

# A Shot Across the Bow: How to Write an Effective Demand Letter

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*Whether it is strikes or war, even the biggest battles in history have ended sitting down at a table. What is better — to be a boxing champion or a chess champion? I prefer chess.<sup>1</sup>*

## I. Introduction

Often the bravado with which war is commenced ultimately proves costly, with an outcome uncertain and a goal illusive.<sup>2</sup> In days of yore, to minimize the risks of a full-scale war, a wise ship captain who spotted a pirate ship on the horizon would order a *shot across the bow* — a well-aimed cannonball fired to create a small explosion in front of the opposing ship as a warning.<sup>3</sup> The captain's decision, grounded in prudence, economics, good sportsmanship, and self-interest, would elicit a response. The ship on the receiving end of the shot could turn back, halt and raise a white flag, send out a scouting party to “talk things over,” or return fire and engage in battle. Unlike a “shot in the hull,” which most certainly would have led to a full-fledged fight, a shot across the bow at least gave the opposing ship's captain and crew options by which they could avoid a costly battle.

Litigation is the civil dispute equivalent of war,<sup>4</sup> and like war it is costly, the

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<sup>1</sup> Lech Walesa (quoted in Bob Woolf, *Friendly Persuasion* 109 (Putnam Adult 1990)).

<sup>2</sup> In Operation Iraqi Freedom, “shock and awe” in March 2003 and a declaration of “Mission Accomplished” two months later have proved by 2008 to be costly, with the outcome uncertain, and the goal of a “free and democratic Iraq” to be ever more elusive. See e.g. Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (Penguin Press 2006); Bob Woodward, *State of Denial: Bush at War, Part III* (Simon & Schuster 2006).

<sup>3</sup> See “fire a shot across sb's/the bows,” *Cambridge Idioms Dictionary* (2d ed., Cambridge U. Press 2006). The actual use of a shot across the bow is described in *U.S. v. Officers of the U.S.S. Mangrove*, 188 U.S. 720, 721-22 (1903) and *U.S. v. De La Rosa-Hernandez*, 157 Fed. Appx. 219, 220 (11th Cir. 2005); the phrase is used metaphorically in *Thomas v. Guardsmark, LLC*, 487 F.3d 531, 535 (7th Cir. 2007).

<sup>4</sup> See Carrie Menkel-Meadow, *Access to Justice and The Social Responsibility of Lawyers: When*

outcome is uncertain, and the goal, usually money, is often spent in the effort.<sup>5</sup> An attorney's skill is measured by the ability to achieve as much of the client's goal as possible, with minimal cost and delay. This truism counsels that litigation should be a last resort for resolving a dispute and that an attorney, like a ship captain in the days of yore, should give the opposing party options by which it can avoid a full-scale legal battle. Such options are provided through the pre-litigation process of negotiated settlement.

Because of the risks of litigation, only a small fraction of disputes go to trial.<sup>6</sup> Therefore, it is curious why so much time, training and effort goes into teaching law students and lawyers how to litigate, and so little into how to efficiently achieve as much of a client's goal as possible through the process of negotiated settlement.<sup>7</sup> Indeed, negotiated settlement is an art and science unto itself. In resolving civil disputes, "a haphazard approach" to a negotiated settlement "simply may be a waste of time, if not counterproductive."<sup>8</sup> The process of dispute resolution through effective negotiated settlement, ironically like the paradigm for conducting war, involves carefully crafted strategies.<sup>9</sup>

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*Litigation is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering*, 10 Wash. U. J.L. & Policy 37, 61 (2002). An alternative view that litigation is an "investment" has gained some favor in recent years, but does not diminish the notion that *as between litigants* litigation is war, albeit with pens not swords as an apt metaphor. Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. Colo. L. Rev. 193 (2007); David M. Trubeck et al., *The Cost of Ordinary Litigation*, 31 UCLA L. Rev. 72-76, 78 (1983).

<sup>5</sup> One study analyzed the "take no prisoners" litigation strategy of Toro, a national lawn mower manufacturer. Jonathan R. Cohen, *Apology and Organizations: Exploring An Example From Medical Malpractice*, 27 Fordham Urb. L.J. 1447 (2000). Traditionally, Toro would immediately refer lawsuit to outside counsel to be aggressively defended. In 1991, Toro changed its approach and decided to mediate the cases first. In mediation, after exchanging essential information about the claim, Toro's counsel would typically express sympathy for the claimant's injury and then make what Toro saw as a fair offer of settlement. The net result was that under this new approach, Toro settled claims far more rapidly and at far less cost. The life span of a case went from 24 months to four months; average payout from \$68,368 to \$18,594; and average costs and fees per claim went from \$47,252 to \$12,023. *Id.* at 1460-61; *see also* Jonathan R. Cohen, *The Culture of Legal Denial*, 84 Neb. L. Rev. 247, 26-66 (2005).

<sup>6</sup> Another study showed that the median percentage of civil cases that went to a jury was only .5 percent, and only 3.6 percent were tried to a judge. Richard Y. Schauffler et al., *Examining the Work of State Courts, 2005: A National Perspective from the Court Statistics Project* 321 (National Center for State Courts 2006) (available at [http://www.ncsconline.org/D\\_Research/csp/2005\\_files/O-EWWhole%20Document\\_final\\_1.pdf](http://www.ncsconline.org/D_Research/csp/2005_files/O-EWWhole%20Document_final_1.pdf)).

<sup>7</sup> *See* Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 Tul. L. Rev. 76, 93-94 (1984). To be sure, in recent years law schools have begun to offer classes in mediation, negotiation, and ADR, but litigation training for law students remains king.

<sup>8</sup> *Id.* at 97.

<sup>9</sup> The military paradigm traces back to the 13 principles set forth in Sun Tzu's *Art of War*, written in the 5th Century B.C. Exploration of the settlement paradigms is beyond the scope of this article, but generally settlement of disputes follows what has been called a "uniform negotiation model." Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 768-70 (1984). This linear model means that disputes usually settle

What's more, settlement negotiations typically begin with a strategy that is the legal equivalent of a shot across the bow — a demand letter.

“As the name suggests, a demand letter is a letter written on behalf of a client in which the attorney demands that the recipient take or cease taking a certain action.”<sup>10</sup> While most lawyers are familiar with demand letters, far fewer are familiar with the specific strategies behind their effective use. Indeed, there is more to an effective demand letter than merely making a demand. In this article, I argue that writing an effective Shot Across the Bow letter requires the attorney to engage in specific analytical, writing, and tactical strategies. I also propose a methodology for the preparation and execution of such a letter. By breaking down the steps and providing an example, I contend that a well-conceived, well-written, and well-sent Shot Across the Bow letter can increase the likelihood of a prompt, efficient, and satisfactory end to a civil dispute.<sup>11</sup>

This article is broken down into several sections. Section II discusses the general strategy of a demand letter, which is to favorably influence the recipient's perception of the risks and rewards implicated by the dispute at hand. Section III is a short section noting that the initial step to devising a Shot Across the Bow letter is an assessment of the client's risk tolerance and practicalities of the journey upon which the client is about to embark. Section IV builds on Section II by discussing specific strategies by which a letter writer can favorably influence an opposing party's perception of risk. Section V examines the role of the sender of a demand letter, and Section VI analyzes the strategy of the letter's content. In Section VII, the issue of who should receive the letter is explored, and Section VIII discusses the seemingly simple but critical issue of the method of delivering the letter. Section IX examines the process of assessing the effectiveness of the letter. Finally, in Section X, the article sets forth how to actually write a Shot Across the Bow letter, with an example demonstrating the strategies and tactics discussed throughout the article.

## II. The General Strategy of a Demand Letter and Rational Choice Theory

According to legend, the first letter ever was written by Taffimai Metallumai, a Neolithic cave child who requested a spear for her beloved father, Tegumai Bopsulai.<sup>12</sup> Since then, senders have continued to work to craft effective

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somewhere mid-range between each party's initial demand, and the process consists of the following steps: 1) setting "target points" or "aspiration levels," the dream result or ceiling; 2) setting "resistance points" or "reservation points," the break-off point or floor; and 3) the ritual of offer and demand with patterns of "reciprocal concessions." *Id.*

<sup>10</sup> Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, *Writing for Law Practice* 232 (Found. Press 2004).

