Chapter 1

Demand Letters: The Lingua Franca of Attorneys

The Importance of Demand Letters

A demand letter that includes a collection demand presages a lawsuit. A prima facie element of a cause of action might constitute a pre-suit demand. "The filing of a claim is a condition precedent to the maintenance of any cause of action against the public entity and is therefore an *element* that a plaintiff is required to prove in order to prevail." *DiCampli-Mintz v. Cnty. of Santa Clara*, 55 Cal. 4th 983, 990, 289 P.3d 884, 888 (2012). "Notice [of the warranty claim] must not only be pleaded; it must also be proved." *Metowski v. Traid Corp.*, 28 Cal. App. 3d 332, 339, 104 Cal. Rptr. 599, 602 (Ct. App. 1972)

Some leases, contracts, and statutory or administrative rules and regulations require a pre-filing demand letter. The demand letter goes into evidence. It is a prima facie element in the case. If the demand letter is sent registered mail, the signed returned receipt card, the receipt from the post office, the letter, and the envelope are all admitted into evidence. A demand letter ends the matter if the recipient either complies or resolves the claim.

A demand letter initiates a lawsuit. The first contact in nearly every litigation file is a demand letter. Some letters are worded well, but many are not. An insulting demand letter might infuriate a party that seeks retribution in the ensuing civil litigation. Pinching an old Italian expression, revenge is a dish best served in court. Attorneys assume an unforgiveable risk in infusing a letter with mean-spirited language. While the attorney might seek personal gratification in insulting the addressee of the letter (the respondent) the attorney is representing a client, who may not appreciate being associated with counsel who is mean, hateful, vindictive, or worse.

In the orb of entertainment law, for example, thousands of IP infringements rise in the east followed by thousands of cease and desist demand letters that set in the west. Pirate Bay, the Swedish file-sharing site, posted online the "cease and desist" letter but continued to offer the latest movies, songs, books, and video games.

The demand letter serves many purposes. It might convince a party to comply with a contract, thereby preventing a lawsuit. Good demand letters explain a party's position so that the recipient can consider a negotiated compromise or choose to litigate the dispute. Demand letters either make the phone ring or not.

Demand letters might flush out a previously undisclosed bankruptcy that surfaces in the response that encloses the First Meeting of Creditor notice. National and multinational vendors designate a "lockbox address" for the place of payment in the commercial invoices. This is the address of the seller's bank account. Bankruptcy courts have routinely held that the bankruptcy notice to the lockbox address is the notice to the creditor, even though the bank fails to turn over the bankruptcy notices. The response to the demand letter bearing the bankruptcy notice might constitute first notice of the bankruptcy. It is better to know at this time that the addressee (respondent) has filed bankruptcy than to have the addressee filing contempt of court charges against the sender for violating the bankruptcy automatic stay. This notice is important because any notice of the bankruptcy is deemed notice of all key due dates, such as the date to file a proof of claim and the date to file suit to exempt the debt from the discharge. These dates are set in stone.

Some demand letters break the ice. In response to a demand letter, the lawyers begin talking with each other to better understand their respective positions. A dialogue early in a case either opens the door to settlement or helps parties quickly recognize that immediate settlement is not an option. In sending out a demand letter and anticipating some type of response, the sender should establish a protocol that enables the addressee to easily communicate with the sender. The sender should expect the phone call that might kick off a dialogue that could lead to an amicable resolution of the claims. Conversely, making stilted or crippled attempts at communication through voice mail, ignoring e-mails, or being personally inaccessible (in a meeting, out to lunch, unavailable, etc.) defeats the purpose of the demand letter. The demand letter is the key to the door of communication between the parties. When settling a case, talk is less costly than litigation.

Demand letters notify the addressee of a potential claim and put the addressee's (respondent's) insurance carrier on notice. In nearly all liability policies, the insured is required, under penalty of forfeiting coverage, to notify the carrier of the claim. In "claims-made policies," which are common in the malpractice market for attorneys, demand letters accusing the attorney of an error are turned into notice to the insurance company by the end of the day or hour.

Demand letters are subject to immediate dissemination among the addressee principals, partners, spouses, financial institutions, associates, and other parties who are legally entitled to notice of any potential claim. A demand letter that has informed the recipient of a claim surfaces in the annual report by the auditors who are issuing a financial statement. The fact of the claim is subject to compulsory disclosure under federal securities laws.

Demand letters are required to notify manufacturers, distributors, wholesalers, and retailers of claims of defective products, warranty claims, and infringement claims. The contract, warranty, or terms and conditions might impose precise timing and other requirements for making a written demand under a defective products or warranty claim. These rigorous requirements are in the "fine print" section; the "terms and conditions" are also found online. Many warranties require that written notice be received within a specified period of time, and moreover, that written notice must be directed to a specific addressee and possibly, or most assuredly, the mail stop.

Depending on the particular type of insurance, some policies require time-sensitive written notice of the claim accompanied by proof of loss and supporting documentation. Insurance policies are unforgiving. Noncompliance with a technical terms just hands the insurance company an excuse to deny coverage or reject a claim due to its tardiness. This is a big deal because the casualty that is "uncovered" is a disaster.

