Priming Legal Negotiations Through Written Demands ${\tt Carrie\ Sperling}^{\star}$

As I left for work one crisp, sunny April morning, I spotted a five-by-seven printed form on my car's front windshield. The form's message proclaimed, in large, bold letters, "youparklikeanasshole." The form had a checklist of infractions like "two spots, one car," "that's a compact?" and "over the painted lines." The bottom of the printed form said,

Parking is far too limited in our overcrowded streets and parking lots, and you happened to park like an asshole. Go to the above web site to see why someone else thought you parked like an asshole. Don't be too offended, we all do it one time or another—it just so happens you got caught.³

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My next-door neighbor, who evidently put the note on my car, listed my infraction as "other" with a follow-up explanation written by hand: "You are parking too close to my garage. It's hard for me to pull my truck in." I studied the note for a few moments. I felt my heart start to pound and my whole body became uncomfortably warm. I wadded the note and tossed it. I was angry. When I arrived at work twenty minutes later, I was still angry. I told my co-workers about the note. They all agreed with me; it was rude and inappropriate.

When I returned home that evening, I visited with neighbors who were not complaining about my parking. I showed them the note, now crumpled and dirty. They, too, became angry. One neighbor suggested exacting revenge on the note's author by letting the air out of his tires. Another neighbor excitedly suggested something involving Crisco. Although I am a trained mediator, I became giddy about the prospect of getting even.

Perhaps it was a moment of self reflection that led me to question why I was even thinking of revenge. But that written demand evoked intense emotions in me and in my neighbors. We did not care about investigating appropriate responses or attempting to resolve the problem; we wanted to make my neighbor pay for his rude behavior. Instead of encouraging me to change my behavior in the way my neighbor requested, the note had an entirely different effect. The written demand prompted me to make my neighbor regret placing that note on my windshield.

This incident led me to question the legal demand letters lawyers write. I wondered if demand letters often evoke similar negative emotional reactions in their recipients. And, if so, do those emotions influence the recipients' behaviors in ways that hinder settlement?

Lawyers routinely begin legal negotiations with a written $\operatorname{demand\ letter}^4$ and a wealth of multi-disciplinary, empirical

research exists to assist lawyers as they negotiate on behalf of their clients. 5 However, the application of this empirical research to the written demand letter is largely absent from mediation and negotiation texts. 6 Instead, these texts focus almost exclusively on face-to-face negotiations. Lawyers and law students seeking quidance on how to effectively write a demand letter must look to legal writing texts. ⁸ But the advice these texts provide lacks a connection to the multi-disciplinary empirical research that is so important in the mediation and negotiation context. 9 This disconnect may serve as an impediment to quicker, more favorable settlements. In fact, the untested advice in legal writing texts could have the opposite effect, causing protracted litigation and less favorable negotiations.

Based on the empirical research available, this Article argues that the current advice on how to write demand letters probably hinders, rather than facilitates, settlement. Of

course, to determine what kind of demand letter is most effective in bringing about a more favorable settlement, the advice and methods must be empirically tested. Only then will lawyers know whether their initial demand letters ultimately help or hurt the opportunity for settlement.

Part I of this Article describes the current state of research in the legal negotiation arena and argues that this well-supported and well-accepted research has all but ignored the written demand. Part II argues that the demand letter is one of the most important documents a lawyer writes because it often initiates negotiations, and that various psychological processes involved at the outset of a negotiation can significantly affect the negotiation's success. Part II goes on to identify some of these psychological processes, including framing, and anchoring, and connects these processes to the written demand. Part III discusses how the demand letter

provides the lawyer with the opportunity to tell the client's narrative, persuasively integrating law and fact in a way that is often hindered by procedural roadblocks once a lawsuit is filed. Several states now require parties to send demand letters before filing suit. These demand letters not only set the stage for negotiation, but they also can limit a plaintiff's relief or prevent recovery altogether.

Part III focuses on one particular area of psychological research—priming. The research in priming demonstrates the power of the written word to drive behaviors. After discussing this research, this Article uses the priming studies to hypothesize that the demand letter may actually hinder rather than facilitate settlement. Research in priming could assist attempts at persuading others to enter negotiations with the optimal mindset for cooperative negotiation.

The Article concludes by urging those in the relevant fields—negotiation, alternative dispute resolution, and legal writing, among others—not only to recognize the importance of the demand letter, but also to integrate the demand letter into the thriving cross-disciplinary research that touches on legal negotiation.

I. Common, Well-Established Principles Inform Face-to-Face Legal Negotiation and Dispute Resolution

By now the legal community has come to understand the importance of legal negotiation and mediation. The evidence is undeniable—very few cases reach trial. One reason to favor early settlement is the overwhelming cost of litigation in the United States. Those wishing to reform our litigation process point out not just the cost to particular litigants, but the ancillary costs as well. The expense of litigation strikes

fear in some defendants and may deprive plaintiffs of their day in court. 16 Litigation expenses include not only the attorney's hourly fees, but also court costs, depositions, and expert fees. 17 Litigation often ties up a company's resources and causes reduced productivity. 18 Litigants have come to know, and empirical studies have shown, that parties are probably better off settling than going to trial. 19 Beyond the litigants themselves, litigation drains government resources and decreases funds available for other important functions, such as education. 20 It follows that, the more contentious the litigation, the more costly the trial and the greater the drain on public resources. 21

The realization that lawyers rarely take their cases to trial has shifted focus. 22 Perhaps because of this realization, law schools are offering more classes and clinical opportunities in negotiation and mediation to supplement their offerings in

trial advocacy 23 because the skills and strategies required to settle legal disputes often collide with the skills and strategies required to win a trial. 24

A. Growth of Research in Legal Negotiation and Dispute Resolution

Law school curricula have swelled with course offerings in legal negotiation and alternative dispute resolution. 25 Likewise, practitioners and courts have turned to mediation in astounding numbers. 26 The surge in growth surrounding the study and implementation of alternative dispute resolution is often traced back to the Pound Conference, assembled nearly thirtyfive years ago as a way to address a perceived dissatisfaction with the operation of the justice system. The widespread use of mediation as a court-ordered tool to control dockets was one outgrowth from that conference. 28 But, more importantly, the Conference sparked a vibrant debate among scholars,

practitioners, and judges about the role of alternative dispute resolution in the justice system and in society at large.²⁹

Scholars also began to study the effectiveness of this alternative process and the ways in which participants in the process could maximize its benefits.³⁰

B. Accepted Principles

Legal-negotiation theory draws upon a wide array of knowledge and expertise to understand why some parties favorably resolve disputes, though others come to an impasse. This theory operates on certain widely-accepted principles, namely that parties are usually better off settling their disputes than litigating them. Settlement is no longer seen as a simple cost-saving calculation. Instead, settlement is a way to avoid the ancillary costs of litigation, such as destroyed relationships, loss of control, lack of creative solutions, and loss of time.

Negotiation textbooks now include multi-disciplinary research from economics, game theory, social psychology, and philosophy. 35 Legal-negotiation theory sees collaborative negotiations, also known as cooperative or problem-solving negotiations, as more effective than competitive ones; collaborative negotiators understand that emotions play a significant role in the process and they attempt to distribute the benefits of settlement to all parties in a negotiation. 36 The literature suggests that legal disputes are efficiently and effectively resolved when the parties search for integrative solutions that incorporate a variety of interests, not just money. 37 Parties are warned to avoid hostility and blame, 38 to frame solutions as gains rather than losses, 39 and to view the negotiation as a collaborative process rather than a win-win, one-time attempt to settle before trial. 40

Although lawyers and courts are now applying these accepted principles more frequently, the principles are aimed almost entirely at face-to-face negotiations or in-the-room mediations. 41 Legal-negotiation textbooks downplay written negotiations, focusing instead on oral negotiations. 42 And, when these texts address written communication, they completely ignore the demand letter. 43 Despite a growing movement toward alternative dispute resolution, 44 the principles at its core are being applied too late or not at all. 45 By the time parties meet face-to-face, they most likely have exchanged correspondence and other documents. 46 Yet, the documents that enshrine the parties' initial demands and negotiation positions have been nearly ignored in the negotiation literature. 47

Perhaps the experts fail to consider the written demand because they believe the advice about negotiations has an obvious connection with the written demand, and it therefore

needs no comment-lawyers would obviously know how to apply the advice about face-to-face negotiations to their written offers to settle. The current negotiation literature, however, seems to challenge this assumption because scholars are now beginning to pay particular attention to written negotiations in the electronic medium, that is e-mail and texting. 48 Advice regarding negotiating via e-mail has become fairly common, but remains rather cursory. 49 And because the literature covers email negotiations, but not demand letters, it feasibly could lead a student or practitioner to believe that demand letters are not part of the negotiation process.

More likely, experts fail to consider the written demand due to a belief that written documents are different from face-to-face negotiations, that emotions do not drive our responses to written communication, and that written communication invokes a cognitive reaction that is free from the emotional binds that

plague our face-to-face negotiations. 50 The empirical research, however, contradicts this belief. 51

Written words can spark emotions and drive people's behavior in ways of which they are completely unaware. 52 The current research makes it impossible for lawyers to ignore the extra-textual effects that written communication may have on a client's demand. 53 Perhaps the recipient of a carefully reasoned demand letter fully and logically contemplates the lawyer's well-reasoned arguments, but psychologists have demonstrated that a lawyer's words have effects far beyond conscious reason. 54 Because demand letters are often precursors to further negotiations, lawyers should seek to understand their potential effects on the recipients before committing their original positions to writing. 55

II. The Demand Letter as an Important Early Step in Negotiation

Generally, legal negotiations start with some form of

written demand, sometimes addressed to the party and sometimes addressed to the party's legal counsel. 56 Although very little research has been conducted on written negotiation, 57 there are several reasons to believe that the demand letter is an important piece of the legal negotiation process. 58 First, the demand letter directly addresses the relevant party rather than a third-party judge or mediator. 59 It often establishes the first impressions of the parties in a negotiation, and studies confirm that these first impressions are extremely hard to overcome, 60 perhaps driving the course of the litigation.61 Second, the demand letter may be the only opportunity to present the opposing side with an "integrated narrative of law and fact." 62 This integration is important for settling disputes, but the rules of civil procedure often fail to give parties the

opportunity to make this integration before trial. Finally, the American legal system has somewhat institutionalized the demand letter, often requiring one before a plaintiff may file suit. Therefore, whether it is required by law or written as an invitation to settle, the demand letter plays an important role in legal negotiations.

A. First Impressions are Difficult to Overcome

Lawyers should carefully consider how initially to approach a negotiation because this approach can have lasting effects throughout the negotiation. There are many well-tested examples of the way first impressions influence the course of negotiations. Experts try to understand these processes in order to avoid unproductive negotiations or to gain advantage in a particular negotiation. Therefore, to understand the potential effects the demand letter may have on its recipient,

it is necessary to understand the psychological biases and short cuts at work when negotiations begin. 68

1. Initial Biases

Studies confirm that first impressions are extremely hard to overcome. 69 Once a party takes an initial position, that party is likely to value evidence that supports that position and devalue evidence that does not. 70 Furthermore, people generally take self-interested positions and assess their positions in a biased way. 71 Placing people in a partisan role only strengthens their biases. 72 For example, in one study, participants were divided into two groups: jury members and nonjury members. 73 Those in the jury group received background information and information on both sides of each case. 74 Nonjury members received only partial information, either background or one-sided information. 75 Researchers directed all participants to guess how a jury of twenty members would have

voted on the specific cases. 76 Those with plaintiff-only information believed that more jurors would vote for the plaintiff, and those with defendant-only information believed that less jurors would vote for the plaintiff. The Each group was biased toward the side for which they had been selected even though they knew that they had not been provided the arguments for the other side. 78 More importantly, those with only partial information recorded higher certainly in their predictions than those who received full and balanced information on the cases. 79 The researchers expected that less information would result in a lower degree of certainty, but the effect was the opposite. 80

In addition to the tendency to see facts with a self-interested bias, when confronted with anger or other negative emotions, people tend to escalate their anger. Anger creates a desire to retaliate, and the parties enter a cycle of agitation that is hard to break. Therefore, although a lawyer could

expect the recipient of a demand letter to take a selfinterested position at the outset of a negotiation, once the
recipient becomes angry and defensive the likelihood of
efficient resolution becomes remote. 83 This is because anger
changes the way the brain operates; 84 people become less creative
and cooperative, and, instead, become more vindictive. 85

Similarly, the perception of unfairness, like anger, has a powerful, negative influence on negotiations and can lead a person to give up something of value simply to punish the person who is perceived to be acting unfairly. So Using variations on an experiment known as the "Ultimatum Game," researchers have demonstrated a person's propensity to suffer losses in order to punish another who has behaved unfairly. The game involves two players and a sum of money, for example one hundred dollars.