<sup>11</sup> Insert the words “quick, cheap and happy” — the way most attorneys and their clients want disputes to be resolved.

<sup>12</sup> Rudyard Kipling, *How the First Letter was Written* in *Just So Stories* 123 (Doubleday 1907)

letters — letters that convince the reader to do what the sender wants.

In 1930, eons after the seminal spear letter, University of Washington Dean Henry A. Burd published his classic work entitled *Business Letters, Their Preparation and Use*,<sup>13</sup> addressing how to write, among others, the “collection letter.” The general requirements set forth by Professor Burd remain as true today as they were 75 years ago, or 100,000 years ago when Taffimai asked for the spear, for that matter. Professor Burd counseled that the writer must have “an intimate knowledge of human nature, the quality of imagination which will allow him the ability to put himself in another’s place, and command of language that will enable him to express his thoughts to a nicety.”<sup>14</sup>

The demand letter should “fit the reader.”<sup>15</sup> To accomplish this feat, the sender must

1. study the problem and visualize the reader,
2. collect and organize the material,
3. write the letter, and
4. evaluate the response and react appropriately.

These principles apply not only to business letters but to the lawyer equivalent: the Shot Across the Bow letter.

Thus, in developing an effective Shot Across the Bow letter, the sender must 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. In a world of unlimited wants and limited resources, when people, organizations, or countries interact, disputes are certain to occur because some have what others want. Dispute resolutions involve risk and are influenced by the preferences each party has for risk.<sup>16</sup> Necessarily, at root the lawyer must craft the letter to manipulate the recipient’s perception of and response to the risks that the lawyer and his client’s claim pose to the recipient.

Stated generally, risk is an evaluation of the likelihood of securing what one wants balanced against its cost. In deciding what steps to take to satisfy those wants, these actors create mathematical mental models. People faced with a dispute “rely on models all the time,” because by “abstracting from the seemingly chaotic details of real life, models make it possible to perceive patterns otherwise

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(available at [http://books.google.com/books?id=mQMC AAAAYAAJ&pg=PA18&source=gbs\\_selected\\_page&cad=0\\_1#PPA123,M1](http://books.google.com/books?id=mQMC AAAAYAAJ&pg=PA18&source=gbs_selected_page&cad=0_1#PPA123,M1)).

<sup>13</sup> Henry A. Burd & Charles J. Miller, *Business Letters, Their Preparation and Use* (McGraw- Hill 1930).

<sup>14</sup> *Id.* at 250.

<sup>15</sup> *Id.*

<sup>16</sup> Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. Cal. L. Rev. 113, 128 (1996); see also Howard Raiffa, *The Art and Science of Negotiation* 44-65 (Belknap Press 1982).

hidden from view.”<sup>17</sup> Actors in such a dispute would need to conclude that the cost (C) of the fight is less than the value of that goal (G) to that actor multiplied by the likelihood (L) of achieving it. This concept can be represented as:  $C < L(G)$ .<sup>18</sup> The United States Supreme Court said it this way: “most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction cost of further litigation, are greater than the cost of the settlement package.”<sup>19</sup>

The formula, called the Rational Choice Theory or Bargain Theory, explains that an objectively rational actor must conclude that the chance of securing the prize is worth the cost of trying.<sup>20</sup> The lower the likelihood (L) or the greater the cost (C), the higher the value of the goal (G) must be for the rational actor to decide to wage the fight. Alternatively, an inexpensive fight (low C) that is likely to succeed (high L) should rationally be undertaken even to achieve a modest goal (G). The model works from either side of the dispute, as both parties engage in the mental process.

### III. The Initial Step — Don’t Poke the Bear Unless You Are Ready for a Fight

The preliminary step to devising a Shot Across the Bow letter is an assessment of the client’s risk tolerance and practicalities of the journey upon which the client is about to embark. Going after Exxon Mobil obviously involves a different cost calculus for the sender of the Shot Across the Bow than does making a demand on Joe’s Gas Station on the corner. In some cases, a combination of the financial resources and the size of the opponent relative to the amount in dispute, the resources of the client, and the uncertainty of success

will counsel against “poking the bear”<sup>21</sup> and even sending the letter.<sup>22</sup>

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<sup>17</sup> Robert G. Bone, *Modeling Frivolous Lawsuits*, 145 U. Pa. L. Rev. 519, 525 (1997).

<sup>18</sup> This formula can be further broken down to compute the plaintiff’s bargaining limit under which he will “(1) multiply the expected damage award by the probability that the court will award it to him, (2) subtract from the product in (1) the amount of his anticipated litigation costs, (3) add his settlement costs, and (4) subtract his opportunity gains from receiving payment now as opposed to a judgment later.” Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry Into The Selection of Settlement and Litigation Under Uncertainty*, 56 Emory L. Rev. 619, 630 (2006) (citing Alan E. Friedman, *Note: An Analysis of Settlement*, 22 Stan. L. Rev. 67 (1969)).

<sup>19</sup> *Evans v. Jeff D.*, 475 U.S. 717, 734 (1986); see also Michael McCann, *It’s not About the Money: The Role of Preferences, Cognitive Biases and Heuristics among Professional Athletes*, 71 Brooklyn L. Rev. 1501, 1503-10 (2006).

<sup>20</sup> See e.g. Richard Hensen, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. Rev. 391, 393 (1990); see generally Richard A. Posner, *Economic Analysis of the Law* (7th ed., Aspen Publishers 2007).

<sup>21</sup> The author cannot divine the origin of this phrase. He first heard it from his daughter

It is essential for the client to understand the costs and risks of litigation, settlement, and the value of just “walking away.” Although client counseling and informed consent are beyond the scope of this article,<sup>23</sup> these are essential considerations for an attorney prior to devising and sending a Shot Across the Bow letter. Since the lawyer writing the Shot Across the Bow letter already knows his client’s calculus (or should), the balance of this analysis focuses on evaluating the opponent’s risk calculus (usually the putative defendant) since it is the opponent’s risk tolerance that the Shot seeks to penetrate.

## IV. Influencing the Opponent’s Perception of Risk

### *A. Generally Maximizing the Opponent’s Rational Perception of His or Her Risk — Breaking Down “C (cost),” “L (likelihood),” and “G (goal)”*

The strategy of writing a Shot Across the Bow letter at its core involves analyzing and influencing an opponent’s perception of risk. This process requires a detailed analysis of the elements of risk introduced earlier — cost (C), likelihood (L), and goal (G), all of which are unique to the situation and the recipient of the letter.<sup>24</sup> In terms of the formula from Section II ( $C < L(G)$ ), these are the basic strategies for favorably influencing the opponent’s perception of risk: 1) increasing the opponent’s perception of the cost of the fight (higher C); 2) reducing the opponent’s perception of his or her chances of winning the fight (lower L); 3) reducing in the opponent’s mind the importance of the goal sought through the fight (lower G); or 4) some combination of the three.

With regard to C (perceived costs), the letter writer should attempt to increase the opponent’s perception of the costs of the fight. “Cost” would obviously involve actual dollars — the amount of money it would take to fight the possible lawsuit as well as the damages demanded. Cost, however, would also include the opportunity cost of using the money for the lawyers instead of investing in the company, lost productivity for the employees who are required to participate in the litigation,<sup>25</sup> the cost of negative public

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<sup>22</sup> See Rhee, *supra* n. 18, at 682 (discussing risk tolerance for litigation as a function of the relative possible cost as a percentage of the party’s wealth).

<sup>23</sup> An attorney has a fiduciary obligation to discuss with his or her client the risks of litigation and it is the client’s ultimate decision to proceed or not. See generally Robert Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinable Offense*, 29 W. St. U. L. Rev. 235, 243 (2002).

<sup>24</sup> Rhee, *supra* n. 18, at 671.

<sup>25</sup> David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. Pa. J. Lab. & Emp. L. 73, 81 (1999).

relations,<sup>26</sup> the drain in energy from those at the top of the company who are forced to deal with the lawsuit rather than run the company, and the psychological toll generally associated with litigation.<sup>27</sup> The writer of a Shot Across the Bow letter should make sure that the recipient of the letter truly appreciates the potential costs of a full-scale legal battle.

With regard to L (likelihood of success), the letter writer should attempt to reduce the opponent's perceived chances of success and convince the opponent that he or she will be fighting a lost cause. This can be accomplished through a combination of three strategies. First, and most obviously, the letter writer can lay out the legal arguments that demonstrate the strength of the letter writer's position under the law.<sup>28</sup> Second, the letter writer can explain why his or her client's position makes sense in terms of compelling public policy considerations. Third, if the facts of the matter permit, the letter writer can explain why the emotional components of the case favor the client and how the emotional facts would be compelling in court. If possible, the facts should be presented with appropriate emotion. However, not all legal situations evoke strong emotions. For example, a child abuse dispute is imbued with emotion,<sup>29</sup> whereas a UCC row between banks contesting the Midnight Deadline lacks pathos altogether.<sup>30</sup>

With regard to G (the opponent's goals), the letter writer should attempt to reduce the importance of the opponent's goals in the mind of the opponent (i.e., should attempt to convince the opponent that there is less to fight for). In this regard, the letter writers must account for the opponent's material goals — like money — as well as the opponent's subjective non-material goals such as justice, sentiment, or revenge. The less import that the recipient places on achieving his or her goals (both monetary and non-monetary), the more likely the opponent will settle on terms favorable to the sender.<sup>31</sup>

### ***B. Unconscious Biases Generally***

The rational choice model discussed above, although helpful, has a fundamental flaw. The model assumes that the opposing party will proceed rationally in considering whether the likelihood of succeeding in litigation and reaping the rewards is worth the cost. However, it is rare that parties' interactions

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<sup>26</sup> See Kenneth L. Shropshire, *Diversity, Racism and Professional Sports Franchise Ownership: Change Must Come From Within*, 67 *Colo. L. Rev.* 47, 88 (1996) (discussing negative public relations effects of litigation on corporation.)

<sup>27</sup> Trubeck et al., *supra* n. 4, at 120.

<sup>28</sup> Calculating the likelihood of winning (or losing) based on the objective known facts and the established law is a subjective art, although we lawyers sometimes like to cloak it in a shroud of "reasoned judgment" to make it sound more like a science. See Rhee, *supra* n. 18, at 643, 690.

<sup>29</sup> See e.g. *DeShaney v. Wisconsin*, 489 U.S. 189 (1989).

<sup>30</sup> See e.g. *Colonial Bank v. First National Bank of Harvey*, 898 F. Supp. 1220 (N.D. Ill. 1995).

<sup>31</sup> See, e.g. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *J. Leg. Stud.* 225, 227-47 (1982).

will be brokered completely under such a rational choice model because that model depends on a series of assumptions that do not often hold true in real conflicts. Among these assumptions are that the parties have identical estimates as to the probabilities of which side will win, that the parties have symmetrical stakes in the litigation, that the parties are risk-neutral, and that the parties don't engage in strategic behavior while negotiating.<sup>32</sup> More importantly, such a model assumes that humans are completely rational — alas, they are not.

Risk assessment, like many deliberative processes, is often influenced by “cognitive biases” — subconscious mental processes that impair rational thought.<sup>33</sup> These biases affect perceptions of risk and, as Cass Sunstein has said, make rational choice models “often wrong in the simple sense that they yield inaccurate predictions.”<sup>34</sup>

The literature on cognitive biases indicates that people systematically deviate from rational thinking. They make inferences based on their attention and memory as if those processes are infallible; they do not take into account that their brains automatically conduct a significant amount of processing outside of their awareness.<sup>35</sup>

For the writer of a Shot Across the Bow letter, cognitive biases can be used to influence others' perception and handling of risk. As we will see, the lawyer can move a reader either towards the rational model or in some other direction, depending on which direction is advantageous.

### C. Effective Framing

Perhaps the most-studied cognitive deviation is “framing” — sometimes called “Prospect Theory.”<sup>36</sup> Research by Nobel laureate Daniel Kahneman and the late Amos Tversky revealed that, when making decisions, people tend to exhibit a “fourfold pattern” of attitudes toward risk:

1. faced with a moderate-to-high probability of obtaining a gain,

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<sup>32</sup> Leandra Lederman, *Which Cases Go to Trial? An Empirical Study of Predictors of Failure to Settle*, 49 Case W. Res. L. Rev. 315, 321 (1999); see McCann, *supra* n. 19, at 1151-68 for an excellent discussion of cognitive biases in the negotiation of professional athlete contracts.

<sup>33</sup> McCann, *supra* n. 19, at 1510.

<sup>34</sup> Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. Chi. L. Rev. 1175, 1175 (1975) (cited in McCann, *supra* n. 19, at 1518).

<sup>35</sup> Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 Cornell L. Rev. 739, 750-52 (2000).

<sup>36</sup> See generally Todd McElroy & John J. Seta, *Framing the Frame: How Task Goals Determine the Likelihood and Direction of Framing Effects*, 2 Judm. & Dec. Making 251 (Aug. 2007); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263 (1979); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. Chi. L. Rev. 163, 166-67 (2000) [hereinafter Guthrie, *Framing Frivolous Litigation*]; Chris Guthrie, *Prospect Theory, Risk and the Law*, 97 Nw. U. L. Rev. 1115, 1117-19 (2003) [hereinafter Guthrie, *Prospect Theory*]; *Allen v. Chance Mfg. Co.*, 873 F.2d 465, 470 n. 5 (1st Cir. 1989).



- they are risk averse;
2. faced with a moderate-to-high-probability of suffering a loss, they are risk seeking;
  3. faced with a low probability of obtaining a gain, they are risk seeking; and
  4. faced with a low probability of suffering a loss, they are risk averse.<sup>37</sup>

Under principle 1, plaintiffs with sound legal claims tend to be risk averse because they view the goals of their lawsuits as potential gains. Thus, plaintiffs generally prefer to settle their cases and avoid trial. Defendants, however, typically view threatened lawsuits as potential losses. As a result, under principle 2, defendants tend to be more risk seeking and are generally more willing to take the risky path and litigate.<sup>38</sup>

The writer of a demand letter should be mindful of these human characteristics and frame the proposal accordingly.<sup>39</sup> Because the recipient of the demand letter is the potential “defendant” in any ensuing lawsuit, the letter writer should attempt to present his or her demand as a gain for the opponent rather than a loss. If the writer is successful at framing the request as a gain for the recipient, then the other side will be less likely to assume the risk of fighting the matter in court.<sup>40</sup> The letter writer should be aware, however, that other factors will also influence how the opponents view their choices, such as their prior expectations, the characteristics of the litigation, and their values (for example, whether they have an overriding concern for justice). With these factors in mind, the writer will adjust his or her thinking and the letter accordingly.<sup>41</sup>

#### ***D. Highlighting Urgency***

When making demands, the lawyer should also be conscious of the opponent’s intertemporal bias. Rational Choice Theory discounts the present value of a risk or reward that will not occur until the future. For example, \$10 today is worth more than \$10 in a year, but you can discount that \$10 in a year by a 5 percent interest rate and determine that \$10 in a year is the same as \$9.50 today. It’s an even trade. But humans tend to discount deferred gains and losses more than Rational Choice Theory would indicate.<sup>42</sup> People want things now,

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<sup>37</sup> Rachlinski, *supra* n. 35, at 750-52.

<sup>38</sup> Guthrie, *Framing Frivolous Litigation*, *supra* n. 36, at 168.

<sup>39</sup> Rachlinski, *supra* n. 16, at 118; Guthrie, *Prospect Theory*, *supra* n. 36, at 1123.

<sup>40</sup> Rachlinski, *supra* n. 16, at 120.

<sup>41</sup> *Id.* at 144-47.

<sup>42</sup> “With regard to time, cognitive psychology describes this phenomenon as an “intertemporal” or “presentist” bias that prompts a tendency to discount future risks and rewards more heavily than is rationally warranted. Accordingly, people disproportionately favor present consumption over deferred gratification.” Richard J. Lazarus, *Environmental Law After Katrina*:

even when waiting for the payout will actually result in a greater benefit. We are an impatient species. Put another way, even taking into account calculations of the time-value of money, humans value immediate gains and fear immediate risks more than reason dictates they should. A skilled lawyer will make use of this bias when she frames her demand, highlighting the urgency of the danger she poses to the opponent and emphasizing the immediacy of the benefits that the opponent will accrue by complying.

### ***E. Maximizing Hindsight Bias***

Hindsight being 20/20, when looking back, humans have an innate tendency to overestimate the likelihood with which they could have anticipated the occurrence of a future event.<sup>43</sup> In other words, people “often believe that they knew something was going to happen when in fact they did not.”<sup>44</sup> Someone accused of negligence, for example, may wonder how he could have been so careless, and already have a lower perception of his chances to win at trial than the facts would suggest. A somewhat similar tendency, described as the bias of illusory correlations, can have a similar effect on the opponent’s perception. Humans are prone to see causal connections between events that are actually the product of random chance.<sup>45</sup>

Hence, a demand letter that fuses into its claim as many facts as can be related to its underlying allegation may have a better likelihood of impacting the opponent’s assessment of his or her risk. An attorney writing the Shot Across the Bow letter must tell the story in a way that points the finger of responsibility at the opponent. One way to exploit hindsight bias is to show the recipient of the letter that they were warned of the hazard or outcome that occurred. The inclusion of factual details that implicate the foreseeability of the event in dispute will often trigger hindsight bias, making the argument more compelling and somewhat self-fulfilling.<sup>46</sup>

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*Reforming Environmental Law by Reforming Environmental Lawmaking*, 81 Tul. L. Rev. 1019, 1035 (2007); Muel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 Utah L. Rev. 1329, 1369.

<sup>43</sup> Guthrie, *Prospect Theory*, *supra* n. 36, at 1499, 1504; *see also* Jennifer M. Bonds-Raacke et al., *Hindsight Bias Demonstrated in the Prediction of a Sporting Event*, 141 J. Soc. Psychol. 349 (2001).

<sup>44</sup> McCann, *supra* n. 19, at 1474 (citing Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 Psychol. Bull. 311, 311-12 (1990)).

<sup>45</sup> Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499, 1503-05 (1998).

<sup>46</sup> The prevalence of hindsight bias is of great concern to trial lawyers. Because jurors hear of the events after they occur, they assume, with the benefit of hindsight, that they could have been prevented. Stated another way, someone did something wrong. Merrie Jo Stallard, “Insight #1 — Managing Hindsight Bias,” *Litigation Insights* 2, <http://www.litigationinsights.com/newsletters/vol1.pdf> (last accessed June 5, 2008) (citing Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*, 22 L. & Human Behavior 671 (1998)).

### ***F. Tapping into Egocentricity***

In addition to the imperfections in humans' assessment of risk, there are several biases that hinge upon egocentric motivation. For example, people tend to evaluate events in self-serving ways, construing successes to be the result of their own efficiency or control. Similarly, humans construe failures as being caused by bad luck or circumstances external to them.<sup>47</sup> This is, in part, a mechanism by which self-esteem is enhanced and protected,<sup>48</sup> and it may have a profound effect on an opponent's perception of what occurrences he may attribute to himself. A demand letter involves a writer and reader who direct their attention at executing their own subjective responses to the content rather than bother with the perception of others.<sup>49</sup>

The prevalence of self-centered bias plays two roles in crafting a Shot Across the Bow letter. First, the sender must understand that attributing blame to the recipient for the underlying dispute will meet with strong resistance regardless of the truth. Therefore, spending too much time and ink to convince the listener of his or her blameworthiness should be avoided. Second, egocentric bias actually can be used to facilitate settlement. In designing a Shot Across the Bow letter, this cognitive bias can be employed by allowing the recipient of the letter to claim credit for solving the problem. By enlisting your opponent as an ally and giving him or her credit for solving the problem, your client can be well served with a favorable result.

### ***G. Taking Advantage of Occurrence Bias***

Another important bias that attorneys must consider in developing a strategy for a Shot Across the Bow letter is what Harvard Professor Daniel Gilbert terms "the Hound of Silence."<sup>50</sup> The human mind focuses on what happened, not on what did not happen. Sir Francis Bacon observed that "[b]y far the greatest impediment and aberration of human understanding arises from [the fact that] . . . those things which strike the sense outweigh things which, although they may be important, do not strike it directly."<sup>51</sup> This human characteristic to consider occurrences, but not non-occurrences, creates a strong tendency to overemphasize past events. People who are forced to consider details of what did not occur (what might have happened) as well as what did occur arrive at a more

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<sup>47</sup> Langevoort, *supra* n. 45, at 1505.

<sup>48</sup> *Id.*

<sup>49</sup> See Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. Personality & Soc. Psychol. 322 (1979); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. Econ. Perspectives 109 (Winter 1997) (discussing the impact of self-serving biases on settlements); Miron Zuckerman et al., *The Egocentric Bias: Seeing Oneself as Cause and Target of Others' Behavior*, 51 J. Personality 621 (Dec. 1983).

<sup>50</sup> Daniel Gilbert, *Stumbling on Happiness* 106-19 (Vintage 2007). This phrase comes from a Sherlock Holmes story in which the key evidence is that the dogs did not bark, thus establishing that the perpetrator must have come from within the home. *Id.* at 106-07.

<sup>51</sup> *Id.* at 109-110 (citing Francis Bacon, *Novum Organum* (1620)).

accurate view of the situation. For the author of a Shot Across the Bow letter, this psychological phenomena means that the full picture of what happened and did not happen must be explored and explained. The writer cannot assume that the recipient will consider the non-occurrences without them being specifically pointed out.

### H. Considering Individual Characteristics

The existence or strength of any bias varies among individuals and in particular circumstances.<sup>52</sup> Research indicates that age,<sup>53</sup> wealth,<sup>54</sup> gender,<sup>55</sup> cultural background<sup>56</sup>, and existing beliefs<sup>57</sup> can all affect the opponent's rational decision-making abilities. Additionally, training in statistics and economic reasoning, for example, seems to reduce the susceptibility of some individuals to cognitive biases.<sup>58</sup> Similarly, individuals with higher levels of general cognitive capacity (for example, those who aced the SATs) are more likely to make the economically rational decision.<sup>59</sup> Whether the opponent is accountable to another for his decision also has an impact on how he perceives risk. Research suggests that if a person knows in advance of forming a decision that he or she will have to explain it to, say, a boss, who is reasonably well informed and who is interested only in accuracy, then there is a greater chance that the person will act with economically rational behavior.<sup>60</sup>

Compounding the sender's task of analyzing how to draft of Shot Across the Bow letter is the fact that people are dynamic. An individual's perception of risk can change over time, as emotions, mood, and memories that are triggered

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<sup>52</sup> Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L.J. 67, 86-87 (2002).

<sup>53</sup> See Hui Wang & Sherman Hanna, *Does Risk Tolerance Decrease With Age?* 8 Fin. Counseling & Plan. 27 (1997) (available at <http://ssrn.com/abstract=95489>) (aversion to risk decreases with age — sometimes called the Life-Cycle Risk Aversion hypothesis).

<sup>54</sup> Research shows that “people who ‘have’ make more risk-averse decisions, while the ‘have-nots’ make more risk-seeking decisions.” Ingmar H. A. Franken et al., *The Rich Get Richer and the Poor Get Poorer: On Risk Aversion In Behavioral Decision-Making*, 1 Judm. & Dec. Making 153, 156 (Nov. 2006).

<sup>55</sup> See Christine R. Harris & Michael Jenkins, *Gender Differences in Risk Assessment: Why do Women Take Fewer Risks than Men?* 1 Judm. & Dec. Making 48 (July 2006).

<sup>56</sup> See e.g. Jessie X. Fan & Jing Jian Xiao, *A Cross-Cultural Study In Risk Tolerance: Comparing Chinese and Americans* (Take Charge Am. Inst. Consumer Fin. Educ. & Research Working Paper 5-3, Dec. 2005) (available at <http://ssrn.com/abstract=939438>) (concluding that Chinese are more risk tolerant than Americans).

<sup>57</sup> This is called “confirmation bias,” that is, people ignore or discount information that challenges existing beliefs. McCann, *supra* n. 19, at 1512-13.

<sup>58</sup> Mitchell, *supra* n. 52, at 87.

<sup>59</sup> *Id.* at 94-95.

<sup>60</sup> *Id.* at 110-14.

by certain situations can all have an impact on decision-making.<sup>61</sup> In evaluating the recipient, the lawyer must take into account all of these factors and determine how to best frame his demand to influence the opponent's perception of risk. To effectively deal with this complex array of biases, the lawyer crafting the demand letter should create a checklist to help the lawyer think through the content and tenor of the letter.

## V. Strategies Regarding the Sender

Sometimes demands are best not committed to writing. A telephone call or a personal meeting may be the appropriate means to try and resolve a dispute.<sup>62</sup> A matter involving a longstanding personal relationship or a delicate situation involving a personal issue might best be raised in person. This article focuses, however, on the Shot Across the Bow letter and assumes that the actor has made a determination that such a letter is appropriate.

With the opponent analyzed and the determination made that a Shot Across the Bow letter is appropriate, the next step is to determine the sender. The letter may come from the client or the attorney. A personal appeal between the principals in a dispute may be more effective than a letter from an attorney.<sup>63</sup> In a litigious society, a letter from an attorney may well be forwarded by the recipient to his or her own attorney for analysis and response. In certain circumstances, that level of scrutiny or cost should be avoided. Lawyers tend to be more faithful to the rational choice theory, and sending a "lawyer's letter," which is likely to be forwarded to the recipient's own lawyer, may minimize the sender's ability to alter the opponent's risk perception through the cognitive biases described above. Moreover, a "lawyer's letter" often signals that one is ready for battle.

The softest Shot Across the Bow letter, then, is a letter directly from the client to the principal on the other side. This approach would be appropriate, for example, where a discrete dispute has interrupted a long standing relationship that a client may wish to continue into the future, such as rift between a general contractor and a frequently-used subcontractor. The position of a client and his relationship with the opponent may be such that a brief client letter will accomplish the desired result. Cornelius Vanderbilt is said to have written a letter to a dishonorable gentleman stating: "You have undertaken to cheat me. I will not sue you because the law takes too long. I will ruin you."<sup>64</sup> If you represent a Mr. Vanderbilt, maybe he should send the letter.

Even if the client is the selected sender, the lawyer must nevertheless review the letter for the client. "A layman's unconscious use of the legal implications of

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<sup>61</sup> *Id.* at 67, 87.

<sup>62</sup> Bernard Heller, *The 100 Most Difficult Business Letters You'll Ever Have to Write, Fax, or E-mail*, 8 (HarperCollins 1994).

<sup>63</sup> Henry Weihofen, *Legal Writing Style* 173 (2d ed., West Publ. Co. 1980).

<sup>64</sup> Jeff Buchmeyer, *The Process: Demand Letters and Settlements*, 45 Texas B.J. 837, 837 (1982).

his words may inadvertently say things that prove to be misleading,” or might compromise a future legal position.<sup>65</sup> The balance of this article is written with a view towards the lawyer both writing and sending the letter, but the concepts apply equally to a “ghost letter.”

## VI. Strategies Regarding the Content of the Letter

With the initial analysis done, it is time to write the letter. While the contents of an effective Shot Across the Bow letter are governed by the analysis of the opponent, the mechanics are not. An attorney must write the letter mindful of certain fundamental rules of persuasive writing. Writing must be precise and concise.<sup>66</sup> Hemingway pointed out that “lucidity, the distilling of the fundamental, enhances effectiveness,”<sup>67</sup> and Aristotle taught 2500 years ago:

The component of events ought to be so firmly compacted that if one of them is shifted to another place, or removed, the whole is loosened up and dislocated; for an element whose addition makes no perceptible extra difference is not really a part of the whole.<sup>68</sup>

The writing must be lucid and clear, and spelling, punctuation, and technical proficiency are essential.<sup>69</sup>

As with any effective letter, a Shot Across the Bow letter should follow the “Letter in Three Parts” Rule.<sup>70</sup> The first paragraph should be a single sentence explaining the letter’s purpose — the “signal.” The reader must be put on notice of what lies ahead. A long introduction that builds up to the purpose is generally a distraction to be avoided.

The second section of a letter is the body, which contains the exposition, explanatory analysis, and argument. As the heart of the Shot Across the Bow letter, this part of the letter effectively persuades the reader to accept the writer’s wish — pay the money, cease this activity, or commence that activity. The typical elements of legal persuasion, such as logic, analogy, judicial or statutory “if-then” tests and the classic IRAC method, should be considered and employed as the preliminary analysis dictates.<sup>71</sup> Be pleasant and professional but remember that

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<sup>65</sup> *Id.*

<sup>66</sup> See Weihofen, *supra* n. 63, at 8-61.

<sup>67</sup> Charles J. Moxley, Jr., *Effective Litigative Writing*, 10 J. Bus. & Technical Commun. 143, 158 (1996) (citing Malcolm Cowley, *Introduction* in Ernest Hemingway, *The Sun Also Rises* xviii-xx (Scribner 1962)).

<sup>68</sup> Moxley, *supra* n. 67, at 158 (citing Aristotle, *Poetics* 32 (U. of Michigan Press 1970)).

<sup>69</sup> Moxley, *supra* n. 67, at 159-61; see also Weihofen, *supra* n. 63, at 61-105.

<sup>70</sup> See e.g. Career Development Center, Buffalo State University of New York, *Cover Letters*, <http://www.buffalostate.edu/offices/cdc/cover.html>. (last updated June 2007).

<sup>71</sup> See generally Charles R. Calleros, *Legal Method and Writing* 73-74 (5th ed., Aspen Publishers

being kind can always use some help. As Al Capone, admittedly not a typical authority cited in a law review article, observed “You get much farther with a kind word and a gun than you get with a kind word alone.”<sup>72</sup> The legal arguments are the lawyer’s “gun.”

Even though legal principles may be included, Shot Across the Bow letters should not read like interoffice legal memoranda. The goal of the letter is to transform the recipient’s apathy or antagonism towards the sender’s client into understanding, empathy, or fear. This process is called “action decision sequence” or “decisional momentum” by those who study the science of how decisions are made.<sup>73</sup> In this regard, because human beings are genetically predisposed to understand and be moved by a narrative, a storytelling letter will have greater impact on the reader than a letter missing the elements of character, setting, plot, and theme.<sup>74</sup> As David Ball stated,

Story is the strongest non-violent persuasive method we know. Tell me facts and maybe I will hear a few of them. Tell me an argument and I might consider it. Tell me a story and I am yours. That is why every persuasive enterprise from the Bible to television commercials relies on story.<sup>75</sup>

Rational, analytical arguments appeal to the temporal and organizational structure of the human mind. They convince us because of their truth.<sup>76</sup> By contrast, aesthetic concepts appeal to the emotional structure of the human mind. Storytelling, the use of a narrative to make a point, persuades people because of its “likeliness,” which, in turn, is based on a person’s knowledge about “how things happen in the real world.”<sup>77</sup>

Human experience has three elemental components: 1) individual persons (characters), 2) a surrounding world (setting), and 3) a sequence of action

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<sup>72</sup> Woolf, *supra* n. 1, at 129.

<sup>73</sup> Kathryn M. Stanchi, *The Science of Persuasion; An Internal Exploration*, 2006 Mich. St. L. Rev. 411, 416.

<sup>74</sup> See Joseph Carroll, *Literature and Evolutionary Psychology* in *The Handbook of Evolutionary Psychology* 931 (David M. Buss, ed., John Wiley & Sons 2005) [hereinafter Carroll, *Literature and Evolutionary Psychology*]; Joseph Carroll, *Literary Darwinism: Evolution, Human Nature, and Literature* (Routledge 2004); see also David P. Barash & Nanelle R. Barash, *Madame Bovary’s Ovaries: A Darwinian Look at Literature* (Random House 2005); Joseph Carroll, *The Human Revolution and the Adaptive Function of Literature*, 30 *Phil. & Literature* 33, 39 (2006).

<sup>75</sup> David Ball, *Theater Tips and Strategies for Jury Trials* 66 (NITA 1994) (quoted in Brian Foley and Ruth Anne Robbins, *Fiction 101: A Primer For Lawyers on How to Use Fiction Writing Techniques To Write Persuasive Fact Sections*, 32 *Rutgers L.J.* 459, 465 (2001)).

<sup>76</sup> Tami D. Cowden, *Telling the Client’s Story: Using Fiction-Writing Techniques to Craft Persuasive Briefs*, 14 *Nev. Law.* 32 (Sept. 2006) (“[b]ecause the story structure is so ingrained into human culture, humans are hardwired to root for the hero”).

<sup>77</sup> David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Court*, 23 *Leg. Stud. Forum* 449, 450 (1999).

connected by emotionally meaningful purpose (plot).<sup>78</sup> Themes are the “conceptual organization” that tie together character, setting and plot.<sup>79</sup> Tone is the emotional presentation of such work.

By using these elements, University of Missouri Professor Joseph Carroll notes that authors of literature “wish to influence the feelings of the audience. The author is a person talking to other people about still other people. The author and the audience both respond to characters with emotions that parallel emotions we have in observing real people in the real world. The author responds to the characters and seeks to manipulate or persuade the audience.”<sup>80</sup> Lawyers also seek to manipulate and persuade their audience; the literary elements of character, setting, plot, and theme (with a small dose of tone) are important components to all legal writing and critically important to an effective Shot Across the Bow letter.<sup>81</sup>

The signal having been given, and the story told, the Shot Across the Bow letter, finally, must contain an action sentence that relates to the first sentence and is proven by the middle section of the letter to be the wisest course of action for the recipient. “By \_\_\_\_ you must \_\_\_\_,” is a typical ending to a Shot Across the Bow that not only invites but also almost always elicits a response.

## VII. Strategies Regarding the Targeted Recipient

Once the letter is complete, the question becomes “to whom should it be sent?” While it may seem obvious to send the letter to the person upon whom the client wishes to make a demand, the determination of who (and who else) should receive the letter must also take into account the effect it may have on the opponent’s risk perception, as discussed above. For example, if one is making a demand of an organization, and the natural path is to send the letter to one of the entity’s employees at the heart of the dispute, then carbon copying<sup>82</sup> the opponent’s boss may increase the extent to which the intended recipient feels accountable for his decision making. This feeling of accountability may potentially lead him towards making the economically rational decision.<sup>83</sup>

In addition, although an attorney cannot circumvent an opposing party’s lawyer by communicating directly with the party, the attorney should be mindful of the consequences of sending the Shot Across the Bow letter directly to a

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<sup>78</sup> Carroll, *Literature and Evolutionary Psychology*, *supra* n. 74, at 944.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Professor Sherwin demonstrates this point by examining the narrative genre along with the effects of plot and mood in stories. Richard K. Sherwin, *A Matter of Plot and Voice: Belief and Suspicion in Legal Storytelling*, 87 Mich. L. Rev. 543 (1988).

<sup>82</sup> This is a somewhat curious phrase in a laser printer world.

<sup>83</sup> Mitchell, *supra* n. 52, at 110, 114.



lawyer who might be counsel for the other party should litigation arise. Being somewhat removed from the dispute, counsel will likely be insulated from many of the emotional attachments that can foster cognitive biases. In addition, due to his or her professional training and experience, opponent's counsel will likely not be as susceptible to particular cognitive biases as the opponent.<sup>84</sup> If the attorney does not relay the letter itself, but simply paraphrases it to his client, then an opportunity to influence the opponent's perception of risk may vanish. This is particularly important for demand letters, which are an early opportunity to frame the conflict before the opponent's perception of the risk is largely determined by outside forces such as the opponent's attorney.

### VIII. Strategies Regarding Delivery

Once the letter is ready to be sent, the lawyer should evaluate the moment and method of delivery. Determination of the date and time may include such considerations as whether the opponent will be in town, on vacation, hosting a prestigious special event, or about to receive his yearly bonus. These possibilities may, for example, have an effect on his emotions, his sense of security, his sense of urgency, and the perceived risk.

As for the method of delivery of the Shot Across the Bow letter, the lawyer must choose among the myriad methods including transmission by e-mail, regular mail, Federal Express, personal delivery, or, if the lawyer has real nerve, having the opponent pick it up him or herself. The differences among e-mail, regular mail, and Fed Ex deliveries are mostly centered around how long it will take for the letter to actually arrive, but there is a certain level of formality, seriousness, and urgency to a letter delivered overnight that cannot be matched by a recorded voice chiming "you've got mail." "When someone sees a Fed Ex package, they open it. It's as simple as that."<sup>85</sup>

The disadvantage of written communications is that they necessarily omit information that can be conveyed through non-text means. These include such important clues to the speaker's meaning as "gesture, inflection, pronunciation, vocal expression, fluency, and tone."<sup>86</sup> Without these tools, not only is part of the lawyer's meaning lost, but the opponent's estimation of him will also be skewed. When communication with strangers is conducted through written means, the reader will substitute his own expectancies as to the lawyer's intent and will often

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<sup>84</sup> Note, however, that lawyers too are susceptible to deviations from rational decision making. For example, corporate lawyers often have a tendency to be overly cautious. See Langevoort, *supra* n. 45, at 1518.

<sup>85</sup> Ivan Levison, *Direct Mail, Email and Advertising Copywriting, Reaching C-Level — How eye catching sales letters get top executives to read your mail*, <http://www.levison.com/sales-letters.htm> (June 2003).

<sup>86</sup> Nicholas Epley & Justin Kruger, *When What You Type Isn't What They Read: The Perseverance of Stereotypes and Expectancies over E-Mail*, 41 J. Experimental Soc. Psychol. 414, 415 (2005).

incorporate stereotypes to do so.<sup>87</sup> As a result, the lawyer might choose to deliver the letter in person or arrange for the opponent to pick it up in person in order to utilize these non-text tools and more carefully influence the impressions the opponent forms of the lawyer and the client (and, by implication, the risk attached to the demand).

Mood affects receptivity to bad news.<sup>88</sup> Mood is influenced by the day of week as well as the time of day. Generally, the best days on which to positively receive bad news are toward the end of the week; people tend to be in a better mood as the week progresses and in the afternoon, all other factors being equal.<sup>89</sup> Perception of something analyzed is also colored by a bias called “presentism,” — the view of past or future events in light of current circumstances or frame of mind.<sup>90</sup> Consider shopping at the grocery store for a week’s worth of food while on an empty stomach. The overflowing bags of food that result are a consequence of the unconscious bias of presentism. As Professor Gilbert explains, “brains are imperfect scribes and gaps in conceptualization of yesterday and tomorrow are filled with material we call today.”<sup>91</sup> Like the unconscious biases discussed above in the strategy section, presentism must be considered with respect to the decision of when to send the letter.

These general tactical rules of when to send the letter must be checked by the specifics of the situation. First, verify that the recipient is available to receive the Shot Across the Bow letter. A well-conceived and well-written letter sent to someone not there is the proverbial falling tree not making a sound. Second, the recipient may have a schedule tied to his vocation that increases or decreases his or her receptivity to bad news, like receiving a Shot Across the Bow, to a particular day of the week or time of the day. Litigators usually have court in the morning, and delivering a letter or email first thing may be met with a half glance or annoyance that would otherwise vanish later in the day. A restaurateur faces a day increasing in stress as the sun moves from east to west, and a letter delivered to a restaurant in the morning may well be received by a more relaxed and receptive person. Billing and shipping cycles may counsel for a letter early in the week or late in the month. Holidays matter. Sending a demand on Christmas Eve is likely to elicit scorn and contempt that waiting a week could avoid.

The goal of a demand letter is to persuade the recipient to do something he or she would probably prefer not to do. Selecting the best day and time is an

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<sup>87</sup> *Id.* at 419-20.

<sup>88</sup> See G. Robert J. Hockey et al., *Effects of Negative Mood States on Risk in Everyday Decision Making*, 14 *Cognition & Emotion* 823, 823 (Nov. 2000).

<sup>89</sup> See Steven Reid et al., *Seasonality, Social Zeitgebers and Mood Variability in Entrainment of Mood: Implications for Seasonal Affective Disorder*, 59 *J. Affective Disorders* 47, 51-52 (July 2000); Boris Egloff et al., *Relationships Between Time of Day, Day of the Week, and Positive Mood: Exploring the Role of the Mood Measure*, 19 *Motivation & Emotion* 99, 99 (June 1995).

<sup>90</sup> Gilbert, *supra* n. 50, at 123-39.

<sup>91</sup> *Id.* at 125.

important consideration in avoiding unnecessary impediments to achieving that goal.

## IX. Strategies Regarding the Response

After the letter is sent, it is important to report, validate, and analyze what happened. Before making this assessment, however, it should be determined when the best time is to reconnoiter the effects of the letter, and who is best able to gather the most reliable information — the attorney, the client, or both. Generally, prompt and continuing assessment by both the attorney and client is best. The more information they have, the more influence they can have on the situation, for as *School House Rock* observed “knowledge is power.”<sup>92</sup> Generally, the Shot Across the Bow letter will elicit one of three responses, and the sender must be ready for all three. First, the letter may be met with indifference — an observable nothingness. Once the appearance of neutrality is validated (to make sure that the recipient is not preparing for a counter-attack), the sender must analyze the non-response. Typically, the reason lies in failure to properly implement the prior steps in the Shot Across the Bow paradigm. The most typical next step then becomes another shot, usually bigger, louder, and closer.

Alternatively, the letter could be met with some degree of positive response. At one extreme, the opponent may capitulate — pay the money, stop competing in violation of a covenant, or otherwise agree to whatever the sender’s goal may be. L(G) > C nirvana! But more likely, the Shot Across the Bow letter will elicit, in diplo-speak, *rapprochement*, and negotiations will ensue to resolve the dispute. In that case, the Shot Across the Bow letter will have served its purpose too by “bringing the other side to the table” without filing a lawsuit and incurring the attendant cost and risk.

Finally, the Shot Across the Bow letter may be the trigger to a lawsuit. Although the attorney who sends the Shot Across the Bow letter must be prepared for litigation and ready to react, that step must not be taken precipitously. In this regard, the lawyer must always be mindful to avoid “Chekhov’s Law.” Russian writer Chekhov observed that if in the first act of a theatrical play there is a gun hooked on the wall, it is there to fire in the last act of the play.<sup>93</sup> This rule in theatrical drama composition can be applied to the drama of the law. Lawyers who prepare for litigation are often eager to engage in it. Such a tendency must be avoided. Going to the “gun on the wall” too soon is often unnecessary and ineffective.

Typically, aggression from the opponent may be a visceral response, lacking

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<sup>92</sup> See *Schoolhouse Rock Lyrics*, <http://www.schoolhouserock.tv/> (last accessed June 5, 2008). The origin of the phrase is Sir Frances Bacon, *Religious Meditations, Of Heresies* (1597).

<sup>93</sup> See Donald Rayfield, *Anton Chekhov: A Life* 203 (Henry Holt & Co. 1998) (quoting a conversation in which Chekhov advised: “If in Act I you have a pistol hanging on the wall, then it must fire in the last act.”).

in thought or strategy. Such overreaching by an opponent may provide an opportunity for an effective follow up Shot Across the Bow letter. Hemingway explained the phrase *ver llegar* used by matadors for dealing with a charging bull: “The ability to watch the bull come as he charges with no thought except to calmly see what he is doing and make moves necessary to the maneuver you have in mind. To calmly watch the bull come is the most necessary and primarily difficult thing in bullfighting.”<sup>94</sup> A lawyer must analyze the opponent’s reaction (or over-reaction) with calm dispassion, and take the snorts and hard charge of the recipient as an opportunity to skewer him. Standing firm in the face of bluster, bravado, and bull is often the most difficult part of properly executing the Shot Across the Bow letter; it is often also the most important.

## X. How to Actually Write a Shot Across the Bow Letter and an Example

Writing is a highly personal endeavor. Although every person and certainly every attorney has an individual method and style, the requirements of effective legal writing are 1) to have something cogent to say (planning) and 2) to say it cogently (execution).<sup>95</sup> Generally, to accomplish this, any writing involves four steps; prewriting, drafting, revising, and editing.<sup>96</sup> These steps, learned in middle school, hold true for lawyers, with some customized cardinal conventions that apply to writing a Shot Across the Bow letter.

The client has come to an attorney to solve a problem<sup>97</sup> and, therefore, the first step for the writer of a Shot Across the Bow letter is to identify and understand that problem.<sup>98</sup> Interviewing the client, reviewing documents, and conducting legal research are necessary predicates that fall under the “information gathering” or “prewriting” phase of letter writing. This stage concludes with the attorney identifying the purpose of the letter and the audience who will read it. The entire letter rests on these two pillars. Nothing should be prejudged; nothing assumed. Reaching decisions on these two elements is the most important part of the prewriting process.

Once these elements are decided, the lawyer must, as discussed more fully above, study the problem and visualize the reader.<sup>99</sup> During this process, the

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<sup>94</sup> Ernest Hemingway, *Death in the Afternoon*, at *Explanatory Glossary* (Charles Scribner’s Sons 1932) (quoted in Gerry Spence, *How to Argue and Win Every Time* 70 (St. Martin’s Press 1995)).

<sup>95</sup> Moxley, *supra* n. 67.

<sup>96</sup> See Barbara Laroche, U. of Alberta, *Young Authors’ Workshop*, <http://www.planet.econ.net/~bplaroche/index.html> (last updated June 4, 2000).

<sup>97</sup> See Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1 (1984) (“lawyering means problem solving”).

<sup>98</sup> A lawyer’s primary role in a Shot Across the Bow is to solve the client’s problem, not “win” the case. See Menkel-Meadow, *supra* n. 9, at 768; Carrie Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 Hofstra L. Rev. 905, 907-10 (2000).

<sup>99</sup> See *supra* nn. 15-22 and accompanying text.

attorney develops the case theory: the basic concept around which everything else revolves.<sup>100</sup> To arrive at a case theory, some attorneys think out loud and collaboratively by discussing their ideas with colleagues.<sup>101</sup> This process is common.

Some lawyers engage in an essentially uncensored stream of consciousness process, writing down whatever comes to mind on a topic — a process called free writing.<sup>102</sup> The process is, unfortunately, too often ignored by lawyers in the process of developing a theory of the case. Professor Moxley contends, and this author agrees, that lawyers should free write more often because

[t]he free writing process — opening the mind to all associations, possibilities, hunches that may occur — provides a powerful basis for exploring the factual and legal possibilities of the case. The ungrounded initial flights of fancy not only facilitate but may be essential to the development of the most grounded of plans.<sup>103</sup>

A similar method of brainstorming is called “mind mapping,” which involves bubbles, lines, and sketches of ideas.<sup>104</sup> It is a sophisticated doodle. Whether the lawyer resorts to free writing, collaborative discussion, or mind mapping, the process forces the attorney to think through the strategies discussed in this article regarding framing, occurrence and hindsight bias, egocentricity, and the other notions necessary to analyze the problem, the recipient, and the solution.

Not as a next step, but as part of the dynamic organic process called “thought,” the attorney conceiving the Shot Across the Bow letter must take all of this information and thought and develop a storyline — complete with characters, setting, plot, and theme. “Human beings think about social interaction in story form.”<sup>105</sup> These story-based demand letters have proven more common and more effective than a mere recitation of facts and law

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<sup>100</sup> See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative In Case Theory*, 93 Mich. L. Rev. 485, 492-95 (1994).

<sup>101</sup> Inst. Mgt. & Administration, Partner’s Report, *Cultivating A Leadership Culture (Hint: You Didn’t Learn this in Law School)*, 00-11 Partner’s Rpt. 1 (Nov. 2000).

<sup>102</sup> See Moxley, *supra* n. 67, at 143; Peter Elbow, *Writing Without Teachers* 3 (2d ed., Oxford U. Press 1998); Kenney F. Hegland, *On Essay Exams*, 56 J. Leg. Educ. 140, 143 (2006); Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers* 39 (3d ed., Thomson West 2005).

<sup>103</sup> Moxley, *supra* n. 67, at 148.

<sup>104</sup> Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 Clin. L. Rev. 835, 858 (2003); Tony Buzan & Barry Buzan, *The Mind Map Book: How to Use Radiant Thinking to Maximize Your Brain’s Untapped Potential* (Penguin Group 1996); Diane Murley, *Mind Mapping Complex Information*, 99 L. Lib. J. 175 (2007).

<sup>105</sup> Lopez, *supra* n. 97, at 3.

followed by “pay me.”<sup>106</sup> The determination of these literary elements will help trigger an appropriate tone, all tailored to the chosen recipient.

The mechanics of how to send the letter and when to send the letter must be decided. All of this should be done promptly and in collaboration with the client. The client’s input is crucial for it is the client’s story and problem that the lawyer is being called on to solve. As one strong proponent of client inclusion in the process of developing a case theory aptly notes, “cases are about clients, not lawyers.”<sup>107</sup>

Collaboration between the attorney and the client in developing a Shot Across the Bow letter means that lawyers must go beyond the paternalistic notion that they know best, and instead they must listen to and work with their clients.<sup>108</sup> “The core of the process,” Gerald Lopez explains, “is the (lawyer’s) effort to understand the client’s story in his own terms and (for the lawyer to) use her own knowledge and experience to help the client refine his understanding, while,” at the same time, “(the lawyer is thinking) about the stories she might tell on behalf of the client (or coach the client to tell on his own behalf) to various audiences.”<sup>109</sup> Once the client has approved the final version of the letter, it is sent.

An example of a Shot Across the Bow letter written to address a specific situation offers an opportunity to see the paradigm put forth in this article in practice.

Max Powell hires you as his lawyer. He explains the problem he needs to have you solve. His 10-year-old son, Jason, suffered a personal injury. Max tells you the following story. Jason and a few of his friends went to Office Park, a commerce-themed amusement park that had just opened nearby. The City heralded the development, and it quickly became a social mecca and economic engine for the area. The anchor attraction at Office Park, and the impetus for the trip, was “Risky Business,” a roller-coaster ride that enabled its participants to experience the ups and downs of the stock market in a way they had never before imagined.

After corralling the kids through the line and getting them to their carts,

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<sup>106</sup> See Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact In a Uncharted Parallel Procedural Universe*, 79 Notre Dame L. Rev. 1981, 2007 n. 107 (2004) (noting that particularly well-written Shot Across the Bow letters were called “Oh S\*\*t!” letters because this was the reaction of defendants and their counsel upon receipt and review); Thomas Gibbs & Timothy Hoban, *A Proactive Approach to Avoiding Disputes*, 61 Dis. Res. J. 24 (2006) (advising that a demand letter should tell a cohesive logical story).

<sup>107</sup> Miller, *supra* n. 100, at 576.

<sup>108</sup> Laura L. Rovner, *Disability, Equality and Identity*, 55 Ala. L. Rev. 1043, 1093-95 (2004).

<sup>109</sup> *Id.* (citing Gerald R. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 Geo. L.J. 1603, 1613 (1989)). Professor Lopez is one of the prime architects of the movement to include clients as part of the case theory story building, which had traditionally been the sole province of the lawyer.

Max was surprised that no attendants came by to make sure the kids were properly fastened in. Upon reflection, he realized that there were in fact no attendants supervising the ride at all. His surprise was greatly increased when, while traveling through the Roaring Twenties portion of the ride, he actually heard a gigantic roar, and his cart rocked precariously on its track. Surprise soon turned to terror when the train unhinged during the Great Depression Plunge and rather than carry on to the brighter economic times that followed the Second World War, he and his party experienced the Crash of '29 in a more literal sense.

When Max came to, groggy and with limited vision, he felt a cold cloth being applied to his forehead and heard a voice say "Your son is in shock." Terrified and confused, he managed to reply "Help him. Please take care of him," before passing out again. Jason was rushed to the hospital with several broken bones, but no permanent injuries. He was released two days later. Max spent the night in the hospital for observation.

Within hours of the incident Office Park owner, John Tuckabuckaway, appeared on the evening news. With the park in the background, he proclaimed that he would spare no expense to make sure that his Office Park was safe. He acknowledged that something must have gone wrong, pledged to investigate, and apologized to Max and Jason, wishing them both a prompt recovery.

The goal of the lawyer is to get as much money from the defendant, spending as little as possible, and to secure that recovery in the shortest amount of time. Evaluation of the opponent reveals that it is a large corporation with an egomaniacal owner. A new hotel complex is set to open in a few months. Your client wants justice, but also wants to move on. Max does not want to have his son relive the trauma of the event.

With this in mind, you decide to make a high end demand directly to the owner, framing the story as a tragic accident for which the owner acknowledged fault, and to play to his ego by allowing him to be an important part of the story by writing the happy ending. The case theory is simple, a boy and his friends out for a day of fun turned tragic. The letter is annotated to text in the article.

**Letter to Owner of Office Park**

*By sending the letter to the Owner directly, the attorney has a better chance of affecting the decision maker. (Section VII)*

VIA FEDERAL EXPRESS

*Using Federal Express attracts attention. (Section VIII)*

Dear Sir,

*Letter clearly states its purpose and what the sender wants. (Section VI)*

I represent 10-year-old Jason Powell and his father, Max. For the serious personal injuries they suffered on October 7, 2007, at Office Park, demand is made for \$100,000.

*This section starts to tell the story and personalizes the message. The framing also appeals to the recipient's ego bias. (Section IV-F)*

Office Park is an important part of our community, both socially and economically. It provides a gathering place for teens and families, and jobs for hundreds of people in this economically depressed region. My clients had been there many times, and three months ago were there to celebrate Jason's 10th birthday. His friends came along.

No doubt you are aware of the horrific crash on the Great Depression Plunge. You personally appeared on the evening news, said you were sorry, and explained that "nothing will stand in the way of fixing the problems, making the Park safe, and assuring that anyone hurt will be taken care of."

*Quoting the recipient's words forces him to put those words into a present context and act accordingly. (Section IV-D)*

*An admission is an important legal tool. (Section VI)*

Your admission of responsibility and pledge to compensate those injuries was commendable. You

*By reminding the recipient of what he said and what happened, the letter addresses both ego bias and presentism. (Section IV)*

justly received positive press in the wake

*This acknowledgement plays into the theme of the letter and invites the recipient to write the happy ending by writing a check. (Section VI)*

of the tragedy. This positive view can be reinforced by fairly dealing with my clients.



My clients' medical bills total \$32,321. Although their injuries, concussion, and trauma-induced problems have been treated and resolved, and Jason from stress. hospitalized each, and the physical and psychological, was severe. A trial would force them to publicly relive the crash.

*This again both personalizes the message and brings the future back to the present. (Section IV-D)*

both Max still suffer They were for days pain, both

*This sentence contains the only discussion of legal concepts. The letter is written to a businessman and citations to cases would detract from the rational and emotional impact of a short, crisp letter telling a story for which only the recipient can write a happy ending. (Section VI)*

The law is clear that you owe the highest duty of care to your customers. A lawsuit and the attendant publicity would certainly remind the public of this tragedy. This would be particularly distracting in light of the opening of your company's new

hotel adjacent to the Office Park.

A lawsuit would take years and my clients are prepared to accept compensation that is likely less than a jury would award to put this matter behind them. Given the facts and law in this matter, and your pledge to compensate my clients, we have made a reasonable offer. We are amenable to a personal meeting and look forward to your response by the end of next week.

*By giving a date certain but allowing for a meeting, the lawyer is sending a clear signal that this shot across the bow is intended to avoid a war, not start it. This also highlights the urgency of resolving the dispute. (Section IV-D)*

S/S

## **XI. Conclusion**

Lawyers and pirates have a bit more in common than the fact that Abe Lincoln had a black beard and there was a pirate so named. Like the pirate and the merchant who shared the sea 200 years ago, the skilful lawyer understands the necessity and power of a Shot Across the Bow as a means to avoid war. A lawyer will write the letter in a way that gives clear notice to the opponent as to the purpose of the letter. The letter will be written to tell a story that persuades the opponent to view the situation more empathically. The lawyer will write to take advantage of innate and specific biases that will affect the opponent's perception of the risk he faces. The author of a Shot Across the Bow will then ask for action on the part of the recipient. A letter, carefully thought out, deliberately drafted and sent, with purpose and design, will increase the chances of avoiding risky and expensive litigation while, at the same time, achieving the client's goal.