item #15, a cease and desist, never acted upon, then re-issued based on identical facts may raise issues concerning waiver. Waiver of a legal right carries a high burden and the inquiry is extremely fact specific.

D. WHO SHOULD RESPOND?

1. The Client
2. In-house Counsel
3. Outside Counsel

III. THE CONTENTS — DRAFTING TIPS

“FORM” RESPONSES TO DEMAND LETTERS – BE CAREFUL

CRAZY THOUGHT: PICK UP THE PHONE!

A. DRAFTING TIPS: STRATEGY, SUBSTANCE & STYLE

1. The introduction should identify you as counsel for the client and state that the purpose of the letter is to respond to the prior demand letter.
2. Consider providing an accurate and realistic recitation of the facts. Draft the fact section with an eye towards the Motion to Dismiss, Answer, and/or potential Counterclaims.
3. Respond to specific demands and, if appropriate, consider proposing creative business solutions. (Is there a specific demand?!)
4. Provide a specific deadline for further reply if necessary.
5. Remember that the response letter may have many audiences, including the judge, jury, internet, media, competitors, clients, vendors, employees, your community and the public, and that these potential audiences may not be privy to the original demand letter. An otherwise reasonable response letter may appear unreasonable unless it provides proper context.
6. Understand that the recipient has no obligation to maintain confidence, even if you demand it.
7. Don't misstate the law or the facts.
8. Provide an incentive to resolve issues early.
9. Don't make threats your client has no intention of ever pursuing.
10. Visualize the Reader: Consider the other party's decision-making process, as well as that person's goals, personality, background, and vulnerabilities, to determine how he or she will react to the letter.
11. Draft with the potential for insurance coverage in mind.
12. Draft for a broad audience.
13. Consider whether to require confidence.
14. Consider a Rule 408 header.
15. Reserve all rights, claims, demands where appropriate (i.e., no specific content is required by law).
16. Avoid threats, sarcasm, movie quotes or bad jokes. Also avoid good jokes.

17. **Remember the legal hold notice.**
18. Maintain a professional tone.
19. Direct all future communication to you?
20. Obtain verification of receipt.

IV. ETHICAL ISSUES IN RESPONSES TO DEMAND LETTERS

A. ZEALOUS ADVOCACY V. IMPROPER THREATS

1. Threats of criminal or administrative proceedings “solely to gain an advantage in civil litigation”
2. Blackmail and extortion risk (reporting to immigration, threats to publicize sexual liaisons and extra marital affairs, etc.)

B. VIOLATIONS OF LAW (e.g., FDCPA)

C. SIGNATURE OF COUNSEL (check your state jurisdiction to determine whether a demand letter is held to the same or similar standard of a pleading)

V. QUESTIONS?

*Thanks for listening. I hope it was helpful.
Bill*

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