The first player must offer a portion of the one hundred dollars to the second player. If the second player accepts the offer,

both players get to keep the money. 88 If the second player rejects the offer, both players walk away with nothing. 89 Both know that these are the rules of the game before they play it. 90 As economists postulate, a rational second player would accept any offer, even just one dollar because one dollar is more than nothing, and nothing is what the second player would receive if she rejected the offer. 91 But this rarely happens. First players generally offer between forty and fifty percent of the money, here forty or fifty dollars. 92 If the offer is less than an even split, the second player will often reject the offer and the first player will walk away with nothing. 93 This results because the second player would rather take nothing than allow what she sees as an unfair windfall to the first player. 94

Because of these reactions, experts advise negotiators to expect a biased participant and to avoid insults, shame, blame, and other techniques that would cause the other party to erupt

in anger, and, rather, to focus the other party on fair outcomes. 95 Of course, negotiators are wise to heed the experts' advice. But, what if the other party is already angered by a shaming demand letter or feels unfairly treated after receiving an insulting offer? The appropriate time to consider these biases is when the parties initiate their communications, whether face-to-face or in writing. 96

2. <u>Favorable Heuristic Reasoning⁹⁷</u>

In contrast to negative emotions, which can impede settlement, initial positive emotions can facilitate settlement. First, when a person has positive feelings toward someone, that person is apt to reason through heuristics, or mental shortcuts. On the other hand, negative, distrustful emotions cause a person to reason more logically, and thus require more proof before making a decision. Therefore, a letter that emits negative emotions will likely generate the

need for heightened persuasion.¹⁰¹ Alternatively, a letter that generates positive emotions may set the stage for more favorable, heuristic reasoning.¹⁰²

One example of a favorable heuristic is the foot-in-thedoor effect. 103 Strategies that take advantage of this favorable heuristic rely on studies that demonstrate people's willingness to comply with more imposing requests if they first accede to an initial, smaller request. 104 Once people give in to a demand or make a concession, they are much more likely to give in to larger demands or make more substantial concessions. 105 For example, people who previously agreed to sign a socially conscious petition to "keep California beautiful" will more likely agree later to "put a big sign on their lawn . . . advocate[ing] safe driving." 106 Achieving that first point of agreement, then, becomes crucial to making more significant advancements later in the negotiating process. 107

Unconscious anchors may also cause favorable heuristic reasoning because they affect people's later, seemingly unrelated, perceptions. 108 An anchor is a value that serves as an initial reference point. 109 Even when this initial value is completely unrelated to an estimate or a negotiation, the initial value affects the subsequent estimated value or offer. 110 For example, in one of the first studies on the effects of anchoring, researchers asked participants to spin a wheel that contained random numbers and then asked them to guess what percentage of African countries are members of the United Nations. 111 The answers were affected by the number upon which the wheel landed. 112 If the wheel landed on the number ten, participants were more likely to guess around twenty-five percent, but if the wheel landed on sixty five, participants were more likely to guess closer to forty-five percent. 113 Thus, the number on the wheel, which had no relation to Africa or

international political organizations, served as an unconscious anchor for participants' later choice. 114

In negotiations, extreme initial offers can actually result in better settlement terms for the offeror, probably due to the effects of anchoring. 115 A study conducted by Russell Korobkin and Chris Guthrie demonstrates. 116 Korobkin and Guthrie gave two groups identical information about a defective new car and asked participants to play the role of the car purchaser. 117 The participants were told that, to avoid a lawsuit, the dealer made a final offer to pay the purchaser \$12,000 if the purchaser kept the defective car. 118 In one group, the participants were told they had already rejected the dealer's initial offer of \$2,000 and continued ownership of the car. 119 The other group was told they had rejected the dealer's initial offer of \$10,000 and the option to keep the car. 120 The participants in the group with the \$2,000 initial offer were more likely to accept the \$12,000

final offer than those in the group where the dealer offered $$10,000$ initially.121

This study supports the argument that extreme initial offers likely result in a more favorable settlement simply due to the subconscious effects of anchoring. 122 The initial offer anchored the value of the settlement. Those who received a \$2,000 initial offer saw the \$12,000 as a vast improvement—a good deal. 123 Those who received the \$10,000 initial offer saw the \$12,000 as too similar to the initial rejected offer. 124 Therefore, the initial offer may act as an anchor, having lasting effects on the amount of a final settlement. 125 For these reasons, lawyers would be wise to cautiously choose the number they use when initiating negotiations, especially in writing. 126

Finally, framing can be a powerful way to harness favorable heuristics. Many authors have discussed the power of framing

in negotiations, especially the effects of framing losses as gains. 128 For example, researchers have shown that the simple framing technique of reporting outcomes in terms of gains rather than in terms of losses significantly affects participants' choices. 129 One early study, known as the "Asian disease" problem, asked participants to assume six hundred people were facing exposure to a lethal disease. 130 The participants were then asked to choose between two courses of treatment. 131 With program A, two hundred people would be saved. With program B, there would be a one-third chance of saving all six hundred people, but a two-thirds chance of not saving anyone. 132 Given these two choices, most participants chose program A-to take the certain gain of saving two hundred people. 133 However, results changed drastically when a different group of participants were given the same choices, but the scenarios were framed in terms of losses instead of gains. 134 In this study, participants chose

between program A where four hundred people certainly would die and program B, where there was a one-third chance nobody would die, and a two-thirds chance that six hundred people would die. Given this new, negative frame, a majority of the participants chose program B instead of A, even though the actual data had not changed. A

The evidence on framing effects should caution attorneys writing demand letters. Lawyers should understand that people would rather opt for a certain gain rather than a certain loss. But, more importantly, people choose uncertain losses over certain losses. Because settlement offers are usually certain losses, typically described as a stated amount of money, parties receiving demand letters are probably more inclined to choose the uncertainty of a future loss at trial than a certain loss today. Lawyers would be wise to work on reframing their offers, especially those they commit to writing.

For these many well-tested reasons, parties should concern themselves with the other side's initial impressions. 140

Although many people tend to think of negotiations as face-to-face interactions, they often start in writing. Attorneys should contemplate the potential first impressions their letters will have on opposing parties because those initial impressions are likely to have long-lasting consequences in the way future negotiations play out. Therefore, the demand letter, although a written document, cannot be ignored.

B. The Importance of Law-Fact Integration

Evidence suggests that the earlier a party is able to tell her story to the other side through integrating the facts and the law, the more likely the parties will settle. One way to integrate law and fact effectively is through narrative. Legal writing scholars have increasingly focused on the importance of narrative in composing a compelling legal

argument, 143 and the demand letter provides an ideal forum for persuasive narrative. 144 These experts have employed techniques used in other disciplines to study the well-accepted principle that narrative is an essential element in persuasion. 145 A story works better as a tool of persuasion than does simple logic. 146 Stories form a person's understanding of the world, and his or her place in the world. 147 Stories, unlike facts, incorporate our underlying values and a sense of order. 148 Stories give shape to human reality. 149 Humans have used stories as an effective form of communication for so long that some scholars believe the narrative schema is "innate." 150

Furthermore, there is inherent value in a client simply telling her story. Too often, legal disputes become disconnected from the narrative that allows people to make sense, not only of the legal claims, but also of the human emotions and values that underlie the legal claims. Finally,

humans often see the world in the context of certain narrative forms—the hero versus the villain, 153 the mythic birth or rebirth, 154 the mystery. 155 The lawyer's job is to identify a fitting narrative for her client's case that will provide the appropriate lens through which others will see her moral and legal plight. 156

Although narratives undoubtedly play an important role in legal persuasion, our rules of civil procedure fail to foster an integration of law and fact into a meaningful narrative before trial. The modern rules of civil procedure require plaintiffs to offer only a "short and plain statement" when initiating a lawsuit. Plaintiffs' facts are often separated from the legal claims. Defendants answer by simply admitting or denying each allegation in the complaint. Likewise, the rules of discovery do not require the parties set forth any sort of factual narrative. In fact, Rule 26 assumes that the parties will

disclose documents based on their understanding of what evidence is relevant to the legal claims at issue. 161

Not until the summary judgment stage does this process of law-fact integration occur at any meaningful level. 162 However, some formulaic local rules require parties to separate the facts from the relevant law, even in motions for summary judgment. 163 In some jurisdictions, parties file a statement of undisputed facts in a document entirely separate from the brief containing the party's legal arguments, making the integration awkward at best. 164 Under the current rules of procedure, the all-important law-fact integration may not actually happen until trial. 165

Although the rules of procedure operate against telling a client's coherent narrative, lawyers are finding ways to present their clients' stories outside the formal rules. Stephen

Subrin and Thomas Main call this the "parallel procedural universe"—a sphere outside the formal procedures where lawyers

are finding creative ways to meaningfully integrate law and fact. 167 In this realm that is divorced from procedural formalities, lawyers are using demand letters, exchanging notebooks, sending settlement brochures, and producing sophisticated documentaries in order to effectively tell their client's story persuasively with the hope that a favorable settlement will soon follow. 168

Lawyers operating in this parallel universe, using extraprocedural narratives to facilitate settlement, probably have
the right instincts about what techniques effectively lead to
settlement. However, they are operating on intuition and
experience. Because their informal techniques lawyers are
outside the formal procedures and often shrouded from view, they
are nearly inaccessible to empirical study, resulting in a
problematic lack of knowledge regarding the reasons lawyers use
these informal tactics. To Furthermore, these settlement

documents are frequently privileged communications. 171 Rules of evidence often bar them from view, and they are not usually part of the record. 172 As a result, researches know almost nothing about this uncharted universe from an empirical standpoint. 173 They do not know what kinds of materials are effective or what principles are driving lawyers' decisions about how to present their clients' narratives. 174 Lawyers are creating a sphere of practice that instinctively works to more efficiently resolve their cases. 175 However, without any empirical testing of their methods, we cannot really know what works, why it works, and how it can be improved. 176

C. Demand Letters Often Required by Law

Lawyers no longer write and send demand letters simply as a common practice or custom. Rather, they send demand letters based on statutory requirements. For example, the law requires pre-suit letters in many consumer protection disputes 178

and actions to collect a debt.¹⁷⁹ These statutory requirements were enacted to encourage settlement and limit damages,¹⁸⁰ yet little attempt has been made to incorporate negotiation theory into these legally necessary demand letters.¹⁸¹

Although the purpose behind requiring letters is prelitigation settlement, 182 these statutory requirements seem to contradict good negotiation practice in several ways. First, on the most fundamental level, these laws almost certainly frame the negotiation as a one-time shot rather than a multi-stage process. 183 Under the consumer protection laws, for example, the claimant is required to "reasonably identify the unfair or deceptive act or practice" and "the injury suffered." 184 The letter's recipient then has the option of tendering an offer of settlement in writing. 185 If the claimant rejects the offer and presses on with litigation, the claimant's damages are limited to the amount of the tendered offer if the offer was

reasonable. The limitation on recovery is meant to create an incentive for the plaintiff to settle at the first sign of a reasonable offer because, at trial, the plaintiff may only receive the amount of the first offer, and the plaintiff who takes his case to trial risks the uncertainty of not receiving any payout at all. 187

One problem with these statutes requiring pre-litigation demand letters is that the statutory language is not designed to follow the procedure of typical legal negotiations, with stops and starts, offers, counter-offers, and re-evaluations. 188

Another problem is that these consumer protection statutes create a distributive negotiation frame in which the participants view the outcome as zero-sum or a fixed-pie. 189 The statutes generally limit a party's recovery to money damages. 190

For example, a plaintiff would have no incentive to ask for non-monetary remedies or to coax the potential defendant into

cooperative negotiation if the initial letter would ultimately limit the plaintiff's monetary recovery to the written demand presented in the first demand letter. Therefore, even though parties with a consumer dispute could avoid the statute's limitations altogether by negotiating a settlement that considers compensation other than money, the required prelitigation notice seems to limit the lawyer's negotiation tools at the outset.