Because there are always divergent opinions on a complicated topic, attorneys are rarely absolute guarantors of their legal opinions. A 5–4 Supreme Court vote does not suggest that the minority was wrong but only states that it disagreed with the majority. It is commonly understood that attorneys are not guarantors of the outcome of any case, particularly volatile jury trials. As any sophisticated investor knows, an opinion from an attorney that describes the tax treatment by the IRS is only valid if the IRS agrees. However, none of these homilies apply to attorneys who face the mundane task of delivering a demand letter. Unlike in litigation or complex transactions, attorneys must guarantee that the demand is correctly drafted, framed, and delivered, consistent with the contract or law, to the addressee (respondent). Failure is not an option.

In nearly every case, the demand letter is the shot over the bow. Attorneys should expect a return volley.

Demand Letters That Trace the Respondent or Suggest That the Respondent Skipped Town

Demand letters that bear on their envelopes "address correction requested" or "please forward" compel the U.S. Postal Service (USPS) to inform the sender of the addressee's new address and even deliver the letter. Conversely, the USPS returns demand letters that bear the notation "Moved . . . n.f.a. [no forwarding address]." The USPS pastes a yellow "sticky" on these letters that reads "Nixie . . . return to sender," "not deliverable as addressed," or "unable to forward."

Returned mail suggests that the sender's records might be inaccurate or outdated or that the addressee (respondent) has moved. If notice of the pre-suit claim is essential to a

lawsuit, return of the mail might offer the defendant an exit from liability. This is called a pass. Getting the address correct is getting the message delivered.

Returned mail suggests that the addressee (respondent) might have gone out of business, left the community, or absconded, all of which influence whether civil litigation would be a viable investment. Returned mail means that the addressee (respondent) is gone from the address and never to be found.

If the addressee (respondent) left a moving address (which are good for about six months), the sender should receive notice of the new address. Given that a demand letter might constitute a condition precedent to filing a lawsuit, this new address will save the case from an ignominious and avoidable disaster. The fact that mail bounces when delivered to the last known address is bad news by any standard.

Bounced mail informs the attorney that the initial address is unusable. Should civil litigation proceed, the attorney will endeavor to confirm a new address for service and notice requirements. If the addressee provided a forwarding address, counsel will immediately have a new address for service of process. If no new address can be found, the fact of bounced mail suggests that the defendant is long gone. Saving the returned mail therefore secures a wealth of information that will streamline future service of process.

Federal Rule of Civil Procedure 4(m) and the states that follow the federal rules mandate service of process in 120 days or the party might face dismissal of the case. If the case is filed on the cusp of the statute of limitations, the dismissal, even if without prejudice, could be disastrous. Bounced mail signals that a particular address is probably bad, which prompts the attorney, *at the outset*, to do a skip trace and locate a verifiable address. Likewise, in filing an application for additional time to serve the summons and complaint, the attorney can demonstrate to the court that the defendant is difficult to serve because mail to the last known address "bounced," and presumably the defendant is a potential "skip" and additional time is required. Absent the academic ascending the bench, most judges, even hailing from a criminal law practice, have firsthand experience with "bounced mail" and appreciate its implications. Always keep the "bounced mail."

The Medium Is the Message

Clients hire attorneys to write demand letters and are enormously gratified that their attorney has put their demand "front and center" before the addressee (respondent). Within a few days after the receipt of the demand letter, clients call their attorneys for a status report. "Did the debtor call you?" "What did you say?" "Are we making progress?" "If the debtor does not pay, what are our next steps?"

Aside from its content, a demand letter speaks volumes about the party making the demand and, more importantly, its author. A well-written, professional, and thorough

demand letter tells the addressee (respondent) that the sender invested good money in the demand process and will continue to work to ensure a favorable outcome. Some attorneys enjoy a reputation as zealous advocates of their client's interest. If such an attorney is the author of the demand letter, the addressee will do well to respond to, and not ignore, the demand letter.

Does spelling count? This is the wailing cry of every pre-digital third-grader. Demand letters require perfect spelling, grammar, syntax, organization, and clarity. Spell check, grammar check, and proofreading are de rigueur. First impressions count for everything. Neatness counts. Good bond paper counts. Perry Mason's eloquence is wasted if the jury is fixated on his untied shoelaces. A sloppy demand letter is the equivalent of showing up late for the big meeting or standing in court with lint on one's shoulder or a tear in one's clothing. Sloppiness degrades the solemnity of the demand letter and suggests that the attorney is careless. It also distracts from the message.

Clients hire some attorneys because of their reputation in the community, their pedigree, or the fact that they are expensive. Which attorney the client hires is part of the message. Hiring the priciest attorney in town to write the letter can suggest that he or she will devote great resources to accomplish the goals of the demand letter. The reputation of the attorney then delivers the message that "I spend whatever is necessary." However, it can also suggest something else. The recipient of the pricey demand letter might conclude that the sender is misguided or foolish for spending on a marquee attorney when a storefront attorney just down the street could have written the same letter for a fraction of the cost. In this case, the pedigree of the attorney communicates the message that "a fool and his money are soon parted."

