LITIGATION MINUTE: DRAFTING PRE-LITIGATION DEMAND LETTERS

Date: 15 September 2020

U.S. Complex Commercial Litigation and Disputes Alert

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

The early stages of a legal dispute are often marked by the exchange of demand letters. While they typically receive less attention than formal legal filings, demand letters warrant careful strategic consideration to accomplish desired objectives and to avoid any potential pitfalls. Here are five points to keep in mind when drafting a pre-litigation demand letter:

Clearly state the nature of your demand

It is important to include relevant supporting information, but the primary purpose of a demand letter is to make a demand of the recipient. The letter should therefore begin and end by clearly identifying the nature of the demand. Don't bury the lede—accurately convey your demand in a clear and concise manner so that it doesn't get lost in the details of the dispute.

Stick to the facts and avoid inflammatory language

The focus of a demand letter should be to convince the recipient that your claim is valid and that they should take it seriously. Keep it civil (i.e., avoid maligning the recipient) and get the facts right. And remember that your audience may vary (i.e., encompass both lawyers and non-lawyers). The letter should use plain language as much as possible.

Consider the applicable ethical constraints

Inflammatory or misleading language can not only sink your chances of receiving a constructive response, it can also have consequences. When communicating a demand, lawyers have an obligation to be truthful with regard to the law and the facts. See ABA Model Rule of Professional Conduct 4.1 (prohibiting making a false statement of material fact or law to a third person, or failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); Model Rule 4.4 (a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person). The nature of a demand letter is often to threaten litigation, but it should not threaten frivolous litigation.

Follow the requirements of any applicable contracts or statutes

Commercial contracts often contain provisions that specify requirements for providing notice of breach. The specificity of these provisions vary, and may include details such as to where, when, and how notice should be

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sent. It is therefore important to ensure compliance with any applicable contract language. Similarly, some statutory claims have strict legal prerequisites to filing suit, which may need to be addressed in a demand letter.

Understand the applicable scope of privilege

It is well-settled that statements made by attorneys in the course of litigation are privileged from defamation claims. In some jurisdictions, however, pre-litigation demand letters are entitled merely to qualified privilege. Accordingly, counsel should be cautious to understand the scope of the privilege available in the applicable jurisdiction.

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