If the purpose of these legally required demand letters is to facilitate settlement, there is no evidence that this additional pre-litigation requirement is working. 191 In fact, demand letters may actually hinder settlement and prolong litigation, thwarting the intent of legislative schemes. 192 If a demand letter can actually hinder settlement, legislators would not necessarily be wise to require them. Again, empirical study could inform about the most effective avenues to bring about

faster settlements and less-congested dockets, but that empirical testing has not yet been conducted.

III. The Demand Letter as a Priming Device

By now this Article should have convinced the reader that demand letters cannot be ignored when developing and implementing a negotiation strategy. These written negotiations set parties' initial impressions and spark their initial emotions. They bring about certain psychological and emotional forces that can either act as barriers to settlement or pave the road to favorable negotiation. Demand letters provide lawyers the opportunity to tell their clients' stories in an integrated, persuasive narrative, and they are increasingly required by law. 195

These reasons alone should convince the legal profession to consider more seriously the demand letter. But, if any research

could convince lawyers that the words they pen can have lasting consequences for future negotiations, it is the research into the effects of priming. When a person's recent perceptions incidentally and unknowingly influence his behavior, his behavior has been "primed." 196 For instance, when people play a word game that contains terms "relevant to the elderly," like grey, old, wrinkle, and Florida, they walk more slowly after finishing the word game than people who played a word game with "age non-specific words" like birds, tree, and book. 197 Unbeknownst to the players with the first set of words, they were primed to conjure the "elderly" stereotype. By unconsciously priming this stereotype, the players behaved more like their perception of the stereotype, that is, they walked more slowly. 198

Because the written words used to convey a settlement demand likely influence the recipient's subsequent behavior, the

effects of priming on the overall negotiation process should be carefully considered and empirically studied. Although little research has been done on the effects of priming in negotiations, the words lawyers use in a demand letter almost certainly have some priming effect on their recipients.

Recall my neighbor's written demand that I change my parking habits. My neighbor chose the written word to convey his message. He wanted me to change my behavior; he wanted me to park further away from his garage. Having only written words in front of me, my emotions took control. I became extremely angry, and the anger did not dissipate over the course of the day. When I came home, I was still angry. My emotions controlled my reaction to his demand. 199 Instead of complying with his request, I was driven to seek revenge despite my conscious awareness that revenge would probably be counterproductive. I was amazed at my own reaction to my

neighbor's written demand, and I experienced, first hand, the power of the written word to ignite emotions and to initiate and guide behaviors. My emotions flared not because I was offended by my neighbor's body language or intimidated by his size and demeanor; they flared absent any personal contact. The written words drove my subsequent behavior.

My experience with my neighbor is merely an anecdote. But my emotional reaction and resulting uncooperative behavior conformed to the findings of social psychologists who have researched the effects of priming on our behavior and decision-making.²⁰⁰

A. Priming Studies Demonstrate the Power of the Written Word to Influence Behavior, Decision-Making, and Goal

Setting

Somewhat recently, social psychologists began testing whether they could automatically initiate certain behaviors in

their subjects by priming them.²⁰¹ These priming studies provide powerful evidence that written words drive unconscious emotions and behaviors.²⁰² The research challenges the notion that people intentionally weigh their options with careful contemplation before choosing a course of action.²⁰³ To the contrary, our behaviors do not result solely from conscious thought.²⁰⁴ In fact, conscious thought is likely to result from unconscious processes.²⁰⁵

Priming occurs when exposure to certain cognitive categories unconsciously activates certain related categories of knowledge, or activates goal formation, which more directly drives behavior. For example, people who watch a movie about a violent mugger victimizing tourists in the city streets tend to interpret the act of a stranger bumping into them later as hostile or aggressive. Whereas people who view an Inspector Clouseau movie tend to attribute the same act to the stranger's

clumsiness. The movie primes a certain cognitive category that becomes easily accessed later to interpret the stranger's act. 207 People exposed to a Formula One auto-racing champion's name, later, in an ostensibly unrelated task, read a series of words faster, 208 people exposed to a picture of a "skinhead" display more racist attitudes, 209 and people exposed to the scent of an all-purpose cleaner expended more effort to keep their area clean when they ate. 210 In the latter example, the prime—the scent of an all purpose cleaner-activated a schema with concepts related to cleaning; this drove participants to behave in a way related to that concept, such as taking care to keep themselves and the area around them clean. 211

Like a violent movie, the scent of cleaning solvent, or a famous racecar driver's name, written words on a page also have a priming effect. ²¹² In fact, words on a page can automatically initiate complex behaviors in the reader—from behaving more

aggressively, to performing better on a test, to playing a game more co-operatively-because the words prime certain related traits. 213 For example, an early study in priming demonstrated the power of words to initiate either rude or polite behavior. 214 The study used a scrambled sentence exercise to prime the study's participants. 215 An experimenter gave study participants a list of five words and asked them to write a complete sentence using just four of the words. 216 Some participants were given word groupings with words relating to the trait "rude," such as bother, brazen and aggressively. 217 Those participants would take the words in a grouping such as "they her bother see usually" and change them into a four-word sentence, such as "they usually see her" or "they usually bother her." 218 Other participants were given words related to the trait "polite." 219 They would take the words in a grouping such as "they her respect see usually" and change them to either "they usually see her" or "they usually respect her." 220 After completing the exercise, participants left the lab to find the experimenter to receiver directions about the next part of the study. They found the experimenter in an engaging conversation and oblivious to their presence. Participants who were primed with the words relating to rude were about three times more likely to interrupt the experimenter's ongoing conversation than participants who were primed with words associated with polite. 221 Of course, none of the participants were aware that they had been primed with words relating to the constructs "rude" or "polite." 222 They made no connection between the words in the scrambled sentences and their later behavior. 223

Priming research has gone far beyond the initial studies that use words to prime simple behaviors. For example, researchers in the Netherlands have primed mental performance. 224

They demonstrated that when participants simply wrote down their

thoughts about professors before taking a general knowledge test, they scored thirteen percent higher than those who wrote about secretaries, and ten percent higher than those who did not write about anything. 225 On the other hand, participants who wrote about "soccer hooligans" before taking the test scored eight percent lower than those who were not asked to write anything. 226 The test asked general knowledge-based Trivial Pursuit questions, such as "Who painted La Guernica?" or "What is the capital of Bangladesh?"227 The questions had no obvious connection to professors or soccer hooligans. One might think that a test taker either knows or does not know the capital of Bangladesh. Amazingly, though, by priming participants with the professor stereotype ("intelligence"), the researchers were able to increase the participants' scores by sixteen percent over those primed with the soccer hooligan stereotype ("stupidity"). 228 This priming changed the participants'

abilities to answer general-knowledge questions about what the participants already knew, something usually seen as a highly controlled behavior and fixed characteristic. 229

In yet another study, researchers gave a group of participants word-hunt games containing words associated with achievement. 230 Those primed with achievement words performed better on a later word scramble game, and, in a related study, were also much more likely to cheat by going past the time allotted for the exercise than their counterparts who were not primed for achievement. 231 Additionally, in a second related experiment, participants primed for achievement were more likely to persist with a word-scramble problem than to switch to a more enjoyable exercise. 232 And, finally, when those in the achievement-primed group were interrupted while pursuing their goal, they were not deterred; they were more likely to return to the task than those who had not been primed. 233

Most significantly, researchers have demonstrated that people can be primed to unconsciously pursue particular goals. 234 In one study, researchers demonstrated that, when asked to first play a word-hunt game that contained words relating to cooperation, participants who later played a scarce resources game played the game more cooperatively. 235 Those who were not subject to the first exercise did not act as cooperatively as their primed counterparts in the second. 236 A related study also showed that, when a person's goals are primed, the priming effect increases until the goal is reached. 237 Moreover, the goal enforced through priming is not easily disrupted. 238

Few studies have attempted to link the effects of priming to legal negotiations.²³⁹ However, a couple of studies are of particular importance to lawyers crafting initial demands. An early study in priming demonstrated that exposing participants to competitive words, even subliminally, led participants to

play a Prisoner's Dilemma Game more competitively. 240 The prime had particularly strong effects on participants already predisposed to competitive behavior. 241 Therefore, demand letters delivered in a framework of competition with competitive terms will likely cause already competitive lawyers to ramp up their aggressive behaviors.

On the other hand, lawyers who abandon competitive words for words that invoke a sense of fairness may get better results. One study shows that sellers can maintain their desired profits while increasing buyers' satisfaction by priming the buyers to consider the fairness of the transaction. As noted earlier, researchers have shown that people's perceptions of fairness can influence negotiated outcomes. This is because fairness reflects a concern for the group, rather than a single-minded concern for maximizing self-interest.

In the study, participants played the role of a used-car buyer. 245 The buyers were asked to negotiate a sales price for a particular car and researchers provided them a description of the car they were bargaining for, including information about the selling price of cars with similar features. 246 The similar cars sold for prices ranging from \$8,300 to \$8,900.247 With this information, half the participants were "asked to give the lowest and highest fair prices for the used car" before beginning their negotiations. 248 Requiring these participants to think about a fair price was intended to prime a concern for fairness in their negotiation behavior. 249 On the other hand, researchers expected those not asked to give a range of fair prices to behave in a more self-interested way during the price negotiation. 250

The priming had significant effects on the bargaining process and the buyers' satisfaction with the process. 251

Although primed buyers did not make significantly higher opening bids (\$5,653) than the control group (\$5,045), they made larger concessions and moved the negotiations more quickly to settlement. 252 Although the primed group and the control group settled at about the same price (\$8,408 and \$8,352, respectively), the primed buyers reported that the settlement price exceeded their expectations and the control group reported that it fell short of theirs. 253 The primed group negotiated a quicker settlement price, perceived the process as fairer, was more satisfied with the outcome, and was more willing to negotiate with the seller in the future. 254

Priming may not be the panacea to significantly increase settlement values, but this study shows that one can prime behavior essential to successful negotiations. More collaborative negotiations most likely will prove less costly and more satisfying.²⁵⁵ It also provides for the resolution of a

greater number of issues, "making the execution of any agreement reached[] more likely."²⁵⁶ By priming group-oriented concerns, demand letters have the potential of drawing another party into negotiations with more cooperative behavior that will lead all the parties to a more satisfactory settlement.

Priming studies demonstrate that written words have the power to unconsciously motivate behavior even in unrelated contexts and in ways of which the reader is completely unaware. 257 Recall my reaction to the note my neighbor left on my car. Did the words on the page guide me to behave in a way consistent with my perception of an "asshole"? There is certainly evidence from social psychology that supports this conclusion. Because of the powerful connection between written words and a person's behavior and goal formation, we cannot continue to ignore written negotiation. 258 Priming studies provide a compelling reason to delve more deeply into the

possible effects of the words we ink when we initiate negotiation through demand letters.

