THE SECOND DRAFT

ARTICLE

Using Demand Letters to Teach Persuasion and Professionalism

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Of the many types of correspondence that lawyers write, demand letters are one of the most common, but demand letter assignments seldom appear in legal writing courses. Adding a demand letter to a legal writing course creates opportunities for the professor to reinforce persuasive writing skills, to discuss ethics and professional responsibility, and to teach professionalism and civility. This essay walks through these benefits and discusses how a professor can add a demand letter assignment to an existing course.

1. Demand letters reinforce persuasive writing skills.

Demand letters are an easy addition to a legal-writing course, whether a first-year or an upper-level course. They are typically short documents, meaning that

they are not overly burdensome for a student to write—or for a professor to grade. Demand letters fit best in the curriculum of the persuasive-writing semester of a required first-year curriculum or in any upper-level course that includes persuasive writing or a variety of practice documents.

Demand letters provide an opportunity for students to practice their persuasive-writing skills in a related but slightly different context than writing motions or briefs. One of the most important skills that professors can teach is how skills transfer across assignments.[1] For many students, it is eye-opening to see how the same skills they used to write a motion for summary judgment can be used to write a demand letter. Writing a demand letter allows a student to practice her persuasive writing skills while considering how a change in audience from judge to opposing counsel will affect her written tone.

The easiest way for a professor to add a demand letter to her curriculum is to base it on an existing fact pattern in the course. For example, if students are writing a trial-court motion, have the students draft a demand letter to opposing counsel using the same assignment facts. In this way, the assignment creates very little additional work for the professor. The demand letter need not be assigned before the motion. The professor can explain that for academic purposes, the assignment is not following a realistic litigation timeline (as our assignments rarely do anyway, when they have to be compressed into a single semester).

A demand-letter assignment also provides an opportunity for the professor to talk about problem solving, which is an essential aspect of lawyering, but one that is often not discussed explicitly in the legal-writing curriculum. For example, one of us (Alyssa) has previously tasked her students to write a demand letter to a commercial landlord on behalf of a day spa dealing with a noisy neighboring tenant. She encouraged her students to be creative in what they asked the landlord to do. After the students submitted their assignments, the class discussed the various options. The best students asked the landlord to soundproof the walls between the two tenants. Assuming this is physically possible, this is likely to be preferred as the best option by the landlord and both tenants. But many students thought only of asserting the spa's right to move out of the space, citing constructive eviction. While this is a valid legal claim, it would cost the spa substantially more money, and the spa might prefer to keep its current location if it has built up a large number of regular clients. No student grades were affected by the failure to think of this option, but it provided space for a rich class discussion.

An additional benefit to teaching demand letters is that students learn how to properly format a letter. Letter writing appears to be a lost art for many Generation Z students. Many need to learn relatively simple guidelines, such as how to format the recipient information on a letter and how to indicate that another person has been sent a copy of the letter. Of course, many "letters" today are actually sent via email, but they are often still formatted as mailed correspondence.

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[1] *See* Shaun Archer et al., *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. LEGAL EDUC. 258 (2014).

2. Demand letters allow exploration of related ethical issues.

In addition to providing an opportunity for students to practice their persuasive-writing skills, demand letters create a natural pathway toward incorporating questions of professional identity and legal ethics into a writing course. A professor may choose to deliberately facilitate a discussion of the ethical issues pertaining to demand letters, or such a discussion may arise organically from students' questions. In either circumstance, legal-writing professors can benefit from being able to address their students' frequently asked ethical questions.

Ann has taught more than 70 ethics CLEs, and these are the questions that attorneys ask most frequently about demand letters. The information below should provide sufficient background for professors to answer student questions and bring ethical issues to the forefront of students' attention.