How Demand Letters Benefit the Respondent

Demand letters might compel the addressee to call up the party to discuss the claims, including settlement, or to offer a differing point of view. Aside from serious issues arising from the federal and state Fair Debt Collection Practices Act(s), which regulate consumer collections, commercial demand letters originating from attorneys and collection agencies are daily fodder: "Pay up or I will sue." Even though a claim is due and payable and the creditor has the right to file suit immediately, the debtor's settled expectation is that the creditor will write one last letter to demand payment before filing suit. In some states, a party must write a demand letter as a condition of recovering court costs. If a customer writes a bad check, the merchant can recover three times the face of the check if that merchant made a timely demand that incorporated a statutory warning.

Facing treble damages, many customers make good on the bad check. The demand letter is the last clear chance to resolve a case.

Merchants of durable goods, such as cars, big-ticket consumer electronics, household goods (home appliances, consumer electronics, furniture, etc.), sports equipment, firearms, and sometimes toys offer very favorable credit terms—"OAC," meaning on approved credit terms. Depending on the particular credit agency, acceptable OAC is the top 10 to 20 percent of potential credit applicants. A demand letter from the creditor or agency with access to the consumer's credit report gives the consumer a chance to clear the claim before the consumer's credit is badly damaged. Facing a demand letter from an agency, the first question of every intelligent consumer is whether immediate payment will avoid any ding to the consumer's credit report. Bad credit might prevent a buyer from scoring a purchase through low-interest financing and, worse, saddle the buyer with expensive high interest rates. This demand letter is the final "shot over the bow" before the consumer's credit is damaged and therefore gives the consumer the last clear chance to avoid a credit catastrophe.

Most, but not all, demand letters ask for money. These are commonly called "collection letters." Agencies, attorneys, and parties routinely send out these letters, also called "dunning letters." Some demand letters seek money arising from a commercial breach of contract or breach of a personal or real property lease. Some demand letters demand an accounting, return of personal property, notice of claim under a policy of insurance, or notice of a breach in the contract. Some demand letters notify a party of a lawsuit and seek indemnification, notify parties of intention to file a lawsuit if required by the statute or contract, and even enclose a copy of the lawsuit to make a point. Some demand letters seek to compel a party to comply with economic and noneconomic covenants. Some demand letters seek recompense under a warranty claim, or notification that the goods, as ordered from the seller, are defective, damaged, or nonconforming.

Delivering the Message

Before the digital age, attorneys would typically mail a demand letter through the USPS. Depending on the importance of the matter, attorneys could use a courier to hand-deliver the demand. Up to the early and even middle 1980s, thousands of bicycle couriers crowded the New York City streets. Up to the late 1970s, attorneys used Western Union to send a telegram. (This author sent many telegrams up and through the late 1970s. Dictating a telegram to the Western Union operator was a moment frozen in time.) FedEx entered the delivery market in the 1970s and became a major force in the early 1980s. In the mid-1980s fax machines became common. Senders now use e-mail or PDFs to deliver the letter as an attachment. Note, however, that email recipients, fearful of "malware," "worms," "spyware," or other computer attacks, delete attachments from unknown senders. When in doubt, which is nearly always, and absent privacy, confidentiality, or disclosure issues,

the attorney can fax the letter. Faxing a demand for compensation arising from sexual misconduct is a complete nonstarter. Try overnight sealed delivery services (i.e., Federal Express, UPS, etc.). Retain the fax confirmations.

Many contracts and federal, state, county, or city statutes, ordinances, or regulations specify the method of delivery and moreover whether the documents as delivered must be originals. Depending on the case, court, and circumstances, failure to comply with these imperatives can defeat the purpose of the demand letter. The method and means of delivery constitute an integral part of the communication. If the contract requires service of the demand with the words "return receipt requested," "registered mail," "certified mail," or "addressed to the agent, or addressee," the demand letter, whether sent by PDF, FedEx, or even hand courier, must conform to the request. "Return receipt requested," "registered mail," and "certified mail" are not all the same. In a bankruptcy case, a debtor may claim that a notice of claim is defective, even though received, because the sender used "return receipt requested" and not "registered mail." These are the basic rules:

