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An Offer They Can't Refuse: Teaching Persuasive Writing Through a Settlement Offer Email Assignment

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An Offer They Can't Refuse: Teaching Persuasive Writing Through a Settlement Offer Email Assignment

By Alyssa Dragnich and Rachel H. Smith

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Do you catch more flies with honey than with vinegar? Our first-year legal writing students had to confront this question as part of a new assignment we introduced in the spring of 2014 that required them to write an email settlement offer to opposing counsel. This assignment fit easily into our trial and appellate brief assignments, allowed students to learn about persuasive writing in a new format, and helped students experience a bit of the creativity of law practice.

At Miami Law, we follow a fairly traditional model for a two-semester legal writing curriculum. In the fall, students learn objective writing, including office memoranda and client letters. In the spring, they turn to persuasive writing, including trial court motions and appellate briefs. We also include a correspondence component to both semesters, but we have struggled with exactly how to structure that component in the spring. Because students learned to write a client letter in the fall, a repeat of that assignment was not sufficiently challenging for many students. We experimented with assigning a discovery meet-and-confer letter but found it was conceptually beyond our first-year students' level of understanding.

But last year, we landed on the Goldilocks "just right" level of difficulty for our spring semester correspondence assignment. We asked students to write an email proposing a settlement to opposing counsel in a civil litigation matter. The results were far better than we had hoped:

students were highly engaged and interested in the assignment, they practiced a related but different type of persuasive writing, and they thought creatively in ways we never expected.

A. Designing Our Settlement Offer Email Assignment

We wanted to develop an email assignment that required students to write persuasively, but with a different tone, style, and approach than they used in their motion and appellate brief assignments. We also wanted to give the students an opportunity to think strategically and resourcefully about how best to serve their clients' needs.

The settlement offer email assignment was easy to develop. We assigned it in the middle of our simulated litigation, as students move from trial motion to appellate brief. The fact pattern involved a complaint by a female employee alleging employment retaliation against a public relations firm under Title VII of the Civil Rights Act of 1964. Half of the students represented the employer and wrote a motion for summary judgment. The other half of the students represented the employee and wrote a motion in opposition to summary judgment. The professor, acting as the district court judge, then issued an order granting summary judgment for the employer. Ultimately, the students would switch sides and write an appellate brief arguing for the opposite result they previously sought.

Before they embarked on the appellate brief assignment, we asked students to write an email proposing a settlement offer to the lawyer representing the other party. We

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created email addresses specifically for these hypothetical attorneys, using free Gmail addresses. Students copied their professor on the email. We set a limit of 300 words.

The instructions given were slightly different for each party. For example, students representing the employer were given the following guidance:

As you know, summary judgment has been granted in favor of Company, but Employee has let us know that she plans to appeal this ruling. Summary judgment decisions are often affirmed on appeal. However, there is no guarantee that the order will be affirmed, and the appeals process is costly in terms of both time and money. Therefore, Company wants to offer a settlement to Employee. This settlement offer should be attractive enough that Employee will accept it rather than pursue her appeal, but it should protect Company's interests, both financial and non-financial, and should not be more generous than necessary.

Students representing the employee received the following instructions:

Employee is obviously disappointed by the summary judgment decision. She is considering an appeal of this order, but she knows that summary judgment decisions are often affirmed on appeal. In addition, an appeal is expensive and time-consuming. As a result, she would like us to approach Company with a settlement offer. Employee is willing to leave Company if the offer sufficiently compensates her for the discrimination and retaliation she has suffered and protects her future employment prospects. Company has already won summary judgment, so the offer needs to be reasonable enough for Company to accept it.

All students were told to begin their emails with a brief summary of their best arguments and an explanation of why a settlement was in the best interest of their opponent. We then suggested a menu of four terms and directed students to choose or modify any or all of the terms; we also invited them to include additional terms if they chose. The

instructions directed students to think strategically about the kind of package that would protect their client's interests but be attractive enough to persuade their opponent to settle. The following terms were provided to students as a menu of options:

- A buy-out of ___ months' salary [students chose the number of months]
- A ___ reference if prospective employers inquire about the employee [students chose whether to ask for a neutral or positive reference]
- A confidentiality agreement that precludes either party from discussing the events that led to the lawsuit and the details of the settlement agreement
- Attorneys' fees spent to date

The final part of the assignment required students to calculate the deadline for the plaintiff to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) and request that the opposing party respond to the settlement offer seven business days before that date. This reminded students of the importance of following court rules and showed them that seemingly “easy” things, such as calculating thirty days' time, can be unexpectedly difficult.