2.1. *Is a lawyer allowed to send a demand letter directly to the opposing party?*

If the opposing party is represented by counsel, a lawyer cannot send a demand letter directly to that party. Model Rule 4.2 requires that any communication relating to "the subject of the representation" be directed to opposing counsel.[2] In practice, this is often called the "no contact" rule. Rule 4.2 does permit a lawyer to send a demand letter directly to a represented party if that party's counsel grants permission for the lawyer to do so.

A few key points: First, only the opposing party's *counsel* has the authority to allow direct contact; the party's permission alone will not suffice. Second, in many states, sending a letter concurrently to the opposing party *and* opposing counsel

[2] MODEL RULES OF PROFESSIONAL CONDUCT r. 4.2 (AM. BAR ASS'N 1983). This article will refer to the Model Rules because most professional responsibility courses and the Multistate Professional Responsibility Exam are based on the Model Rules. However, the Model Rules themselves are not binding; states may choose to adopt the Model Rules as written or with modifications. Professors may choose to refer students to specific state versions of the rules, especially where the adopted language may differ from the Model Rule text.

violates the "no contact" rule.[3] This concept may not be intuitive to students raised in the digital age who cannot see the harm in a simple "cc" to the opposing party.

If the opposing party is not represented by counsel, Model Rule 4.3 permits a lawyer to send a demand letter directly to that party.[4] In the letter, the lawyer cannot state or imply that the lawyer is disinterested. Thus, the demand letter should clearly state that the lawyer represents his or her own client, and not the interests of the unrepresented party. Moreover, although the lawyer is permitted to explain the lawyer's understanding of the terms of negotiation, the lawyer cannot give legal advice to the unrepresented party (other than the advice to retain counsel in the matter). An assignment where the student sends a demand letter assignment to an "unsophisticated" opposing party could provide an opportunity to reinforce the importance of using language appropriate for the intended reader.

2.2. *Do lawyers have a duty of candor when writing demand letters? Are lawyers allowed to exaggerate or bluff as a settlement tactic?*

Perceptive students will note that in the Rules of Professional Conduct, the term "duty of candor" applies only to documents filed in or submitted to a tribunal.[5] Furthermore, a demand-letter assignment may raise issues of bluffing as a negotiation tactic. For example, students may notice in the assignment an opportunity to over- or understate the client's willingness to settle or the estimated value of the claim. Thus, they may reasonably conclude that a different standard of truthfulness applies when a lawyer makes a demand or negotiates a settlement.

Although different ethical rules apply to communications outside the courtroom, lawyers have a general obligation to be truthful in conduct both within and outside the practice of law.[6] In the demand-letter context, Model Rule 4.1 imposes a duty of truthfulness when dealing with "persons other than clients."[7] This rule is oft-cited when discussing ethical issues that arise during negotiation.[8] Unfortunately, the rule is not particularly straightforward; a lawyer may not explicitly or through omission lie about material facts, but may bluff, exaggerate, or otherwise skirt the boundaries of truthfulness when it comes to non-material facts. Comment

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[3] *See, e.g.*, State Bar of Ariz. Comm'n on the Rules of Professional Conduct, Op. 02-02 (2002), https://www.azbar.org/for-lawyers/ethics/ethics-opinions/ (enter "02-02" in the search bar).

[4] MODEL RULES OF PROFESSIONAL CONDUCT r. 4.3.

[5] *Id.* at r. 3.3.

[6] *Id.* at r. 8.4(c).

[7] *Id. at* r. 4.1.

[8] *E.g.*, Art Hinshaw, *On Professional Practice: Ethics and Negotiation*, DISP. RESOL. MAG., Sept. 12, 2019, at 33-34, https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-on-professional-practice/.

2 to Rule 4.1 states that willingness to settle and value of a claim are "ordinarily" not material.[9]

A professor seeking a short answer to this complex issue could explain that the norms of negotiation do permit a certain amount of "puffery," citing some examples from Comment 2 to Rule 4.1. However, the professor should emphasize that lawyers can never "puff" about material facts—those on which the other party would rely when accepting or rejecting an offer.[10] Thus, the duty of truthfulness will generally prevail in the statements that a lawyer makes in a demand letter. The professor can also remind students that duties of civility and professionalism, as discussed below, may further limit a lawyer's ability to work around the proscriptions of Rule 4.1.