1. Comply precisely with the language of the contract, statute, rule, or regulation to facilitate delivery of the demand letter. Noncompliance might be a case killer. Attention to the most minute details is a big deal. The mantra is "sweat the small stuff" when ensuring compliance with notice requirements. Any slight misstep hands the attorney for the addressee a potential case-dispositive legal defense.
2. Demand letters that are extremely time-sensitive, such as demands to escrow holders that payment must be received before the "cut-off" date, demands subject to time requirements under statutes or contracts, notices required to be timely or "seasonably sent," and notices of renewal or nonrenewal of leases, licenses, or contracts, should be sent as expeditiously as possible. The attorney should send the demand by way of overnight service (USPS Express Mail, FedEx, UPS, DHL, etc.), hand delivery, fax, PDF, and if necessary registered mail or return receipt requested. Sending mail "registered" (or any derivation) can slow delivery by three to five days, which could be fatal. Multiple means of delivery reduce the risk of nonreceipt. If circumstances compel expeditious delivery of the demand, the attorney, and not an assistant, must take charge to ensure that the demand was delivered. Details count. Attorneys should retain all duplicates of the bills of lading, receipts, and other memoranda that are required by the common carrier to trace the demand letter and confirm its delivery. Proof of delivery is now online for nearly all services. Some overnight services might not archive proof of delivery over a certain period of time, which compels the attorney to promptly retrieve a file copy. In more than one case, proof of delivery has been a critical issue. The body of the letter should recite the means of delivery: U.S. mail, fax, e-mail (with the address), or overnight (with the court air bill number).

3. If the letter is the linchpin to relief, details count. If the attorney is uncertain about the correct amount of postage, he or she should add more postage. If the case involves millions, what does another $2.00 matter? When in doubt, of course, the letter should be sent by an overnight service or USPS Express Mail, which offers proof of delivery and a receipt. Shakespeare offers great wisdom: "A horse! A horse! My kingdom for a horse!" Sometimes, the attorney has to personally deliver the letter. A drive across town to deliver the key demand letter comes with the territory.
4. Some recipients of a demand letter appreciate that nonreceipt of the demand (or the claim of nonreceipt) can hobble, or even bar, the prosecution of a claim. Some contracts require written notice be sent "return receipt requested" at a specific address. Appreciating the content of the envelope, the addressee (respondent) will refuse delivery, which might hobble the plaintiff's case. This is common in service of process of a summons and complaint upon a debtor located out of state. Routinely, the debtor will write on the envelope "not here," "refused," "moved," or "dead," or will fail to come to the post office to pick up the mail. This is a settled expectation. The attorney should redouble his or her efforts and hire a process server or sheriff to serve the lawsuit. Upon receipt of a demand letter from an attorney seeking payment from a client for legal fees or notice of the client's right to arbitration before the local bar association, many clients refuse to accept the mail and send it back. When the attorney files suit, the client might defend on the basis that the attorney did not provide the client with the statutory right to arbitrate and seek to dismiss the case. If the demand letter is essential to a claim, the attorney should embrace this risk with a settled expectation that the addressee (respondent) will seek to avoid notice. As in cases of service of process, the attorney must expect that the addressee (respondent) will claim that the person at the door who took receipt of the demand letter was not the addressee but another relative, a stranger, or a family member who is too young. An addressee (respondent) can claim that the addressee (respondent) never received the actual notice because the addressee (respondent) was "out of the country," "on vacation," "returned to the homeland," or "at a wedding," or that the person who took delivery of the package "tossed it."
5. Sometimes, the defendant (the addressee (respondent) on the envelope, to be more exact) is at the address on the envelope. Many times, the clever defendant will inscribe on the envelope, "Moved with no forwarding address," "Deceased" or "Not here." Share the bounced mail with the client, who probably has a pretty good grip on the defendant's proclivities to dodge "nasty-grams." The fallback position is overnight service (i.e., Federal Express, DHL, USPS, UPS overnight, etc.), which compels a face-to-face meeting with the occupant and statistically a better chance of the mail "sticking."

6. While a touch off the beaten path, even foreign countries seek to dodge the mails. This is the classic statement: "Service of process was accomplished with the assistance of the Swiss Embassy in Tehran, the United States' protecting power in the Islamic Republic of Iran, on June 8, 1997. This Court has yet to receive any response from Defendants, either through counsel's entry of appearance, or through a diplomatic note. The Islamic Republic of Iran is an experienced litigant in the United States federal court system generally and in this Circuit [Citations omitted] . . . The Islamic Republic of Iran also apparently attempted to evade service of process by international registered mail, pursuant to 28 U.S.C. § 1608(a)(3). When the service package was returned to counsel in June 1997, the package had been opened, the return receipt, which counsel had not received, had been completely removed, *and the message 'DO NOT USA' was written in English across the back of the envelope*. This contumacious conduct bolsters the entry of a default judgment." [Citation omitted.]. [Emphasis added.] Clearly, Iran was at home.
7. Some rural communities do not have mail service that drops the mail at the business or residence of the addressee (respondent) (such as Carmel, California). These communities only offer a post office box. If notice is especially time-sensitive, personal delivery might be the only means of ensuring delivery because overnight services (except the USPS) will not deliver to a U.S. mailbox. Only USPS Express Mail will get the letter delivered expeditiously to a post office box. The city of Big Bear (CA) and the city of Carmel (CA) do not offer mail at the residence or business. All mail is routed to the post office for personal pickup.