B. What Behaviors Do Our Demand Letters Prime?

Analyzing the typical demand letter is difficult because not much is known about the kinds of letters lawyers are writing. Lawyers have found a variety of ways to initiate legal negotiations. Outside of a few statutory exceptions, demand letters are not bound by any format. Procedural rules do not hinder the parties' written negotiations. Furthermore, procedural rules often protect these letters from public disclosure. 262

To understand what lawyers are writing, one can look to what lawyers may have learned from legal writing texts. 263

Although many legal-writing texts offer no advice on how to write a demand letter, 264 some devote a few pages to written negotiation. 265 The advice offered, however, is untested and

seemingly contradictory, both to other legal writing texts and to the methodologies now used in the mediation and negotiation fields. 266

Most legal writing books that mention demand letters offer advice on strategy, substance, and style. 267 Authors claim that the demand letter ought to be concise, 268 with an accurate and realistic recitation of the facts coupled with a specific demand and a specific deadline for compliance. 269 Authors focus on the effects a demand letter will have on its reader. They advise about the letter's tone, warning that the letter may have many audiences, including the judge overseeing the litigation. 270 Aside from instructing lawyers to "look at things from the reader's point of view,"271 these writing texts fail to incorporate the rich and abundant research from the mediation and negotiation arena. 272 In fact, the authors seem to teach lawyers to write letters in a way completely disconnected from

the foundational principles that drive the best negotiated settlements. The letters discussed in these legal writing texts fail to contemplate collaborative bargaining and, instead, adopt the language of competitive, zero-sum negotiation. 273

For example, Bryan Garner proclaims that the demand letter "should attempt to goad the adversary to capitulate" and "should convey the threat of litigation and its attendant costs and headaches."274 Garner defines a good demand letter as one with "a threatening tone yet with a sensible suggestion for resolving the dispute."275 Another author advises lawyers to write a letter that will "make the other side afraid of something." 276 Still another author writes that the "most persuasive style in a demand letter is one that the reader does not notice, one that focuses the reader's attention on your demands, justifications, and threats. $"^{277}$

Although adopting the language of threats and fear, the authors of these writing texts seem to understand, without articulation, some accepted principles about negotiation. 278 They advise that a demand letter goes too far if it inflames the recipient or backs the recipient into a corner. They warn lawyers not to bully 280 or to deeply offend, 281 and counsel them to use threats as a last $\operatorname{resort}^{282}$ and appear cooperative as long as compromise is still possible. 283 However, this advice, unattached to any explicit theories of negotiation, conflicts with the general principles of negotiation theories, which advises negotiators to avoid threats, blame, and shame; to view the negotiation as a collaborative rather than a competitive process; to avoid focusing on zero-sum solutions; and to frame the negotiation as a win-win proposition. 284 The authors of legal-writing texts seem to be saying that a minor threat may be necessary, but they caution lawyers not to go overboard. There

is no discussion of why a party should make a specific rather than a general demand with a specific rather than an open-ended deadline. And the advice seems to assume that the letter's recipient is a completely rational actor that can be persuaded by strong, logical arguments. Of course the research in negotiation theory contradicts these untested assumptions.

Because texts on negotiation fail to cover the demand letter, lawyers seeking advice on how to start negotiations in writing can only turn to common practice or legal-writing texts. But the practitioners and writing experts may be getting it wrong. If the empirical research in negotiation behavior and priming is right, these model demand letters may cause protracted disputes and less favorable settlements. On the other hand, advice that incorporates the rich, crossdisciplinary research of legal negotiation theory could dramatically change the course of negotiations.

IV. Conclusion: Integrating Science and the Written Demand

The empirical evidence strongly suggests that written demand letters affect their readers far beyond the intentions of the lawyers who write them. By following the traditional advice on demand letters, attorneys could be priming their adversaries for a long, competitive, hostile negotiation process. Empirical research, however, may assist lawyers to write demand letters that would appeal to the other side's values, focus on the other side's gains, and offer an invitation to negotiate in an atmosphere where infinite solutions are available. Moreover, lawyers would probably serve their clients better by priming cooperation, fairness, and empathy. Rather than creating a fixed-pie bias from the outset, lawyers could prime creative thinking about interest-based solutions.

By integrating inter-disciplinary research into the written demand, lawyers can more effectively and efficiently resolve

disputes. 288 With written demand letters, lawyers have more control over their written product. With face-to-face negotiations, people often behave unpredictably and emotions can flare. 289 Lawyers are often advised to "go to the balcony," or to remove themselves so that decisions are not driven solely by their emotions. 290 With the demand letter, lawyers can put their carefully crafted negotiation strategies to work with less fear that their emotions will thwart their well-made plans. 291 Second, demand letters may have long-lasting positive effects on the recipient if a lawyer can effectively prime the recipient's goal formation. 292 Finally, demand letters often provide opposing parties with their first impressions of the factual and legal claims. 293 By focusing on the client's narrative early in the process, a client's lawyer may gain the client's trust while also creating a better opportunity to settle the case favorably. 294

Michael Saks proclaimed in an article about trial tactics, "[s]ooner or later, litigators and scholars of advocacy will come along who really want to know what works, and they will begin systematic empirical testing of various tactics and techniques."295 If lawyers are to accomplish better and more efficient settlements, they must investigate what happened before the first face-to-face negotiation or the first courtordered mediation. They must understand what sets the parties' framework for negotiations, what behaviors and goals have been primed, and what emotions have been ignited before the parties begin their personal interactions. By the time the parties meet face-to-face, their emotions and their positions may be too hostile and fixed to overcome.

Important legal negotiations start with written demand letters. The principles and practices that work in face-to-face negotiation may help lawyers craft demand letters that

facilitate settlement. However, lawyers have not often asked whether their techniques are empirically sound. Instead, lawyers have relied on methods derived from intuition and tradition. Only by empirically testing methods can lawyers know whether they are helping or hindering negotiated settlements. The time has come to engage in this most fundamental research so that what we teach lawyers and law students coincides with what actually persuades.

1 Youparklikeanasshole.com,

http://www.youparklikeanasshole.com/notices/notice_1.pdf (last visited Sept. 29, 2010).

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² <u>Id.</u>

See, e.g., Roger Fisher & Danny Ertel, Getting Ready to

Negotiate: The Getting to Yes Workbook 76-85 (1995) (failing to

mention written forms of negotiation); Jay Folberg & Dwight

Golann, Lawyer Negotiation: Theory, Practice, & Law 203-19

(2006) (incorporating interdisciplinary empirical research

throughout while devoting only seventeen pages to written email

negotiation); Gary Goodpaster, A Guide to Negotiation and

Mediation 167-80 (1997) (failing to mention demand letters even

in a chapter entitled "Negotiation Preparation and Planning"); 1

³ Id.

A See Stephen N. Subrin & Thomas O. Main, The Integration of Law and Fact in an Uncharted Parallel Procedural Universe, 79 Notre

Dame L. Rev. 1981, 2002-03 (2004) (discussing the trend in civil litigation of sending a demand letter to the other party before commencing litigation).

 $^{^{5}}$ See infra notes 25-54 and accompanying text.

Jay E. Grenig, Alternative Dispute Resolution § 3.2, at 51 (3d ed. 2005) (warning negotiators to "carefully consider their words in order to convey the intended message" and to "concentrate upon what is being verbally communicated" while also acknowledging "the importance of nonverbal communication," but defining nonverbal communication to include "facial expressions, hand gestures, posture, and eye contact"); Russell Korobkin, Negotiation: Theory and Strategy (2009) (failing to mention written negotiation generally and the demand letter in particular); Carrie J. Menkel-Meadow et al., Negotiation: Processes for Problem Solving (2006) [hereinafter Menkel-Meadow et al., Processes for Problem Solving [(incorporating interdisciplinary empirical research throughout while ignoring written negotiation and demand letters); Janice Nadler & Donna Shestowsky, Negotiation, Information Technology, and the Problem of the Faceless Other, in Negotiation Theory and Research 145-46

(Leigh L. Thompson ed., 2006) (noting that "[t]raditional approaches to research on negotiation do not typically consider the possibility that the type of communication media used by negotiators could be a factor affecting the negotiation itself" and discussing the effects of the pervasive use of e-mail and other information technology on the bargaining process, though failing to recognize written negotiations); Melissa L. Nelken, Negotiation: Theory and Practice 39 (2d ed. 2007) (including a section on "Opening Offers/Demands," but making no mention of a demand letter); see also Subrin & Main, supra note 4, at 2022 (noting that until recently, demand letter writing was not mentioned in civil procedure texts). But see Bret Rappaport, A Shot Across the Bow: How to Write an Effective Demand Letter, 5 J. of the Ass'n of Legal Writing Directors 32, 35 (2008) (urging an approach to writing the demand letter that incorporates some of the principles of negotiation theory). However, as this

Article argues, this hard-to-find advice is based on intuition and speculation. No systematic attempt has been made to study or test the effects of the demand letter. Some authors advise against starting negotiations in writing. See Charles B. Craver, Skills & Values: Legal Negotiating 180-81 (2009) (discussing the problems with e-mail negotiations); Mark K. Scheonfield & Rick M. Schoenfield, Legal Negotiations: Getting Maximum Results 356-57 (1988) (pointing out the disadvantages to using letters and other written communications in negotiations). 7 See Nadler & Shestowsky, supra note 6, at 145 (noting that, traditionally, researchers focused on face-to-face negotiations). Many of the titles suggest a focus on "talk only" negotiations. See, e.g., J. Anderson Little, Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes (2007); Deborah M. Kolb et al., When Talk Works: Profiles of Mediators (1994); Phillip Glenn & Lawrence Susskind, How Talk

Works: Studying Negotiation Interaction, 26 Negotiation J. 117 (2010) ("[N]egotiations and mediations succeed or fail based in large part on how participants manage their talk."); see also Fisher & Ertel, supra note 6, at 76-85 (failing to mention written forms of negotiation, and instead including a chapter entitled "Communication: Am I Ready to Listen and Talk Effectively?"). Carrie Menkel-Meadow includes the same examples of negotiation in two of her books. One is a lengthy letter from a college student to her parents informing them that she received poor grades. Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 137-38 (2005) (citing Robert B. Cialdini, Influence: The Psychology of Persuasion 15-16 (1993)); Menkel-Meadow et al., Processes for Problem Solving supra note 6, at 80-81 (citing Robert B. Cialdini, Influence: The **Psychology of Persuasion** 15-16 (1993)). The second is a lengthy written advertisement used by the New Haven Railroad during

World War II entitled "The Kid." Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 139 (2005); Menkel-Meadow et al., Processes for Problem Solving, supra note 6, at 82. Although both are examples of the power written documents can have on their readers, Menkel-Meadow includes them in a section entitled "Talking Persuasively." See Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 136 (2005); Menkel-Meadow et al., Processes for Problem Solving, supra note 6, at xii, 78. Neither book advises lawyers how to successfully negotiate in writing, though they acknowledge examples of powerfully written documents. See Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 136-39 (2005); Menkel-Meadow et al., Processes for Problem Solving, supra note 6, at 80-82.

 $^{^{8}}$ See infra notes 263-285 and accompanying text.

 $^{^{9}}$ <u>See</u> <u>infra</u> notes 284-286 and accompanying text.

 10 See Carrie Menkel-Meadow, <u>Legal Negotiation: A Study of</u> Strategies in Search of a Theory, 1983 Am. B. Found. Res. J. 905, 929 (1983) ("[W]e must systematically engage in hypothesis building and testing and we must explore our assumptions and generalizations about negotiations with all the variables and sophistication of the behavior scientist."); Michael J. Saks, Turning Practice into Progress: Better Lawyering Through Experimentation, 66 Notre Dame L. Rev. 801, 801-02 (1991) ("A major part of the problem is that the legal profession has no systematic methodology for producing knowledge about its task or about how well it is accomplishing that task."). ¹¹ See, e.g., **Cal**. **Civil Code** § 1782(a)(2) (West 2009); **Mass**. Gen. Laws Ann. ch. 93A, § 9(3) (West 2006); see also Subrin & Main, supra note 4, at 2010-11 (noting that a few state consumer rights laws and federal environmental laws require demand

letters).