2.3. *At what point does a permissible demand become an unethical threat?*

In the quest to zealously advocate a client's position, students may come up with creative ways to compel settlement. For instance, public shaming through social media is nowadays both rampant and effective. Students may assume that threatening to "make public" an opposing party's misdeeds is a legitimate tactic.

But this is likely impermissible under Model Rule 4.4(a). This rule provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."[11] The professor can explain that even if a certain tactic serves some legitimate purpose, such as encouraging settlement, its illegitimate purpose can tip the scales toward an ethical violation.[12] For instance, an Arizona lawyer representing a client on a sexual-harassment matter tried to compel settlement with the former employer through a public-shaming campaign.[13] The lawyer created a website detailing the allegations as well as flyers with the employer's photo and the word "predator."[14]

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[9] MODEL RULES OF PROFESSIONAL CONDUCT r. 4.1 cmt. 2.

[10] *See* Hinshaw, *supra* note 8, at 33-34.

[11] MODEL RULES OF PROFESSIONAL CONDUCT r. 4.4(a).

[12] *See, e.g.*, In re Strojnik, No. PDJ 2016-9083, 2016 WL 7744810, at *2 (Ariz. Disciplinary Comm'n, Nov. 16, 2016) ("It is not uncommon that charges of violating Rule 4.4(a) involve conduct that has both a 'legitimate purpose and an illegitimate purpose.'") (citing *In re Royer*, 78 P.3d 449 (Kan. 2003)).

[13] *Id.* at *1-2.

[14] *Id.*

The lawyer also threatened to post a "shame on you" banner outside the employer's restaurant.[15] These actions resulted in the lawyer's short-term suspension and placement on probation.[16]

A more complex situation is a demand-letter assignment that raises both criminal and civil potential liability. A professor can teach students to look first at the relationship between the alleged criminal conduct and the civil dispute. If the two are essentially unrelated, then using potential criminal charges as leverage in a civil settlement would violate the ethical rules. For instance, a lawyer representing a client in a trademark suit against a restaurant would cross the line by threatening to report the restaurant's employment of undocumented immigrants to federal authorities.[17] Depending on the facts and the state's laws, threats of this nature could also subject the lawyer to charges of extortion, compounding a crime, or other criminal offenses.[18]

But perhaps an assignment's facts give rise to related claims of both civil and criminal liability. For instance, students may be representing a landlord suing a former tenant for intentional damage to a rental unit in a state where this conduct could also amount to criminal mischief. In some states, simply stating the possibility of criminal liability as a fact with no threat or promise attached would fall within ethical boundaries. A recent Illinois ethics opinion concluded as much, stating that a lawyer may send "a demand letter to her client's employer which accurately sets forth the law which includes the potential for both civil and criminal liability," even though the Illinois Rules of Professional Conduct expressly prohibit threatening criminal charges to gain an advantage in a civil matter.[19]

The waters are murkier when it comes to explicit threats to pursue, or offers to refrain from pursuing, criminal charges in exchange for civil settlement. The ABA Ethics Committee concluded in a 1992 opinion that the Model Rules permit this tactic so long as the "criminal matter is related to the civil claim, the lawyer has a well-founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process."[20]

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[15] *Id.* at *1.

[16] *Id.* at *3.

[17] *E.g.*, N.C. State Bar Ethics Comm'n, Formal Op. 3 (2005), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-3/ (ruling that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations).

[18] *See* ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 92-363, at 3-4.