The attorney should secure the signed "return receipt requested" but examine the document to see who signed for the "green card." If the person who signed is not the addressee (respondent), or someone whose signature is illegible, or unknown, the attorney must expect that the addressee (respondent) will deny actual receipt and that the actual recipient never turned over the envelope. *Dill v. Berquist Constr. Co.*, 24 Cal. App. 4th 1426, 29 Cal. Rptr. 2d 746 (1994), as modified on denial of reh'g (May 26, 1994), rejected service of process by mail when the plaintiff was unable to prove that the signatory on the return receipt card was an officer of the defendant. "The only suggestion in the record that Warner is Strata's agent is his or her signature on the postal receipt. An extrajudicial statement of a person that he or she is the agent of another is not admissible to prove the fact of agency unless the statement is either made in the presence of or communicated to the principal and the principal acquiesces in that statement. . . . Since Warner's implied statement that he or she is an agent of Strata is not competent evidence of that fact, there is no evidence of the supposed agency." *Id.* at 1437. In many cases, the signature on the return receipt cards is Mr. Scribbles. When the return receipt card comes back, the attorney should ensure that the signer is an authorized person, which will stand up to an aggressive

challenge. In *Dill v. Berquist*, the court dismissed the case because the plaintiff failed to serve the lawsuit within the statutory requirement of three years.

This case offers a bitter lesson that the smallest details are critical. If the contract or statute requires service of a claim by *registered mail*, return receipt requested and certified, but the sender only uses "return receipt requested," the court could rule that purported service of the written claim is noncompliant and therefore void. If service of a written claim is a jurisdictional prerequisite to judicial relief, the court case sinks to the bottom of the ocean. Why argue to the court of appeals whether the sender "substantially complied" and should get a pass from noncompliance when just a touch of diligence might have obviated the trip to the appellate court and potentially a big-time malpractice suit? If there is ever a homily that comes from *Dill v. Berquist*, it is *miss no detail*.

The Usefulness of Stock Language

Demand letter writing requires not only clarity but also uniformity. Standard and stock clauses and paragraphs enable the attorney to deliver a more complete message and demonstrate competence and proficiency, but, best of all, they protect the client from unforeseen circumstances that arise from a volatile situation. Forwarding a demand letter for a large amount of money to a recalcitrant and aggressive individual might generate a reaction that no one can anticipate. Stock phrases are the spare tire to every demand. An attorney will never know, until it is too late, when this language is critical.

Here are stock phrases:

- We are forwarding this letter to you by the most expeditious means to avoid any delay in communication.
- Please refer all further inquiries regarding this matter to our offices without further delay. You may contact the undersigned at the telephone number and/or e-mail address as set forth above.
- We remind you that the generator constitutes the property of _____, our client, but you are not authorized to sell, dispose, lease, transfer, conceal, or hide the generator.
- Please communicate with the undersigned at the telephone number and e-mail address at the bottom of this letter. Please refrain from communicating with our client. Please refrain from contacting our client.
- Please be advised that our office will not accept service of process of any notices, papers, pleadings, lawsuits, or other actions that might be pending, or planned, before any tribunal, unless and until we notify you or we make an appearance in the tribunal at issue. Please also be advised that by virtue of this letter, _____, our client,

does not waive any rights under any agreements, nor grant any extension, continuance, or grace from any contractual requirement. No rights or remedies are waived, and all rights and remedies due our client are preserved by this letter. Service of any papers upon our offices will not confer jurisdiction over our client, whether by way of subject matter or personal jurisdiction, nor waive any right to challenge the jurisdiction of the court, venue, service of process, the timeliness of any service or any other defense at law or equity or compliance with the Federal Rules of Civil Procedure and the local rules of the tribunal.

- By virtue of this letter, _____, our client, does not consent to the jurisdiction of any tribunal or venue other than as specified in the agreement by and among the parties. No waiver is made of any choice of law under any agreement by and between the parties.
- ABC Company does not waive any rights or remedies, nor, other than as expressly stated, grant any extension of time, waiver of any requirements by statute rule or contract, forgiveness of any duty, grace, waiver of notice or continuance of any hearing, or requirement to file any paper in any court or agency. All rights and remedies of ABC are preserved in the contract by and between the parties. Nothing in this letter waives or abrogates any such rights or remedies, or constitutes acquiescence to any course of conduct or course of performance, or acceptance of any type of nonconforming tender as a waiver or abrogation of any rights or remedies.

State and Federal Fair Debt Collection Practices Acts

Attorneys are debt collectors under the federal and state Fair Debt Collection Practices Act (FDCPA). This means that an attorney's letters, if seeking to collect a debt based on a transaction that is personal, family, or household, are subject to various federal and state mandates that, if not followed, might give rise to a cause of action that includes attorney's fees. Generally, attorneys are subject to an entire host of consumer protection statutes and regulations, including regulations issued by the Consumer Financial Protection Bureau. Malpractice carriers are acutely aware of these risks.

This book of letters is based on commercial, business, tort, or other transactions that are not subject to or covered by the FDCPA. Clearly, different rules apply in consumer collection cases. Attention to detail in consumer demand letters is paramount. In one recent FDCPA action, the attorney erroneously inserted a wrong name for the creditor. Undeniably, this was a clerical error, but the court did not give the attorney a pass. The FDCPA and state variants are tough taskmasters.

