



Avoiding Malpractice Exposure and Civil Liability During Settlement Negotiations

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Presenters



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DEMAND LETTERS

A demand letter is a document that gives formal notice that a party is considering legal action and generally contains a demand for money or some other form of remedy. Demand letters should be drafted to avoid the appearance of extortion and threats.

Extortion

“Extortion” is defined as the practice of obtaining something, especially money, through force or threats.

1. California
 - a. *Elements of California Penal Code Extortion Claim*
 - b. *Elements of California Civil Extortion Claim*
2. New York
3. Federal



Threats

A threat is defined as statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done.

1. Rules of Professional Conduct Prohibit Threats
 - a. *California*
 - b. *New York*
2. Threat of Criminal Charges
 - a. *California*
 - b. *ABA*
3. Threat to Disclose Personal Information
 - a. *New York*
4. Threat to File a Complaint Not Extortion
 - a. *Federal*
 - b. *California*
 - c. *New Hampshire*



Protected Speech in Demand Letters

Protected speech is protected from government regulation and censorship, depending upon the nature of the speech and the nature of regulation. Demand letters generally fall under protected speech.

1. Federal
2. California



Litigation Privilege

The “litigation privilege” generally protects communications among parties and in pleadings during the course of a lawsuit.

1. California
2. Florida

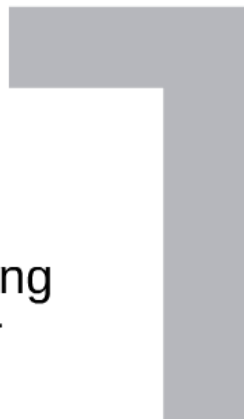


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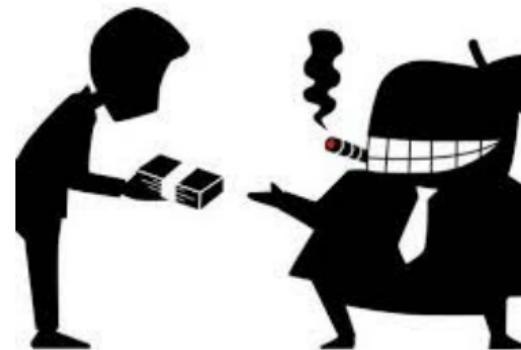
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ETHICAL ISSUES IN MEDIATIONS & SETTLEMENT NEGOTIATIONS

Mediation-Related Discussions Are Confidential

1. Uniform Mediation Act
2. Florida
3. California



Duty of Confidentiality

1. Counsel may not disclose confidential information absent client's informed consent
2. Counsel may not disclose extent of settlement authority provided by client



Duty To Convey Offer To Client

1. ABA
2. California
3. Michigan



Counsel Owes No Duty or Limited Duty to Non-Clients During Negotiations

1. California
2. Texas



Counsel Owes Duty to Provide Truthful Information to Others

1. ABA
2. California
3. Counsel May Use "Puffery"
4. Counsel May Not Use False Statements



Ethical Duties Upon Death of Client

1. ABA
2. North Carolina



Ethical Issues Arising From Communications With Opposing Party

1. Counsel may not communicate with party represented by counsel
2. Counsel cannot use client as mouthpiece to avoid rule
3. Ethical issues when settling with unrepresented party

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ETHICAL ISSUES IN DRAFTING SETTLEMENT AGREEMENTS

Ethical Constraints On Settlements

1. Client controls terms of settlement
 - a. ABA
 - b. California
 - c. Texas
 - d. Illinois
2. Settlement cannot be conditioned on approval of counsel
 - a. California
 - b. Michigan
 - c. Connecticut
3. Counsel may be required to withdraw if settlement agreement is being used to commit a crime
 - a. ABA
 - b. California

Limits on Restricting Counsel's Ability to Practice Law

1. Settlement agreements cannot limit counsel's ability to practice law

- a. ABA
- b. California
- c. Florida
- d. Delaware



Settlement Agreements May Allow for Reduction/Elimination of Fees

1. Counsel must advise client of right to waive recovery of attorney's fees
 - a. California
 - b. North Carolina
 - c. New York
2. Counsel cannot prohibit a client from entering into a settlement agreement with a fee waiver provision
 - a. California
 - b. District of Columbia

Settlement Agreements Cannot Prohibit Counsel from Representing Present and Future Clients

1. ABA
2. New York



Settlement Agreements Cannot Prohibit Counsel from Bringing Similar Suits

1. Cannot prohibit similar suits against government or agency
2. Cannot prohibit similar suits against private party
 - a. California
 - b. District of Columbia
3. Cannot prohibit counsel's ability to advise their prior experience
 - a. California
 - b. District of Columbia

Settlement Agreements May Not Prohibit Use of Information in Future Cases

1. ABA
2. Colorado



Settlement Agreements and Counsel Misconduct and Malpractice

1. California
2. District of Columbia



Settlements May Not Contain Terms Against Public Policy

1. Federal
2. Colorado



Settlement May Contain Confidentiality Clauses

1. California
2. State Laws May Restrict Scope of Confidentiality Provisions

Settlement May Require Return or Destruction of Tangible Evidence

1. ABA
2. North Dakota



Ethical Issues Regarding Errors in Settlement Agreement

1. Counsel Must Correct Inadvertent Errors in Settlement Documents
 - a. Error in Settlement Check
 - b. Duty to Disclose Errors to Court

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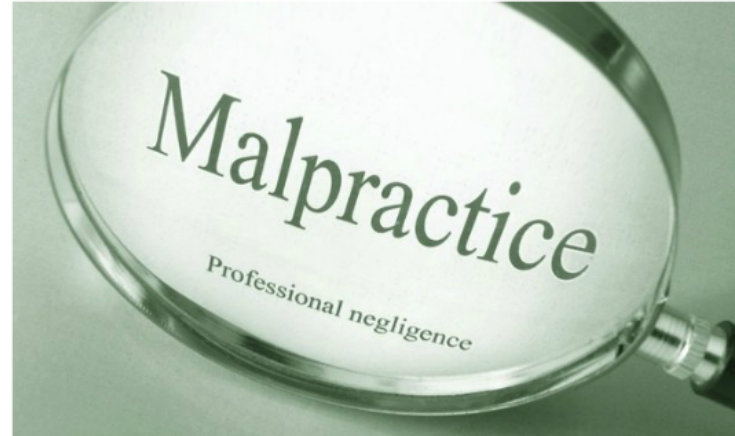
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