[19] Ill. State Bar Ass'n, Pro. Conduct Advisory Op. No. 20-03 (2020), https://www.isba.org/sites/default/files/ethicsopinions/Opinion%2020-03%20%28Board%20Final%29%28May%202020%29.pdf (discussing threats of criminal prosecution in a civil matter) (citing ILL. R. PRO. CONDUCT 8.4(g)).

[20] ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 92-363, at 1.

Nonetheless, professors should advise students that a lawyer rarely encounters a clear-cut situation when it comes to threatening criminal prosecution. Even in states with no *per se* prohibition, lawyers must still consider whether such threats may amount to harassment, interference with the administration of justice, or criminal conduct such as extortion.[21] Lastly, professors should remind students that a lawyer may choose to refrain from making threats as a matter of professionalism.

3. Demand letters teach professionalism and civility.

Finally, demand letters offer an opportunity to discuss concepts related to civility in the profession. Most states have some form of professionalism code with provisions that directly address communications between lawyers and opposing counsel or parties.[22] The professor can start the conversation with students by describing how some professionalism codes provide more than aspirational standards. For example, in Arizona a lawyer may be disciplined for unprofessional conduct, defined as substantial or repeated violations of the Lawyer's Oath or Creed of Professionalism.[23]

When discussing professionalism in relation to demand letters, the baseline should always be adherence to the ethical principles discussed above. Beyond that, the professor may choose to facilitate a discussion regarding the meaning of "zealous" advocacy. The Preamble to the Model Rules of Professional Conduct states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[24] The professor and students can discuss whether zealousness and civility are inherently at odds, forcing a lawyer to choose between duties to the client and duties to the profession. The professor could then bring up the many ways in which a client's interests are better served by professional and civil behavior. For example, the professor could provide examples of how lawyers' incivility in demand letters led to litigation relating to the demand itself, rather than the underlying dispute.[25] The professor could also describe how civility and professionalism prevent protracted disputes and encourage early settlement.

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[21] *Id.* at 2-3.

[22] *See, e.g.*, ARIZ. SUP. CT. R. 31, *A Lawyer's Creed of Professionalism of the State Bar of Arizona*, at (B)(1); *see also* ABA Center for Pro. Resp., *Professionalism Codes* (Mar. 12, 2019), https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/ (providing state-by-state professionalism codes).

[23] ARIZ. SUP. CT. R. 31(a)(2)(E), 54(i).

[24] MODEL RULES OF PROFESSIONAL CONDUCT pmbl.

[25] *See, e.g.*, Neville L. Johnson & Douglas L. Johnson, *My Big Mouth!*, DAILY JOURNAL, https://www.dailyjournal.com/mcle/432-my-big-mouth (providing examples of demand letters that resulted in the receiving party filing suit for civil extortion).

4. Conclusion

A demand-letter assignment creates rich learning opportunities without a heavy resource demand on the professor. Weaving a demand letter into an existing advocacy assignment reinforces persuasive-writing skills while opening the door to a thoughtful discussion of ethics, civility, and professionalism.

To learn more about the substance of demand letters and the related ethical issues, we recommend the following resources.

- Wayne Schiess, WRITING FOR THE LEGAL AUDIENCE (2d ed. 2014), Chapter 6: *Writing to Opposing Counsel*.
- Alexa Chew & Katie Rose Guest Pryal, THE COMPLETE LEGAL WRITER (2016), Chapter 12: *Demand Letter*.
- Jason Dykstra, *Govern Yourself Accordingly: Crafting Effective Demand Letters*, THE ADVOCATE, Nov./Dec. 2017, at 50.
- Peter H. Geraghty, *Making Threats*, YourABA (Oct. 2008), http://anyflip.com/sfej/jswb/basic.
- Allison Martin, *Six Tips for Writing Effective Demand Letters*, Res Gestae 28 (Oct. 2013).
- Terry Carter, *SHUT UP! The Art and Craftiness of Cease-and-Desist Letters*, 104 A.B.A. J. 54 (July 2018).