Given the potential civil liability under the FDCPA and even class action exposure, attorneys are advised to either steer away from collection matters that are subject to the FDCPA or invest serious time, effort, and resources to fully and thoroughly comply with

FDCPA. Compliance with the FDCPA, if required, is important. Anecdotal evidence suggests that collection professionals are subject to many small-dollar lawsuits based on violations of the FDCPA, which then accrue and become expensive. Fair debt collection practices come in both federal and state varieties, which might be more stringent.

Attorneys must embrace the risk of personal civil liability under the FDCPA. Getting sued is expensive, but it is worse when the attorney is required to withdraw from the case in chief. Getting the client sued is worse if the client is a "debt collector." Unhappy for having to defend itself and even more unhappy for having to seek to hire (and pay for) a new attorney, the aggrieved client might focus his or her anger on the first attorney for this legal calamity.

This is worth repeating. Attorneys are subject to the state and federal fair debt collection practices acts, which includes demand letters addressed to a consumer. Compliance is a mandatory. Depending upon the circuit court, filings and other communications in bankruptcy court proceedings are subject to the FDCPA.

Consider the Readers of Demand Letters

Demand letters are read by the addressee (respondent), the attorney for the addressee (respondent), and many third parties. If the matter between the parties enters the arena of civil litigation, the letter might go into evidence. The judge or jury might read the demand letter. Witnesses sometimes read demand letters into evidence. Attorneys should presume that demand letters enter the public domain. Assuming a wide audience, the author should write letters that are professional in tone and content, avoid disparaging remarks and personal attacks, and assert statements and claims that are accurate and verifiable.

No time is ever wasted in repeating that no letter should hang as an albatross around the neck of the attorney or the client on whose behalf the letter was written. Judges and juries have very high expectations of a demand letter. They expect complete professionalism and frown upon anything less. For whatever reason, attorneys often infuse a demand letter with disparaging remarks that degrade the letter and draw the attorney and client into disrepute. Attorneys should write as if speaking out loud to a judge or jury.

Overly hostile, aggressive, mean-spirited, or insulting demand letters can undermine a case because a judge or jury might find the letters offensive or degrading, and this judgment might color their decision-making process. The style of writing should be professional, straightforward, clear, and firm but polite. The letter bears a message that should arrive free of clutter. It should use first and last names, or Mr. Jones, Ms. Jones, or appropriate titles.

In this Internet age of social media, few indiscretions are kept secret. Many celebrities see their careers vanish overnight because they uttered something truly terrible or stupid

that went viral. Inappropriate remarks in a letter might also find a home on social media. There is a clear line between advocacy and idiocy.

Just about anything and everything can be uploaded in a nanosecond. Saying something that is inappropriate, hurtful, or insulting might go viral.

Properly Addressing the Letter

First, in writing any letter, the drafter must identify the person, department, officer, mail stop, or other identified person who is the designated recipient of the letter in the body of the letter and the envelope. A letter addressed to an organization, without a designation of the individual, may be ineffective notice under the contract or the applicable statute, or no notice at all. Writing a letter to "mega bank" without designating the person, suite number and floor, department, mail stop, or other identifying information is potentially tantamount to no letter at all. Writing to the government without the necessary and very required identifying information is likewise legally ineffective. Writing to the Department of Justice is a probable complete nonstarter. Writing to "Mr. Eric Holder, attorney general of the United States, Department of Justice . . . Mail Stop XXXX," might get to the right person. Maybe. FedEx and other overnight services also might "bounce a package" if it is lacking a specific suite or floor number or name.

Second, the contract, rule, statute, or contract might identify a particular person, department, or official who is to receive the demand letter. Many contracts require great specificity in getting the letter to the right person. Specificity in identifying the recipient is common in service of process by mail in bankruptcy court because the envelope must identify the recipient by name. Well-written contracts impose great specificity in identifying the persons to receive notice. This is a very big deal because the notice terms in a letter might well be conditions precedent to the filing of an action. Failing to address the letter to the right person given the address a potential exit from a big-time liability. Again, details count. Getting the demand letter to the right person and making an error along the way is fatal. Here is the proof in the pudding: "It is uncontested that the claim was never delivered or mailed to the 'clerk, secretary or auditor' as required by section 915(a). Likewise, the 'clerk, secretary, auditor or board' never actually received the claim. (§ 915(e)(1).) Thus, neither section 915(a)'s specific requirements for compliance, nor section 915(e)(1)'s provision deeming actual receipt to constitute compliance, were satisfied. Nevertheless, the Court of Appeal held that there was 'substantial compliance.' This was error." *DiCampli-Mintz v. Cnty. of Santa Clara*, 55 Cal. 4th 983, 991-92, 289 P.3d 884, 889 (2012). Moral of this tale: Sweat the details.

UCC Code Section 1202 provides the ground rules for notice as follows:

1202. (a) Subject to subdivision (f), a person has "notice" of a fact if the person:
(1) has actual knowledge of it;
(2) has received a notice or notification of it; or
(3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.
(b) "Knowledge" means actual knowledge. "Knows" has a corresponding meaning.
(c) "Discover," "learn," or words of similar import refer to knowledge rather than to reason to know.
(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

UCC Code Section 1202(f) provides the rules when notice is received by an organization as follows:

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

The short story of UCC Section 1202 is to send the letter to a person, clearly defined department, mail stop, or someone else who is clearly designated as the recipient of the notice. Inadequately addressing the letter is no notice at all. This is very bad. An inadequately addressed envelope that never reaches the proper recipient might defeat any judicial action.

Ensuring Confidentiality of the Contents

Some letters contain embarrassing, confidential, personal, or financial information, or even trade secrets that might embarrass, humiliate, or injure the recipient if the information

comes into the hands of third parties. Moreover, the contents of the contract, and therefore ensuing communications, might be subject to a confidentiality term. Letters should be addressed "Personal and Confidential" or "To Be Opened by the Addressee Only." These steps might be inadequate.

Confidential information is more than some supposedly salacious claims, and many times is very embarrassing, similar to things in daytime TV soap operas. Company or IP trade secrets, banking information, account information, company salaries, attorney-client communications, sales strategies, product formulas, litigation tactics, personal health information, sales data, and plans do not belong in third-party correspondence. A secret said is a secret lost forever.

If the contents of the letter are truly confidential, and if the information in the hands of third parties might be damaging or constitute a breach of the contract or, worse, create civil liability, the best course of action is to physically deliver the letter by courier to the addressee (respondent) to avoid any possible risk. While the services of a courier might be expensive, the risk of unintended dissemination of the information is greatly reduced.

Avoiding Risk of Defamation

Many states immunize pre-suit demand letters from civil liability on the basis that all communications arising from civil litigation are privileged. However, not every letter is part of the litigation privilege if no litigation is genuinely contemplated.

In writing a letter that might contain inflammatory statements, accusations of misconduct, claims of fraud, or anything else that might besmirch the character of the addressee (respondent), the author should "walk back the narrative" to ensure that the statements are not defamatory. In most cases, the author of a letter can assert many claims without using personal attacks, salacious statements, innuendos, insults, or derogatory remarks: "Just the facts, ma'am." What the attorney writes will be read by others.

Just a touch of common sense comes to the fore. Attorneys are accustomed to rambunctious letters, mean-spirited statements, and downright frightening threats. "Sticks and stones will break my bones, but words will never harm me." Most attorneys and personnel accustomed to high-octane conflict come home with nary a furrow in their brow. Everyone else is far less sanguine and takes to heart nasty accusations, threats, and insults that might cling to the recipient, or even infect him or her with an unrequited lust for revenge.

Using Fax, E-mail, and PDF

Aside from statutory and contractual requirements, the sender can fax and email a PDF of the letter to the addressee (respondent). Getting the demand sooner than later is important. Many demands are time-sensitive, and various "clocks" start to run when the letter is delivered. Getting the letter directly in front of the addressee (respondent) communicates that the writer demands prompt action.

Demand letters by themselves suggest that the addressee (respondent) has defaulted in a contract, failed to pay a debt, or potentially engaged in dishonest, inappropriate, or wrongful conduct. Demand letters are accusatory. Faxing a demand letter might publicly disclose this information because most offices have a central public locale for the fax machines. Thus, faxing the letter raises issues of privacy, and potentially defamation, if the contents of the letter are inflammatory. Whatever the accusations in the demand letter, the addressee (respondent) might be able to make some sort of civil claim depending on the local laws of privilege arising from demand letters. Sending a communication via PDF might be more conducive to privacy, but is not entirely safe given that many office computers are accessible by staff who retrieve documents that are attached as a PDF. Other forms of digital communications are sent via the "cloud," Dropbox, and other forms of delivery.

Sealed mail or an overnight service addressed to the particular addressee (respondent) is best, particularly if marked personal and confidential. Hand delivery is even better.

The attorney should always reconfirm to determine the contract or statute that requires a specific means of delivery.

Ensuring the Address of the Sender

Most attorneys maintain an office that bears a street address. Many attorneys are tenants in office buildings: 123 Main Street, Suite 3030, Anytown, VA 24015. But attorneys from time to time move. To ensure that mail is forwarded, the attorney files a "change of address" form with the USPS, which is good for six months.

Depending on the practice, an office address bears some slight risk given that mail posted in later years might never reach the attorney if there has been a change of address. Aside from using great diligence in getting a change of address to multitudes of people, to mitigate the risk of errant mail, the attorney might wish to invest in a USPS mailbox, which is an eternal "return address." A post office box address should be considered for all bankruptcy proofs of claims given that some bankruptcies might have a five-, ten-, and even 15-year lifespan. The box ensures mail delivery to the attorney for all eternity.

"Love All, Trust a Few, Do Wrong to None"

Featuring the abandoned hero seeking redemption, Hollywood spy movies offer the modern version of this axiom as "trust no one." Shakespeare and Tinsel Town counsel wariness in every relationship, including with clients.

Clients have their own secret agenda. They want something. Clients hire attorneys to deliver that something, which is usually money, a favorable contract, or the defense or resolution of a claim or lawsuit. Some clients engage an attorney to warn that they will, if pushed, push the legal buttons to launch Armageddon. Marquee attorneys are charms attached to the client's bracelet. "We got the big gun that costs big bucks, but we don't care." The counsel is a commodity.

Clients rarely reveal all the facts in laying out their case to attorneys, even expensive attorneys. Clients mistake the facts. Clients are wrong. Some clients are criminals. Clients are confused. Clients are dishonest. Clients suffer from real or feigned cases of mistaken identity. Some clients offer forged but really good-looking documents to the attorney. Absent the verifiable bona fides of the client's claims, the attorney should first examine the client's claims. Where is the backup? Let's see the contract. Are these claims credible? Do these claims pass the smell test? Let's take a look at the signed invoices. Do you have proof of delivery? Let's look at the e-mail traffic here. These are all first-rate questions.

Some claims lack any paper trail. These claims are typically tort claims and, more sensationally, sexual assault and molestation claims. While medical and psychological records might buttress the client's claims, some claims rest solely on the credibility of the complaining party. A day does not go by when the news media fail to report a scandal. Lawsuits that accuse someone famous, or not so famous, of sexual misconduct frequently destroy the defendant's reputation and career, regardless of the outcome. Few survive the cosmic black hole of these allegations. Should these allegations turn out to be false, the victim of these allegations will likely sue the accuser and certainly the attorney. These are vengeance lawsuits.

The demand letter is the attorney's ejection seat. The demand letter, and its response, enables the attorney to exit, quickly, a troubled, flawed, or fraudulent case. Upon presentation of the claims, the putative wrongdoer also embraces his or her own ejection seat from an impending debacle. In response to the demand letter, the putative wrongdoer might offer evidence, claims, or argument demonstrating that the claims are fabricated, wrong, or distorted. The putative wrongdoer might demonstrate a case of mistaken identity. The putative wrongdoer might demonstrate that the claim was paid, resolved, or discharged in a bankruptcy proceeding. Consider the demand letter the canary in the coal mine.

With a fair response to the demand letter in hand, the attorney can test the bona fides of the alleged claim. Demand letters unfold cases at the outset. When the evidence unfolds, all parties can take a deep breath, reconsider their position, and hopefully walk away from

the brink of Armageddon or rush headlong into court. Given the paper storm generated by modern litigation, demand letters are beneficial in weeding out bad claims. Unraveling the mystery enables the attorney to stay in the case or beat a hasty retreat. Discretion is the better part of valor. Retreat today, fight tomorrow.

Dealing with the Bounced Mail Disaster

If the demand letter constitutes an escrow claim, which is highly time-sensitive, the bounce of the demand letter through an incorrectly addressed envelope, a bad or stale address, or an error by USPS could foreclose any recovery from the escrow. For example, the Bulk Sale Law only gives creditors 12 business days to file a creditor's claim. Alcoholic Beverage Control escrow laws might offer only 30 days to file a creditor's claim. Mail that is bouncing around can use up this fleeting time.

A bounced demand letter directed to an escrow company commands immediate, undivided, and focused attention to reconfirm the correct address and expedite the timely filing of the demand. Escrow demands are extremely time-sensitive and so require transmission by fax, e-mail, and overnight service. Sending an escrow demand letter, or any other time-sensitive letter, only by return receipt requested might be an error because of the two- to four-day lag time in getting the letter delivered.

Failure to timely file a claim is catastrophic.

The Division 9 (Secured Transactions) Imperative of Delivering Notice of Sale

If the debtor defaults, and the debtor is secured by a security interest, and the secured party seeks to sell the collateral, the secured party must provide notice of sale to the debtor, guarantor, and potentially junior secured creditor under Section 9611(c) of the Uniform Commercial Code.

What happens if the secured creditor sent the notice by U.S. mail (or any other means of physical delivery) but the mail bounced because the debtor has moved? The debtor might, or might not, have left a forwarding address. The forwarding request filed with the post office might have expired. Whatever the reason, the notice of sale bounces back to the sender. The case law is mixed on whether notice was ever given and on what the responsibility of the secured party is to ferret out a new address. For the attorney on behalf of the sender, this is a serious issue that requires a review of the security agreement to determine if notice to a designated address satisfies the requirement of notice. If not, counsel might face the task of locating the debtor or exercising such diligence to conclude that

the debtor is a true skip. Either way, the fact of the bounced mail sends off alarm bells that propel the attorney into immediate action.

Even if the security agreement provides for an airtight, 100 percent lock on an address, but the mail bounces, the secured creditor surely knows that the debtor never got notice of the pending foreclosure sale. Should the secured creditor proceed with the sale, which might produce a low dollar return, and sues the debtor for the deficiency, the debtor might gin up a "triable issue of material fact" botched notice and drive the case to a jury trial.

This treatment is a very short summary of very extensive and even conflicting case law and articles that discuss the diligence of the secured creditor to ensure that the debtor and guarantor have actual notice of the pending foreclosure sale. This body of law varies from state to state and is very fact specific, and moreover dependent upon the security agreement.