 $^{^{\}rm 12}$ See infra notes 212-221 and accompanying text.

¹³ See Richard Birke & Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, 4 Harv. Negot. L. Rev. 1, 1 (1999) ("Fewer than five percent of all civil cases filed will result in a verdict; most of the rest will be resolved by negotiation." (internal citation omitted)); Marc Galanter, The Vanishing Trial: What the Numbers Tell Us, What They May Mean, 10 Disp. Resol. Mag. 3, 3 (2004) (estimating that 1.8% of cases are disposed of through trial); see also Russell Korobkin, Psychological Impediments to Mediation Success: Theory and Practice, 21 Ohio St. J. on Disp. Resol. 281, 293 (2006) ("Only a very small percentage of cases actually go to trial); Margo Schlanger, What We Know and What We Should Know About American Trial Trends, 2006 J. Disp. Resol. 35, 36 (2006) (noting a reduction in the number of civil trials before district courts).

John Bronsteen, Some Thoughts About the Economics of Settlement, 78 Fordham L. Rev. 1129, 1133 (2009).

- Trial Advoc. 87, 88 (2007) ("The modern legal system has evolved into a place where justice may be difficult to obtain unless the litigant is financially well off."); Thomas O. Main, ADR: The New Equity, 74 U. Cin. L. Rev. 329, 333-34 (2005).
- The CPR Legal Program, Containing Legal Costs: ADR Strategies for Corporations, Law Firms & Government 1 (Ericka S. Fine & Elizabeth Plapinger eds., 1988); see David M. Trubeck et al.,

 The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 91-92

 (1983).
- The CPR Legal Program, supra note 17, at 1 ("Extensive discovery, pretrial maneuvering, long trials, and uncertainty over legal outcomes also waste management time and energy,

 $^{^{15}}$ See <u>id.</u> at 1132-33.

destroy business relationships, and result in lost market opportunities.").

- Not Make a Deal: An Empirical Study of Decision Making in
 Unsuccessful Settlement Negotiations, 5 J. Empirical Legal Stud.
 551, 590 (2008).
- ²⁰ Bronsteen, supra note 14, at 1133.
- See id. (discussing the drain on public resources that litigation causes). The more contentious the parties, the more likely they are to seek the court's intervention, increase discovery demands, and refuse to concede any point. See The CPR Legal Program, supra note 17, at 1 (discussing the various costs of litigation).
- Judy MacFarlane & John Manwaring, Reconciling Professional

 Legal Education with the Evolving (Trial-less) Reality of Legal

 Practice, 2006 J. Disp. Resol. 253, 254 (2006).

Gerald R. Williams & Joseph M. Geis, <u>Negotiation Skills</u>

Training in the Law School Curriculum, in **Teaching Negotiation:**Ideas and Innovations 203-07 (Michael Wheeler ed. 2000).

24 Donna Shestowsky, Psychology and Persuasion, in **The**

Negotiator's Fieldbook: The Desk Reference for the Experienced

Negotiator 361, 362 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) ("The kind of training in logic and reasoning that lawyers typically receive in law school and in legal practice can make it challenging for them to truly appreciate that the use of such formal argumentation is but one way to persuade."). One example of this disconnect is the way apologies play out in negotiation and litigation. Although offering a complete apology means that the case will usually settle more quickly, when lawyers get involved they see apologies from the other side as increasing their settlement values because they increase the likelihood of success at trial. <u>Negotiation</u>, 13 Harv. Negot. L. Rev. 349, 381 (2008) (discussing defense attorneys' views on client apologies); Jonathan R.
Cohen, <u>Advising Clients to Apologize</u>, 72 S. Cal. L. Rev. 1009,
1011-12 (1999).

- Jerome T. Barrett, A History of Alternative Dispute Resolution $211-14 \ (2004)$.
- Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution," 1 J.

 Empirical Legal Stud. 843, 849-50 (2004).
- Dorothy J. Della Noce, Mediation Theory and Policy: The Legacy
 of the Pound Conference, 17 Ohio St. J. Disp. Resol. 545, 546
 (2002).

²⁸ Main, <u>supra</u> note 16, at 335-41.

 $^{^{29}}$ <u>See</u> Della Noce, <u>supra</u> note 27, at 551-55 (discussing the debate in the mediation context). Compare Robert J. Condlin,

Bargaining with a Hugger: The Weaknesses and Limitations of a

Communitarian Conception of Legal Dispute Bargaining, or Why We

Can't All Just Get Along, 9 Cardozo J. Conflict Resol. 1, 1-16

(2007) (arguing that the adversarial model of negotiation is

more effective in practice than the problem-solving approach),

with Carrie Menkel-Meadow, Toward Another View of Legal

Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev.

754, 755-59 (1984) (arguing that the problem-solving approach to negotiation more effectively accomplishes the purpose of negotiation than does an adversarial approach).

See Carrie Menkel-Meadow, Chronicling the Complexification of Negotiation Theory and Practice, 25 Negot. J. 415, 416-19 (2009) (discussing the evolution of alternative dispute resolution over the years and noting the aim of a "'joint gain' . . . for all of the parties").

$^{ m 31}$ Carrie Menkel-Meadow, Dispute Processing and Conflict

Resolution: Theory, Practice, and Policy xviii (2003) (noting that some "work in conflict theory has been derived from organizational management, labour relations and the applied sciences of decision-making and problem-solving" (internal citations omitted)).

See Stipanowich, supra note 26, at 848 (noting that alternative dispute resolution is seen "as an intervention strategy to promote what a trial was not designed to accomplish" and including a list of those goals); see also Jacqueline M.

Nolan-Haley, Lawyers, Clients, and Mediation, 73 Notre Dame L.

Rev. 1364, 1386-87 (1998) (discussing the lawyer's role in understanding additional factors, such as the client's emotional

concerns as well as the financial costs of litigation).

³² Kiser et al., supra note 19, at 590.

Robert H. Mnookin et al., Beyond Winning: Negotiating to Create

Value in Deals and Disputes 227 (2000) ("Lawyers are often told

to settle early—by clients, judges, scholars, and books . . . on

negotiation. It's good advice. The problem in litigation is

not that cases don't settle; it's that they settle late, after

huge costs have been incurred.").

See Charles B. Craver, Skills and Values: Legal Negotiating

153-60 (2009) (discussing psychological theories in the context
of negotiation techniques), Folberg & Golan, supra note 6, at

passim (using psychology and game theory in the negotiation

textbook); Korobkin, supra note 6, at 25-90 (using economics and
psychology in the negotiation textbook); Menkel-Meadow, supra

note 31, at xvi-xxv (discussing the multi-disciplinary areas

that dispute resolution incorporates); Nelken, supra note 6, at

197-258 (incorporating psychological principles into the

discussion on negotiation theory); Charles B. Wiggins & L.

Randolph Lowry, Negotiation & Settlement Advocacy: A Book of Readings 39-41, 255-59 (2d ed. 2005) (incorporating economics into negotiation techniques).

 36 See **Korobkin**, supra note 6, at 229-31 (discussing the differences between cooperative and competitive negotiation styles); Menkel-Meadow, supra note 29, at 758 (discussing the benefits of the problem-solving style of negotiation); Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, The Tension Between Empathy and Assertiveness, 12 Negot. J. 217 (1996), reprinted in Korobkin, supra note 6, at 228-30 (discussing the advantages and disadvantages of negotiations being empathetic, cooperative, and competitive). But see Condlin, supra note 29, at 8-16 (showing that there is no support for the notion that negotiators who are more cordial and cooperative are more effective at bargaining).

 $^{^{\}rm 37}$ See Max H. Bazerman, Negotiator Judgment: A Critical Look at the Rationality Assumption, 27 Am. Behav. Sci. 211, 211-15 (1983); Mnookin et al., supra note 34, at 11-26. 38 Chia-Jung Tsay & Max H. Bazerman, A Decision-Making Perspective to Negotiation: A Review of the Past and a Look to the Future, 25 Negot. J. 467, 473 (2009); see also Elizabeth E. Bader, The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle, 10 Pepp. Disp. Resol. L.J. 183, 196 (2010) ("[M]uch of the hostility and sense of insult parties exhibit in mediation is a defensive reaction to underlying feelings of shame or vulnerability."); Korobkin, supra note 13, at 298-303. ³⁹ Craver, supra note 6 at 153-54; Russell Korobkin & Chris Guthrie, Heuristics and Biases at the Bargaining Table, 87 Marq.

L. Rev. 795, 802 (2004) [hereinafter Korobkin & Guthrie,

Heuristics]; see also Jeffrey J. Rachlinski, Gains, Losses, and

the Psychology of Litigation, 70 S. Cal. L. Rev. 113, 176 (1996)

("Just as the loser-pays system induces excessive litigation, so too does litigation in which both parties view the litigation as a loss.").

Gerald R. Williams, <u>Negotiation as a Healing Process</u>, 1996 J.

Disp. Resol. 1, 33 (1996) (observing that "negotiation unfolds

in predictable stages over time").

Negotiator's Fieldbook: The Desk Reference for the Experienced

Negotiator, supra note 24, at 271. This focus is especially

curious when many writers acknowledge that face-to-face

communications likely result in different bargaining styles and

lead to different results than other forms of communication,

such as phone conferences or email exchanges. See Lynn A.

Epstein, Cyber E-Mail Negotiation Vs. Traditional Negotiation:

Will Cyber Technology Supplant Traditional Means of Settling

Litigation?, 36 Tulsa L.J. 839, 841-42 (2001).

 42 See supra notes 6-7 and accompanying text.

- See Dorcas Quek, Mandatory Mediation: An Oxymoron? Examining
 the Feasibility of Implementing a Court-Mandated Mediation

 Program, 11 Cardozo J. Conflict Resol. 479, 484 (2010).
- Dwight Golann, Mediating Legal Disputes, Effective Strategies for Neutrals and Advocates xvii (2009) (noting that mediation often occurs too late in a lawsuit).
- 16 Id. Texts and studies on legal negotiation generally apply to the negotiation that focuses on the ultimate dispute; they ignore the reality that, before parties convene in a room together, they have already had a negotiation—a negotiation about whether the parties will meet at all. This negotiation may turn out to be the most difficult. Negotiation theory overlooks the notion that simply convincing another party to meet or to listen is sometimes a major accomplishment.

⁴³ See supra note 6.

Mediators are advised that the parties have often become bitterly embroiled in conflict before they mediate the dispute.

Id. One commentator, in a book written for mediators, explains that

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[p]arties in [serious legal disputes] hire lawyers, make serious allegations against each other, and often endure years of bitter and expensive litigation before they think seriously about settling their dispute. By this time, whatever interest the litigants may have had in relating with each other is usually gone, and many would prefer not even to talk with the other.

Id.

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See supra note 6 and accompanying text. For example, Russell Korobkin and Chris Guthrie claim that "the opening settlement offer is perhaps the most important aspect of the bargaining

strategy employed by a litigant" because exchanges are typically limited; they fail to mention anything about written demands, however. Russell Korobkin & Chris Guthrie, Opening Offers and Out-of-Court Settlement: A Little Moderation May not Go a Long Way, 10 Ohio St. J. on Disp. Resol. 1, 3 (1994) [hereinafter Korobkin & Guthrie, Opening Offers].

- Nadler & Shestowsky, <u>supra</u> note 6, at 145-46 (noting that, traditionally, researchers have focused on face-to-face negotiations and arguing that the growth of information technology, especially e-mail, requires scholars to focus on these new forms of media and their effects on negotiations); <u>see</u> also Epstein, <u>supra</u> note 41, at 839-40.
- See, e.g., Folberg & Golann, supra note 6, at 203-19

 (allocating only seventeen pages in a nearly four hundred and fifty page textbook to e-mail negotiations); Epstein, supra note

 41, at 842-43 (contemplating the use of well-known negotiating

techniques in e-mail-making extreme demands, splitting the difference, and providing successive concessions-but warning that these may backfire and are probably borderline unethical, therefore ultimately advising lawyers to be straightforward in written e-mail exchanges).

 50 Epstein, supra note 41, at 842 ("A written communication avoids the psychological games lawyers often engage in during face-to-face negotiations."). Michael Moffitt notes that written pleadings can serve as an impediment to settlement because these written documents fail to construct a complex vision of the past, eliminate the emotion from problems, look to past events rather than future events, and limit solutions to those that are law-based. Michael Moffitt, Pleadings in the Age of Settlement, 80 Ind. L.J. 727, 747 (2005). Moffitt's solution is not to change the manner of pleading, but, instead, to create face-to-face, pre-suit conferences so that the parties can

negotiate before the pleadings constrain their problem-solving. Id. This solution has two problems: first, it ignores the power of the written word to shape people's views, ignite their emotions, and drive their behavior, and, second, it assumes that "[1]egal disputes begin with the pleading." Id. at 728. Legal disputes, however do not begin in the court system; they seek resolution in the court system. And, before suit is filed, parties have almost certainly engaged in failed written and verbal negotiations. Therefore, the search for solutions to the negotiation impasse should begin much earlier than the pleading stage.

See infra Part III.A. The empirical research calls into question the whole idea of conscious, rational thought and its supreme role in decision-making. If anything, the research in social psychology is changing the definition of rational decision-making. Until recently, rational thought was seen as a

conscious, deliberate thought process. See Ap Dijksterhuis, Automiticity and the Unconscious, in Handbook of Social Psychology 252 (Susan T. Fiske, Daniel T. Gilbert & Garnder Lindzey eds., 5th ed. 2010). But social psychologists have taught that conscious deliberation is not necessary for rational decision-making. See id. Studies continue to expose instances where unconscious heuristics lead a person to make better decisions than experts who engage in conscious and deliberate weighing of the evidence before deciding. See Daniel G. Goldstein & Gerd Gigerenzer, Models of Ecological Rationality: The Recognition Heuristic, 109 Psychol. Rev. 75, 75-88 (2002). ⁵² See, e.g., Melissa J. Ferguson & John A. Bargh, How Social Perception Can Automatically Influence Behavior, 8 Trends Cognitive Sci. 33, 33-39 (2004) (discussing priming studies). 53 See infra Part III.A (discussing priming studies and their

effect on the written demand).

- See Subrin & Main, supra note 4, at 2010-12 (explaining that demand letters are sometimes required before the court will allow parties to engage in any other actions).
- Structure, Strategy, and Style 273 (6th ed. 2009).
- Subrin & Main, supra note 4, at 2020; see also Shestowsky,

 supra note 24, at 368 ("[V]ery little psychological research has

 examined persuasion specifically in the negotiation context,

 psychology has produced a wealth of research on persuasion more

 broadly that can serve as a helpful guide.").

⁵⁴ See inf<u>ra</u> Part III.A.

 $^{^{58}}$ <u>See</u> Subrin & Main, <u>supra</u> note 4, at 1983-84.

⁵⁹ <u>Id.</u> at 1999 ("[T]he primary audience for a complaint is often, if not usually the judge, while advocacy documents, such as demand letters, are primarily drafted to convince the opposing

party or lawyer or a corporate defendant's management group or the person with the authority to settle.").

- See Kathryn M. Stanchi, The Power of Priming in Legal

 Advocacy: Using the Science of First Impressions to Persuade the

 Reader, Or. L. Rev. (forthcoming 2010) (manuscript at 1-2),

 available at http://ssrn.com/abstract=1604150.
- 61 <u>See id.</u> (manuscript at 45-47) (describing the importance of "priming" in litigation).

⁶³ Id. at 2001; see also Elizabeth Fajans & Mary R. Falk, Untold

- 62 Subrin & Main, supra note 4, at 2002-03.
- Stories: Restoring Narrative to Pleading Practice, 15 Legal

 Writing: J. Legal Writing Inst. 3, 3 (2009) ("Over the

 centuries, this narrative aspect of the complaint, the telling

 of plaintiff's tale through substantive allegations, has been

 eclipsed by the several instrumental functions of complaints

 even as those functions—invoking the court's jurisdiction,

providing notice to the defendant, narrowing the issues, uncovering facts—have themselves waxed and waned in importance."); Moffitt, supra note 50, at 728 (discussing the disconnect between what pleading rules require and what negotiation theory suggests to facilitate settlement from the outset).

^{64 &}lt;u>See infra</u> Part II.C.

⁶⁵ Robert S. Adler, Flawed Thinking: Addressing Decision Biases in Negotiation, 20 Ohio St. J. on Disp. Resol. 683, 712-13 (2005).

⁶⁶ See infra Part II.A.1-2.

⁶⁷ <u>See infra Part II.A.1-2.</u>

 $^{^{68}}$ <u>See</u> Adler, <u>supra</u> note 65, at 712-13.

⁶⁹ See Stanchi, supra note 60, at 1-8.

⁷⁰ Charles G. Lord et al., <u>Biased Assimilation and Attitude</u>
Polarization: The Effects of Prior Theories on Subsequently

Considered Evidence, 37 J. of Personality & Soc. Psychol. 2098, 2101-05 (1979) (demonstrating that both those people with strong pro-death penalty beliefs and those with strong anti-death penalty believes viewed the same subsequent evidence as confirming their respective positions); see also Tsay & Bazerman, supra note 38, at 470-71 (explaining that study participants tended to better recall information supporting their perspectives).

Impasse: The Role of Self-Serving Biases, 11 J. of Econ. Persp.

109, 112-13 (1997) (demonstrating that participants will predict higher awards in a hypothetical case for the side to which they had been randomly assigned, even though both sides were given the same information); Albert H. Hastorf & Hadley Cantril, They

Saw a Game: A Case Study, 49 J. of Abnormal & Soc. Psychol. 129,

Dartmouth and Princeton students viewed a football game between the two teams with significant bias in favor of their own team);

Tsay & Bazerman, supra note 38, at 470-71; see also Birke & Fox,

supra note 13, at 14 ("In general, people have great difficulty divorcing themselves from their idiosyncratic role sufficiently to take an objective view of disputes in which they are involved.").

- Pabcock, <u>supra</u> note 71, at 120. Babcock notes that "differences in roles" can cause one to gravitate to his own biases. Id.
- Tyle A. Brenner et al., On the Evaluation of One-Sided Evidence, 9 J. of Behav. Decision Making 59, 61 (1996).

 $^{^{74}}$ <u>Id.</u> at 61.

 $^{^{75}}$ Id.

⁷⁶ <u>Id.</u>

 $^{^{77}}$ <u>Id.</u> at 63.

⁷⁸ <u>Id.</u>

 80 Id. at 68. ⁸¹ Daniel L. Shapiro, Preempting Disaster: Pre-Mediation Strategies to Deal with Strong Emotions, in The Blackwell Handbook of Mediation 311 (Margaret S. Herrman ed., 2006) ("[E]ach party's strong emotions can fuel their own escalating emotions . . . "); see also Robert S. Adler et al., Emotions in Negotiation: How to Manage Fear and Anger, 14 Negot. J. 161, 164 (1998) (explaining that negative emotions tend to engage more quickly because of their primal use in instinctual human survival); Jefferey L. McClellan, Marrying Positive Psychology to Mediation: Using Appreciative Inquiry and Solution-Focused Counseling to Improve the Process, 62 Disp. Resol. J. 29, 31 (2007) (noting that as a cycle of angry emotions intensifies, "'edginess' and arousal increase dramatically").

⁷⁹ <u>Id.</u>

- McClellan, <u>supra</u> note 81, at 31; <u>see also</u> Adler, <u>supra</u> note 81, at 168-69 ("[T]he two most intense emotions that confront negotiators are fear and anger").
- 83 Korobkin, <u>supra</u> note 13, at 300-01; Shapiro, <u>supra</u> note 81, at 311-12.
- ⁸⁴ McClellen, supra note 81, at 31.
- 85 Adler, <u>supra</u> note 65, at 169 ("[A]nger motivates us to retaliate when we are attacked."); Krorbkin, <u>supra</u> note 13, at 300-01; McClellan, <u>supra</u> note 81, at 31; Shapiro, <u>supra</u> note 81, at 311.
- Malevolent utility function places a positive value on preventing the opposing party from obtaining what she wants from the lawsuit.").
- Martin A. Nowak et al., <u>Fairness Versus Reason in the Ultimatum Game</u>, 289 **Sci**. 1773, 1773-74 (2000).

⁸⁸ Id<u>.</u> at 1773.

 93 $\underline{\text{See}}$ $\underline{\text{id.}}$ (concluding that half the responders reject offers

below thirty percent); see also Werner Güth et al., An

Experimental Analysis of Ultimatum Bargaining, 3 J. Econ. Behav.

& Org. 367, 368.

96 See Daniel L. Shapiro, Emotions in Negotiation: Peril or

Promise?, 87 Marq. L. Rev. 737, 740-41 (2004) (discussing biases
and emotions encountered upon initiating negotiation).

 97 People often use mental shortcuts when making decisions.

Dijksterhuis, $\underline{\text{supra}}$ note 51, at 252-53. These mental shortcuts,

⁸⁹ <u>Id.</u>

⁹⁰ <u>Id.</u>

⁹¹ Id.; Birke & Fox, supra note 13, at 36 n.152.

 $^{^{92}}$ Nowak et al., <u>supra</u> note 87, at 1773.

 $^{^{94}}$ Güth et al., supra note 93, at 368.

 $^{^{95}}$ Tsay & Bazerman, supra note 38, at 470-73.

or heuristics, are intuitive judgments driven by automatic processes outside our conscious awareness. <u>Id.</u> at 252-53. Many researches describe heuristics as highly adaptive human behavior because humans cannot consciously and carefully weigh each judgment or decision they face. <u>Id.</u> at 253. The problem with heuristic reasoning is that it is susceptible to systemic biases. <u>See id.</u> at 252-53.

98 Shirli Kopelman et al., The Three Faces of Eve: Strategic
Displays of Positive, Negative, and Neutral Emotions in
Negotiations, 99 Organizational Behav. & Hum. Decision Processes
81, 83 (2006); Gerben A. Van Kleef et al., The Interpersonal
Effects of Emotions in Negotiations: A Motivated Information
Processing Approach, 87 J. Personality & Soc. Psychol. 510, 510
(2004).

99 G. Robert J. Hockey et al., Effects of Negative Mood States on Risk in Everyday Decision Making, 14 Cognition & Emotion 823,

825 (2000); see also Stanchi, supra note 60, at 15-16

(discussing the effects of positive and negative emotions on cognitive function and decision-making); Tsay & Bazerman, supra note 38, at 473-74

See Hockey et al., supra note 99, at 825 (discussing the studies on the effects of negative mood on mental processing and decision making); Stanchi, supra note 60, at 15 ("The result of pessimism . . . is a narrowed focus of attention and motivation to process information more deeply and systematically.").

¹⁰¹ See Hockey et al., supra note 99, 825.

 $^{^{102}}$ See supra text accompanying notes 98-99.

¹⁰³ Kathryn M. Stanchi, The Science of Persuasion: An Initial Exploration, 2006 Mich. St. L. Rev. 411, 418-19 (2006).

¹⁰⁴ <u>Id.</u>

¹⁰⁵ <u>Id.</u>

- 106 <u>Id.</u> at 418 n.27 (citing **Daniel O'Keefe, Persuasion: Theory** and **Research** 169 (1990)).
- 107 One can imagine that even a relatively small request-perhaps simply to meet in person-sets the stage for a larger request later.
- Chris Guthrie, <u>Insights from Cognitive Psychology</u>, 54 **J. Legal Educ.** 42, 44 (2004).
- Making, in Handbook of Social Psychology 552-54 (Susan T. Fiske et al. eds., 5th ed. 2010) (describing the anchoring heuristic).

 Guthrie, supra note 108, at 44; Dan Orr & Chris Guthrie,

 Anchoring, Information, Expertise, and Negotiation: New Insights

 from Meta-Analysis, 21 Ohio St. J. on Disp. Resol. 597, 597
- Amos Tversky & Daniel Kahneman, <u>Judgment Under Uncertainty:</u>
 Heuristics and Biases, 185 Sci. 1124, 1128 (1974).

¹¹² <u>Id.</u>

¹¹³ <u>Id.</u>

¹¹⁴ <u>Id.</u>

an extreme opening offer to anchor her counterpart."); Korobkin & Guthrie, Heuristics, supra note 39, at 806 (noting that extreme opening demands increases the likelihood of recharging a settlement agreement); Korobkin & Guthrie, Opening Offers, supra note 47, at 3-5 ("Because pretrial bargaining typically includes few exchanges, the opening settlement offer is perhaps the most important aspect of the bargaining strategy employed by a litigant, and it deserves special attention.").

 116 Korobkin & Guthrie, Opening Offers, supra note 47, at 1, 4-5.

 117 <u>Id.</u> at 11-12.

¹¹⁸ <u>Id.</u>

 119 <u>Id.</u> at 12-13.

120 <u>Id.</u>

- ¹²² Id. at 13, 19.
- 123 Id. at 19.
- ¹²⁴ <u>Id.</u>
- ¹²⁵ <u>See</u> <u>id.</u>
- See <u>id.</u> at 3 ("Because pretrial bargaining typically includes few exchanges, the opening settlement offer is perhaps the most important aspect of the bargaining strategy employed by a litigant, and it deserves special attention.").
- 127 See Rachlinski, supra note 39, at 119-21.
- See, e.g., Rachlinski, supra note 39, at 118-28 (providing an extensive discussion of the framing effects in litigation).
- 129 <u>Id.</u> at 123.
- Amos Tversky & Daniel Kahneman, The Framing of Decisions and the Psychology of Choice, 211 Sci. 453, 453 (1981).

 $^{^{121}}$ <u>Id.</u> at 13.

- ¹³¹ <u>See</u> <u>id.</u>
- ¹³² <u>Id.</u>
- ¹³³ <u>Id.</u>
- ¹³⁴ <u>Id.</u>
- ¹³⁵ <u>Id.</u>
- ¹³⁶ <u>Id.</u>
- ¹³⁷ <u>Id.</u>
- 138 Id. at 453-54.
- See Rachlinski, supra note 39, at 128-29 (demonstrating through statistical data that a defendant is less likely to accept a monetary settlement offer that will be a certain loss).

 See Adler, supra note 70, at 712-13 (explaining that initial impressions, even if false, may dominate the entire negotiation).
- See Gary Paquin & Linda Harvey, Therapeutic Jurisprudence,

 Transformative Mediation and Narrative Mediation: A Natural

Connection, 3 Fla. Coastal. L.J. 167, 170 (2002) (explaining that allowing each party the opportunity to tell his or her story can be therapeutic and invoke feelings of empathy in the other party, increasing the likelihood of settlement); Subrin & Main, supra note 4, at 2018 (citing Jason Curriden, Woolf Reforms Target Inefficiency and Inequity in UK Court System,

Inside Litig. July 1999, at 1, 2, 4) ("[G]etting potential litigants to tell their stores in advance makes sense . . . and this will help many of them settle earlier and with more information.").

See Kenneth D. Chestek, <u>The Plot Thickens: The Appellate</u>
Brief as Story, 14 Legal Writing: J. Legal Writing Inst. 127,
131 (2008) (explaining that narrative can integrate the client's
story among the legal facts).

See, e.g., id. at 130-32 (asserting that the use of narratives is advantageous in writing appellate briefs); Fajans

& Falk, supra note 63, at 15 ("[T]he careful drafter's job is to use traditional storytelling techniques to the client's advantage); J. Christopher Rideout, Storytelling, Narrative Rationality, and Legal Persuasion, 14 Legal Writing: J. Legal Writing Inst. 53, 57 (2008) (discussing how the use of narratives can lead to positive outcomes in trial); Ruth Anne Robbins, An Introduction to Applied Storytelling, 14 Legal Writing: J. Legal Writing Inst. 3, n.18 (2008) ("[H]ave we not reached the point where we can just take judicial notice that stories are an important form of human communication?"); see also Stanchi, supra note 60, at 7 (suggesting the use of priming to influence the reader's view of the facts in written advocacy).

¹⁴⁴ Rappaport, <u>supra</u> note 6, at 46.

See Susan Bandes, Empathy, Narrative, and Victim Impact
Statements, 63 U. Chi. L. Rev. 361, 383-84 (1996) (discussing

the role of the narrative and using "literary insights" to explore the narrative's effect); Nancy Pennington & Reid Hastie,

A Cognitive Theory of Juror Decision Making: The Story Model, 13

Cardozo L. Rev. 519, 520 (1991) (using "the perspective of psychologists who are interested in how people think and behave" to explore decision making in juries).

adhere to logic and consistency in order to persuade. See
Fajans & Falk, supra note 63, at 17 (explaining that the soundness of a story is critical to its success).

See Bandes, supra note 145, at 383 ("We make sense of the world by ordering it into metaphors, and ultimately into narratives."); Subrin & Main, supra note 4, at 1985 ("[H]umans attempt to understand reality by identifying some of the many variables in a given situation and then weaving them into a comprehensible story.").

- ¹⁴⁸ Stories even form the foundation of most people's understanding of the deity, the beginnings of the universe, and our religious traditions.
- 149 Rideout, supra note 143, at 59.
- 150 See id. at 55.
- See Fajans & Falk, supra note 63, at 22 (arguing that "narrative fidelity is achieved when our clients can recognize their own stories"); Paquin & Harvey, supra note 116, at 170 (asserting that allowing a client to tell her story can be "cathartic").
- See Subrin & Main, supra note 4, at 2001-02 (suggesting that, in the multitudes of settlement cases, a client's story may be overlooked). But see Bandes, supra note 145, at 383-88. Bandes persuasively argues that narrative is present in every legal dispute, but the narrative may be different in different contexts. Id. at 384-85. Traditional legal narrative

reinforces the status quo, preferring narratives of formalism to narratives of empathy. See id. at 387-89. Therefore, although the client's story is not dislodged from an emotional and value-laden narrative, it is told through a narrative entirely inappropriate for the task of healing and reconciling.

153 Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin:

Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey, 29 Seattle U. L. Rev. 767, 768-69

Linda H. Edwards, Once Upon a Time in Law: Myth, Metaphor,

and Authority, 77 Tenn. L. Rev. (forthcoming fall 2010)

(manuscript at 8), available at

http://ssrn.com/abstract=1462570.

(2006).

Philip N. Meyer, Retelling the Darkest Story: Mystery,

Suspense, and Detectives in a Brief Written on Behalf of a

Condemned Inmate, 58 Mercer L. Rev. 665, 667 (2007).

 $^{^{156}}$ See Austin Sarat, Narrative Strategy and Death Penalty Advocacy, 31 Harv. C.R.-C.L. L. Rev. 353, 368 (1996) ("Facts do not speak for themselves, and stories do not tell themselves. The good lawyer fits the story that he has to tell into the available stock of culturally recognized narratives that connect his client to familiar and recognizable themes."). Kathryn Stanchi arques that priming studies can help lawyers chose a theme of the case when writing their briefs, noting that "[o]ne of the earliest decisions a legal advocate must make is what the overarching theme or feel of the case is going to be." Stanchi, supra note 60, at 8-9. This is good advice, but the choice should be made much earlier than when lawyers begin writing briefs for their cases. Lawyers must decide on the way they will present their clients' stories before the negotiations begin. Of course, the story may change once a case is filed because the audience is now a third party decision-maker. If

lawyers wait until suit is filed to craft the client's story, they have waited too long. When a lawsuit is filed, it likely means the pre-suit story probably failed to persuade. See also Subrin & Main, supra note 4, at 1986 (citing James B. White, The Legal Imagination 859 (1973)) (discussing the importance of telling a persuasive story).

"[p]leadings define problems in ways that make wise and efficient settlement <u>less</u> likely" because they fail to incorporate negotiation theory); Subrin & Main, <u>supra</u> note 4, at 1987 ("[R]are is the pleading, motion, or other paper with a fully integrated narrative of law and fact about the case.").

158 Fed. R. Civ. P. 8(a). <u>But see</u> Fajans & Falk, <u>supra</u> note 63, at 14 (suggesting ways in which lawyers can tell their clients'

stories within the formal complaint).

- Fed. R. Civ. P. 8(b). But see Fajans & Falk, supra note 63, at 14-15 (noting that the narrative theory should be applied to complaints and answers).
- 160 Subrin & Main, supra note 4, at 1999.
- in State Civil Procedure: The National Perspective, 35 W. St. U.
- L. Rev. 121, 128-33 (2007) (providing examples of state discovery rules that deviate most strikingly from the federal rules in the area of discovery practice).
- Subrin & Main, supra note 4, at 2000. Summary judgment rules also create an incentive to increase the cost of pre-trial discovery because many parties simply choose to litigate their cases at the summary judgment level. See John Bronsteen,

 Against Summary Judgment, 75 Geo. Wash. L. Rev. 522, 530-32

See, e.g., N.D. III. LR 56.1. For example, the Northern

District of Illinois's Local Rule 56.1 requires the movant to

file a statement of material facts that is completely separate

from the legal arguments. Id. The non-movant must admit or

deny each paragraph of fact. Id., see Sunil R. Harjani, Local

Rule 56.1: Common Pitfalls in Preparing a Summary Judgment

Statement of Facts, CBA Record, Oct. 2002, at 42, available at

http://www.jenner.com/files/tbl_s20Publications/RelatedDocuments

PDFs1252/396/CBA%20Record%201002.pdf (discussing the

requirements of Local Rule 56.1).

See, e.g., N.D. Ill. LR 56.1; see also Harjani, supra note 163 (stating that, in an effort to simplify the court's task of ruling on a motion for summary judgment, Northern District of Illinois's Local Rule 56.1 requires facts to be relevant and stated concisely, and does not allow parties to intermingle

their "[c]haracterizations, inferences, and legal conclusions" with the statement of facts).

that, even in court-ordered mediation, clients may be denied the opportunity to provide the other side with their own narrative because lawyers have supplanted mediation with a lawyer-driven "bargaining paradigm" that values economically-grounded, rational negotiation. Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to do with It?, 79 Wash.

U. L. Q. 787, 802-05 (2001).

See, e.g., Subrin & Main, supra note 4, at 2017 ("If we are right, the lawyers, largely on their own, usually without a rule, and without a standard, seem to be fulfilling the need to integrate law and fact into an advocacy narrative, and to share it with the opposition, their own clients, and when desirable, with mediators.").

- "the study of persuasive writing has been dominated by a kind of 'armchair psychology'—a set of conventions and practices, handed down from lawyer to lawyer, developed largely from instinct and speculation." Stanchi, supra note 103, at 412. Lawyers must "reexamine the validity of conventional wisdom" to determine whether the conventional wisdom is wrong. Id. at 413.
- 170 Subrin & Main, supra note 4, at 2020.
- See Fed. R. Evid. 408. But see Kristin M. Kerwin, Note, The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond, 12 Rev. Litig. 665, 669-84
 (1993) (discussing the inconsistent patchwork of laws protecting settlement communications from disclosure).

 $^{^{167}}$ Subrin & Main, supra note 4, at 2001-02.

 $^{^{168}}$ <u>Id.</u> at 1983.

- 172 Fed. R. Evid. 408(a)(2) (stating that settlement
- communications are not admissible "to prove liability for, [or] invalidity of" the claim or its amount); Subrin & Main, supra note 4, at 2020.
- 173 Subrin & Main, supra note 4, at 2020.
- 174 See Saks, supra note 10, at 802.
- ¹⁷⁵ Id. at 801-02.
- ¹⁷⁶ <u>See</u> <u>id.</u>, at 802.
- Subrin & Main, <u>supra</u> note 4, at 2005 ("[V]arious provisions of substantive law now require, or make it otherwise desirable, that an initial letter or other document explaining the plaintiff's legal and factual position be sent to the defendant as a prerequisite to filing suit.").
- 178 See, e.g., Mass. Gen. Laws Ann. ch. 93A, § 9(3) (West 2006);
 Tex. Bus. & Com. Code Ann. § 17.505(a) (West 2002).

 179 See Manuel H. Newburger, Acceleration Notices and Demand

<u>Letters</u>, 47 **Consumer Fin. L. Q. Rep.** 338, 338-51 (1993)

1975). The court in Slaney explained:

(discussing when and what kind of demand letters are required in the debt collection area).

See Slaney v. Westwood Auto, Inc., 322 N.E.2d 768, 779 (Mass.

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The demand letter serves a dual function. The first of these functions is to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct. This gives the addressee an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied. The second function of the letter is to operate as a control on the amount of damages which the complainant can ultimately recover if he proves his case.

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- Id. (internal citations omitted).
- 181 $\underline{\text{See}}$ $\underline{\text{supra}}$ note 6 and accompanying text.
- See Slaney, 322 N.E.2d at 779 (noting that demand letters are used to encourage settlement).
- Cf. Menkel-Meadow et al., Processes for Problem Solving,

 supra note 6, at 3-4 (discussing the myriad of skills and the general complexity of negotiation).
- 184 Mass. Gen. Laws Ann. ch. 93A, § 9(3).
- ¹⁸⁵ Id.
- 186 Id. Of course, the definition of reasonable has been hard to pin down. Courts have held that the reasonableness of a settlement offer under the Massachusetts statute is a question of fact. See Kohl v. Silver Lake Motors, Inc., 343 N.E.2d 375, 378 (Mass. 1976).

- $\underline{\text{See}}$ Mass. Gen. Laws Ann. ch. 93A, § 9(3); $\underline{\text{Kohl}}$ 343 N.E.2d at 380 (explaining the parameters of § 9(3)).
- See Mass. Gen. Laws Ann. ch. 93A, § 9(3); see also Williams,
 supra note 40, at 33-35 (stating that there are multiple stages
 in legal negotiations).
- 189 <u>See</u> The Essentials of Negotiation 48-50 (Harvard Bus. Sch. Press, Soc'y for Human Res. Mgmt. 2005) ("In a distributive negotiation, the parties compete over the distribution of a fixed sum of value.").
- 190 <u>See</u> Mass. Gen. Laws Ann. ch. 93A, § 9(3). Requiring these types of demand letters creates the same kind of bias Michael Moffitt identifies in the pleading requirements—they give the perception that the "[p]roblems . . . boil down to, 'Do you owe me money?'" Moffitt, supra note 50, at 728.
- See Korobkin & Guthrie, Opening Offers, supra note 50, at 3-4.

- See id. Although well-intentioned, statutes simply assume, without testing, that requiring parties to make reasonable settlement offers from the outset will promote settlement. The empirical evidence does not support this notion. See id.
- 193 See supra Part II.A.
- 194 See <u>supra</u> Part II.A.
- ¹⁹⁵ See supra Part II.B.
- See John A. Bargh et al., <u>Automaticity of Social Behavior:</u>
 <u>Direct Effects of Train Construct and Stereotype Activation on</u>
 <u>Action</u>, 71 J. Personality & Soc. Psychol. 230, 230 (1996).
- ¹⁹⁷ Id. at 236-37.
- 198 <u>Id.</u> at 237.
- 199 Interestingly, my emotions also ignited my neighbors' emotions. They, too, became vengeful even though the demand did not address them.

See, e.g., Dijksterhuis, supra note 51, at 246-55 (discussing the study "in which priming the category of elderly led to changes in walking speed," thus demonstrating how priming can have an impact on physical behavior); see also C. Neil Macrae et al., On Activating Exemplars, 34 J. of Experimental Soc.

Psychol. 330, 344 (1998) ("Despite the firm intuition that behavior almost invariably has its origin in the intricate workings of the conscious mind, this conviction turns out to rest on little more than a seductive illusion.").

Ferguson & Bargh, <u>supra</u> note 52, at 33. Although the bulk of the studies on priming are recent, other researchers studied the effects of priming hostility on participants' behavior as early as 1976, paving the way for the current studies. <u>See</u> John A. Bargh, <u>Why We Thought We Could Prime Social Behavior</u>, 14

Psychol. Inquiry 216, 218 (2003).

 $^{^{202}}$ Ferguson & Bargh, supra note 52, at 33.

 203 Id. at 34.

²⁰⁴ <u>Id.</u>

²⁰⁵ Dijksterhuis, supra note 51, at 258.

²⁰⁶ Ferguson & Bargh, supra note 52, at 34-36.

Steven Neuberg, <u>Behavioral Implications of Information</u>

<u>Presented Outside of Conscious Awareness: The Effect of</u>

<u>Subliminal Presentation of Trait Information on Behavior in the</u>

<u>Prisoner's Dilemma Game, 6 Soc. Cognition</u> 207, 208 (1988).

 208 Macrae et al., supra note 200, at 345-46.

²⁰⁹ Kerry Kawakami et al., <u>Effects of Social Category Priming on</u>

Personal Attitudes, 14 Psychol. Sci. 315, 318 (2003).

210 Robert W. Holland et al., Smells Like Clean Spirit:

Nonconscious Effects of Scent on Cognition and Behavior, 16

Psychol. Sci. 689, 691 (2005).

²¹¹ <u>Id.</u> at 691-92.

Id. at 692. In fact, many priming studies involve the use of scrambled sentence exercises or word-hunt games to prime

participants. See Dijksterhuis, supra note 51, at 244-48

(discussing various behavioral priming studies to show that priming can utilize categories and traits as primes); Stanchi, supra note 60, at 1-8 (explaining that priming can use sentence structure and word games).

- ²¹³ Ferguson & Bargh, supra note 52, at 33-38.
- 214 Bargh et al., $\underline{\text{supra}}$ note 196, at 233-34.
- ²¹⁵ Id.
- 216 Id. at 233.
- 217 Id. at 234 (noting that other examples include: "bold, rude,
- . . . disturb, intrude, annoyingly, interrupt, audaciously, . .
- . impolitely, infringe, obnoxious, aggravating, and bluntly").
- 218 Id.; Jonathan Haidt, The Happiness Hypothesis 13 (2006).
- Bargh et al., $\underline{\text{supra}}$ note 196, at 234 (explaining that some of the critical stimuli included "respect, honor, considerate, . .
- . patiently, . . . polite, [and] courteous).

²²⁰ <u>Id.</u>

 221 Id. at 234-35. After removing those participants who did not interrupt at all from consideration, it was apparent that over sixty percent of those primed with the construct "rude" interrupted, between thirty and forty percent of those not primed with either "rude" or "polite" interrupted, and only between ten and twenty percent of those primed with the construct "polite" interrupted." Id. Moreover, when the researchers designed the study, they did not anticipate the significant effects of priming on the subjects' behavior. John A. Bargh, Why We Thought We Could Prime Social Behavior, 14 Psychol. Inquiry 216, 216 (2003). The researchers gave participants the same instructions: to complete the scrambled sentence test and, when they had completed the test, to deliver the completed test to the test's administrator down the hall before receiving further instructions. Bargh et al., supra note 196, at 234. When the participants completed the sentence

exercise and were ready to receive further instructions, the test administrator was purposely involved in a conversation with a colleague. Id. The colleague tracked the time between when the participant came into the hall and when the participant interrupted the conversation in order to get further instructions. Id. To their dismay, the researchers found that more than eighty percent of those who were primed with the construct "polite" waited a full ten minutes without interrupting-a striking result considering the study took place in New York City. Id. at 234-35. On the other hand, those primed with the construct "rude" interrupted more frequently and much sooner. Id. at 234. The control group, not primed with either word interrupted more frequently and sooner than those primed with "polite" words, yet waited longer to interrupt than those primed with "rude" words. Id. at 235.

 $^{^{222}}$ Bargh et al., $\underline{\text{supra}}$ note 196, at 234.

²²³ <u>Id.</u>

²²⁴ Ap Dijksterhuis & Ad van Knippenberg, The Relation Between

Perception and Behavior, or How to Win a Game of Trivial

Pursuit, 74 J. Personality & Soc. Psychol. 865, 867 (1998).

- 225 Id. at 869.
- $\underline{\text{Id.}}$ at 872 (comparing participants primed for nine minutes with those not primed at all).
- 227 Id. at 869.
- 228 Id. at 871-72.
- See <u>id.</u> at 874 ("Participants do not become more knowledgeable as a result of the prime . . . The effect must have come about because the prime triggered behaviors beneficial to performance on a general knowledge task that already were part of the participants' behavioral repertoire.").

²³⁰ John A. Bargh et al., The Automated Will: Nonconscious

Activation and Pursuit of Behavioral Goals, 81 J. Personality &

Soc. Psychol. 1014, 1016 (2001).

- 231 Id. at 1017, 1023.
- 232 Id. at 1023-24.
- ²³³ Id.
- ²³⁴ Dijksterhuis, <u>supra</u> note 51, at 248-51.
- 235 John A. Bargh et al., supra note 230, at 1017-1018.
- 236 Id. at 1024.
- 237 Id. at 1024.
- ²³⁸ <u>Id.</u>
- See Djiksterhuis, supra note 51, at 252 (arguing that researchers in the area of decision making have been slow to incorporate the studies on automaticity and priming because they have been influenced by economists' emphasis on rationality, blinded to the fact that people cannot consciously weigh each

alternative before making a choice because "this requires a

degree of introspection that people simply cannot achieve").

- Neuberg, supra note 207, at 221.
- ²⁴¹ Id.
- ²⁴² Sarah Maxwell et al., <u>Less Pain</u>, <u>Same Gain</u>: The Effects of

Priming Fairness in Price Negotiations, 16 Psychol. & Marketing

545, 545, 561 (1999).

- 243 <u>Id.</u> at 548.
- 244 <u>Id.</u> at 549.
- 245 <u>Id.</u> at 554.
- 246 Id. at 554-55.
- 247 <u>Id.</u> at 555.
- ²⁴⁸ <u>Id.</u>
- ²⁴⁹ <u>Id.</u> at 550-51.
- 250 <u>Id.</u> at 551.
- ²⁵¹ <u>Id.</u> at 558, tbl.1.

²⁵² Id. at 556-57.

²⁵³ <u>Id.</u>

 254 Id. at 557-58.

²⁵⁵ See Robert A. Baruch Bush, "What Do We Need a Mediator For?":

Mediation's "Value-Added" for Negotiators, 12 Ohio St. J. on

Disp. Resol. 1, 20-21 (1996); Maxwell et al., supra note 242, at 548 (noting that, in negotiations, coordinative behaviors rather than competitive behaviors "tend to expedite the negotiation process and increase the possibility of mutual satisfactory win-win agreements").

²⁵⁶ See Paquin & Harvey, supra note 141, at 170.

 $^{^{257}}$ See Dijksterhuis, supra note 51, at 246-55.

²⁵⁸ <u>See</u> <u>id.</u>

 $^{^{259}}$ Subrin & Main, supra note 4, at 2020.

 $^{^{260}}$ <u>Id.</u> at 1983.

- See, e.g., Mass. Gen. Laws Ann. ch. 93A, §9(3) (West 2006)

 (providing substantive and procedural requirements of a demand letter); see also Linda H. Edwards, Legal Writing, Process,

 Analysis & Organization 245 n.5 (5th ed. 2010).
- See Fed. R. Evid. 408; see also Kerwin, supra note 171, at 668-69.
- As this article has already noted, legal negotiation texts offer no advice on how to write a demand letter. See supra notes 6-7 and accompanying text.
- See supra note 6 and accompanying text; see also, e.g.,

 Gertrude Block, