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Dear Sir or Madam: The Lost Art of Letter Writing

"In this era of texting and Twitter, it is easy to forget that much of the practice of law still revolves around letter writing."

By Maureen B. Collins

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In this era of texting and Twitter, it is easy to forget that much of the practice of law still revolves around letter writing. From the transmittal letter to the demand letter, these missives serve a variety of purposes, and take an array of shapes and forms. There are, however, principles common among most types of letters. They should be concise and accurate, and take their audience into account. They should reflect well on their authors, and on the clients those authors represent.

To Write, or Not to Write. Consider whether a written letter is the best method of achieving your purpose. As lawyers, we have an urgent need to document everything, and this often serves us well. If you need to negotiate a matter with some degree of speed, you may want to pick up the phone and call. If, on the other hand, you want to fire an opening salvo and to reinforce the strength of your position, by all means write. Whether you write or call may also depend on the relationship you have with the intended recipient. The more adversarial the relationship, the greater the need to document. Remember though, that your letter may one day be marked "Exhibit A" and attached to a complaint.

E-mail presents the greatest opportunity for mishap. Writers often treat it like an informal means of communication, ignoring both the formalities and mechanics of good writing. If you want to "write" a letter, but deliver it immediately, create the letter as an attachment to a simple transmittal e-mail. Doing so will help to avoid the temptation to fire off an ill-considered "letter," and the tendency to treat the e-mail as some lesser form of communication.

Issues of Audience and Tone. The tone of the letter, and the level of formality, will vary with the circumstances. A letter to an adversary is likely to be more formal than a letter to a client with whom you have a longstanding relationship. The tone may also be dictated by the level of legal sophistication of the recipient. A letter to a residential real estate client will be different than a letter you send to in-house counsel at a large corporation. At all times, though, the tone and content are governed by ethical considerations[1] and notions of professional civility.

A letter can be made less formal by using first names and personal pronouns ("Dear Cara:", "we need to resolve this issue"). Word choice plays an obvious part. A letter "demanding" that a party "cease and desist" will be interpreted differently than a letter "suggesting" that a party's "actions be examined for compliance with …". Even sentence length can make a difference. If you want to take a more "bottom line" approach, pepper your letter with short, curt sentences featuring concrete words. If you want to set a more casual tone, use longer sentences and more "relaxed" language. Regardless of the choice, be sure that the tone of the letter reflects the audience, the circumstances, and the purpose of the communication.[2]

The Purpose of the Letter. Letters are sent for a variety of reasons. They may serve to:

- send documents
- confirm a conversation
- argue a point in litigation
- offer advice
- issue a demand

[1] For more information on this subject, see Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (2009).

[2] For excellent and more detailed advice on letter writing in practice, see Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, *Writing for Law Practice*, ch. 7 (2004).

- inquire about how to proceed
- obtain information, or
- simply develop a relationship between the parties.

Most letters fall into four basic categories: transmittal, demand, advice, and litigation. Sometimes the categories are combined, sometimes they are ignored. What follows is a primer on the basic types.

The Transmittal Letter. This letter accompanies documents. It should be short (and usually sweet) and explain to the recipient what he should do with the enclosures. The transmittal letter should consist of three paragraphs. In the first, identify what is being transmitted—describe the enclosures, listing them if necessary. In the second paragraph, instruct the recipient. Why are the documents being sent? What is the recipient being asked to do? How? By what date? As to the final paragraph … well, are you sure you need one? If so, this is the place to reiterate any important instructions or deadlines, and to conclude with pleasantries ("If you have any questions, please feel free to …").

The Demand Letter. The purpose of the demand letter is pretty straightforward: to demand that a party take action or stop action. The most important aspect of the demand letter may not show up in print. It is essential that, before writing the letter, you ascertain that your client has the superior position. Also ensure that your client understands the ramifications of initiating contact with a potential adversary. Imagine, for example, that your client is driving along the highway and spots a sign featuring a trademark similar to hers. She contacts you, you write a letter to the "offending" party, and you receive a response you didn't anticipate: Your client is being sued because the "offending" party has actually been using the trademark longer than your client. These unintended consequences can be avoided by some prewriting research.

If a demand letter is appropriate, consider what you want to accomplish. Your "mission" is often best achieved by sending a three-paragraph letter. I use the term "paragraph" loosely here. In the initial paragraph, identify who you represent and the purpose of the letter. In the second paragraph or section, establish your client's position and establish the recipient's "violation." This second paragraph may be just a few lines, or it may be a few pages. This will be dictated by the audience, the depth of the facts, and the extent to which you identify the applicable law. It will also be impacted by the tone you want to establish. A shorter, more informal letter may be a first "shot across the bow." A more detailed letter laying out the legal foundation suggests that the sender is more serious about aggressively pursuing her position.

This second paragraph should also identify the "demand." Be specific and keep the client's goals in mind. If the client wants the recipient to discontinue an activity, clearly identify the activity, when the activity should stop, and how compliance will be monitored. The letter should also suggest the ramifications of noncompliance with the demand. This too, will differ with circumstances and strategy.

The final paragraph should reiterate any expectations and deadlines. This may also be the place for pleasantries or additional threats of gloom and doom in the event of noncompliance.[3]

Opinion/Advice Letters. The opinion letter is usually a response to a request for information from the client: What are my rights in this situation? Can and should I do this? How can I protect my interests? A well-written opinion letter identifies the issue and the factual assumptions upon which the opinion is based, analyzes the issue in light of the relevant law, and, frequently, offers suggestions or recommendations for a course of action.

In the first section of the letter, identify the issue you were asked to address, your process if appropriate, and your conclusion. Don't make the reader wait until the bottom of the letter. Spell out the conclusion at the beginning and support it with a comprehensive analysis later in the document.

[3] For a considered analysis of the process of writing demand letters, see Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. Ass'n Legal Writing Directors 32 (2008).

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Next, lay out the factual assumptions that underlie your analysis. This is an important, but often overlooked, step in the process. Certainly your analysis depends upon your understanding of the facts as explained to you. Set out those assumptions, clearly and concisely, and add a caveat if necessary (“Based on the facts set forth below …”).

The analysis section should be organized around the legal issues. The level of detail regarding case law should be tailored to the recipient’s need and level of legal sophistication. It should be an objective assessment of risk. This doesn’t mean that you can’t present the best possible argument to support an action you know your client wishes to take. It does mean, however, that you identify the level of risk associated with that action.

Most clients will want recommendations as a follow-up to the analysis. In this section, you can identify the relative merits of the options and, where appropriate, recommend a choice. The alternatives should be explained and any deadlines should be identified.

Conclude the opinion letter by informing your client of the next step in the process, and asking for instructions. Reiterate deadlines or requested actions here, and close with a sentence highlighting your willingness to be of further service. If your client is going to pursue the matter, you want to be the attorney to assist.

Litigation/Letters to an Adversary. There is a tendency to think of litigation as a matter of briefs and pleadings but, in truth, a good part of the action takes place in the form of letters between the attorneys. It is wise to take particular care with such letters, and to avoid the use of less formal means of communication, when the subject matter is in litigation. Obviously, the chance that your letter will end up as Exhibit A is greatly increased when the parties have already demonstrated the inability to resolve the matter amicably.

Initially, you should begin such a letter by identifying the party you represent or, if a response letter, the matter to which you are responding. This section lays the foundation for your “record.”

Next, lay out a factual and legal summary of your position. The depth of this summary depends upon the circumstances, and the phase of litigation. This may also be the place to suggest compromise, or to warn of future action. Matters of tone should be considered here, as should professional responsibilities.

Finally, close by reiterating your position. Suggest or demand a course of action, whichever is appropriate. This would also be the place to establish a time frame, and perhaps, to suggest an alternative course of action. Consider what level of pleasantry is called for. Are you trying to establish a rapport or bang your fist on the desk? Any letter to an adversary should be well-thought-out and crafted with particular care.

Mechanics. There is more variety, now, in what is considered the proper form. Writers differ over the size of an indentation (and whether one should exist at all) and the number of spaces after a period. (Although I cling firmly to the belief that there should be two.) Set out below are some of the basic mechanics of putting a letter together that reflect the general conventions of the day.

A letter should include the sender’s address (often in the form of letterhead), and a date at the top. These are often centered. The recipient’s formal name, title, and address should appear at the left margin. In many cases, the letter will include a RE: line followed by the information identifying the matter to the recipient. It should not include internal references like your own client number. Dropping down several lines, the letter should begin with a salutation. Typically, this takes the form of a “Dear ...”. The salutation should include a title like Mr., Ms., or Dr. and the recipient’s last name only. In less formal instances, where there is a cooperative and continuing relationship, it is appropriate to use only the recipient’s first name. In most formal letters, the salutation is followed by a semicolon. In less formal letters, it may be followed by a comma. Dropping down two lines, the letter should begin with an introductory paragraph, which identifies the purpose of the communication.

Most letters are single-spaced with a one-inch margin. Longer letters may be double-spaced and include internal headings as appropriate. At the close of the letter, it is customary to include a short paragraph summarizing instructions or expectations, and advising how best to respond to the sender. The signature block will be centered or at the left margin. It includes a phrase like "Sincerely," and is followed by five blank lines for the sender's signature. The sixth line should feature the printed version of the sender's formal name. If there is an enclosure in the letter, the abbreviation ENCL. is usually included at the left margin, several lines below the signature. If a copy of the letter is being sent to another party, it may be noted with a CC: (second recipient's name). When there is more than one other recipient, those names should be listed in a column under the first CC: name.

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Another **Perspective**

"It has occurred to me, however, that there is a dearth of material addressing a need that a few lawyers have demonstrated—the art of writing a really *bad* brief. Many briefs exhibit a number of serious shortcomings, but usually these are isolated, and do not occur consistently in one magnificent opus. In a confessedly feeble effort, I will attempt to point out some of the areas in which the devotees of bad brief writing may attempt to be more comprehensive in their efforts.

A really bad brief should hit a judge right between her tired eyes. It should be so outstanding that, instinctively, the reader will exclaim: 'This is the worst brief I have ever read!' That appraisal will not come easily because judges who have been on the bench for more than a year will have digested a number of briefs that contain more than their fair share of remarkable deficiencies. However, the goal of the brief writer should not be to win the prize from rookie judges—after all they have had relatively limited exposure. The aim should be focused on the grizzly, veteran judges who have grumbled over the years about innumerable below-standard briefs, but have never been socked with one that is not just bad, but really terrible.

Much of what I have written thus far, of course, is general commentary, but it is worthwhile to observe that generality—and lots of it—is truly helpful in writing a bad brief. Extremely vague references to the Declaration of Independence, natural law, freedom and justice, and the Constitution are staples that should not be overlooked. One must be cautious, however, in mentioning the Constitution. The breadth to which it has been interpreted in connection with due process leaves open the possibility that the Constitution may turn out to be relevant to the case at hand. In general, however, citing to the sections setting out age limits for House and Senate members may be sufficiently bewildering to be effective. A carefully non-specific paean to justice, of course, is appropriate and, if the writer is a legal scholar, adding equity in a minor key is equally powerful.

Yet it may be that some reliance on case law simply cannot be avoided—or that the writer lacks the courage to take that daring route. Yielding to this 'felt necessity,' however, need not be fatal. A creative writer has many opportunities to cause havoc. For example, mis-citing to volumes or page numbers of an opinion can cause the judge to waste time looking for it. That, of course, is a plus. In this connection, it is preferable to err in giving the volume number, rather than the page. After all, if the right volume is cited, the judge can always check the index in that book to get the correct page number. If the volume number is incorrect, then the problem is far more difficult and, hence, one that the writer should favor.

It must be conceded, however, that the relative difficulty of ferreting out correct volume and page numbers has been somewhat changed by the advent of Westlaw and Lexis. For example, if the volume and page are incorrect, a researcher may still find the case using the names of the parties. Nevertheless, if the caption of the case is *U.S. v. Jones*, for example, there are a sufficient number of cases by that name so that the computer will choke on the volume and the result will be satisfyingly chaotic. However, if the names of the parties are insufficiently generic, the brief writer should give some thought to misspelling the parties' names as well as doctoring the volume and page numbers. After all, there is nothing wrong with wearing a belt and suspenders."

—The Hon. Joseph F. Weis Jr., *The Art of Writing a Really Bad Brief*, Fed. Law., Oct. 1996, at 39, 39.