To prepare students for this assignment, we taught a classroom lesson on professional emails and persuasive correspondence, and we assigned some short readings.¹ We covered the ways in which emails and traditional letters are similar and different. We also discussed the importance of the appropriate tone for an email to opposing counsel. Students soon appreciated how the tone of the settlement offer email would likely need to be very different from that of a document written to a client, judge, or supervising attorney. We also taught our students about how to calculate deadlines and why including a “respond by” date is critical in practice. Students appeared to enjoy the classroom lesson on the settlement offer assignment because it was focused on a specific lawyering task that they could easily imagine doing in practice.

¹ See Suzanne E. Rowe, *E-Writing: tips 4 btr comm*, Oregon State B. Bull., May 2008, at 13; Tracy Turner, *Email Etiquette in the Business World*, 18 Persp. 18 (Fall 2009); see also Robin Wellford Slocum, *Legal Reasoning, Writing, and Other Lawyering Skills* 563-73 (3d ed. 2011).

B. Promising Results

This assignment led to meaningful discussions, both in class and in individual conferences. Students were excited about the negotiation aspect, an element that is often neglected during a litigation-focused 1L year. Many brought up the dilemma of starting with a very low offer and expecting to negotiate upward versus starting with a reasonable offer to avoid the opponent walking away from the negotiation.

The assignment provided an opportunity to talk with students about their professional personas. Some students were aggressive, threatening opposing counsel with horrible outcomes if the case were not settled. Others took a collegial approach, trying to establish common ground with opposing counsel by proposing a mutually beneficial settlement. While students sometimes have a difficult time understanding what the court as a “reader” expects, they appeared to be more comfortable imagining the opposing counsel who would receive the settlement email.

We were surprised and pleased by the professionalism and creativity our students brought to the substance of the assignment. Almost all of our students weighed the costs of an appeal against the chances of success in deciding how attractive to make the offer to the opposing side. But some of the best emails involved creative additions to the settlement terms, such as a nonsolicitation clause to prevent the employee from taking current clients with her, health insurance coverage for a period of time for the employee and her children, payment for job placement services for the employee to find a new job, and our personal favorite, a letter of apology from the company executive alleged to have discriminated against the employee.

In addition to grading these assignments on appropriate tone and use of language, we sought to reward those students who demonstrated thoughtfulness and ingenuity. And indeed, some of the students who received the highest scores on the assignment were those who were less successful at the stricter legal writing conventions for documents like memoranda, motions, and briefs.

C. Bigger Lessons

Often in the first-year legal writing course, students have the mistaken impression that there is only one “correct” answer. They receive such specific guidance on the format, structure, and substance of their documents that they feel disenfranchised. Although the legal writing course teaches them to do the tasks that lawyers do—researching, analyzing, and writing to solve their clients’ problems—students sometimes don’t feel they have the kind of freedom that a lawyer does to make choices and exercise judgment. Accordingly, this assignment, where the “correct” possibilities were endless and reasonable minds could differ on the appropriate style and substance, was a welcome chance for students to work on practical lawyering.

The email settlement offer is a easy vehicle for introducing negotiation skills and settlement strategies into the first-year legal writing course. Exposing students to negotiation and settlement has many advantages, including reflecting the practical reality that most cases settle, broadening students’ understanding of the universe of options available in litigation, and giving students an opportunity to practice working collaboratively with an opponent.² But settlement simulations can require an investment of class time that may be difficult to find in the crowded second semester.³ Assigning a settlement offer email allowed us to raise many of the interesting issues accompanying negotiation and settlement within our existing curricular framework.

Accordingly, we strongly recommend including a settlement offer email in your first-year legal writing course. In the words of one of our students, “This outcome is in everyone’s best interest.”

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² See Olivia Farrar & A.G. Harmon, *Lawyering Outside Lawsuits—Incorporating Negotiations, Settlements, and Mediations into the Legal Writing Curriculum*, 19 *Persp.* 42 (Fall 2010).

³ See Kirsten A. Dauphinais, *Using an Interviewing, Counseling, Negotiating, and Drafting Simulation in the First Year Legal Writing Program*, 15 *Transactions: Tenn. J. Bus. L.* 105, 107-09 (2013).

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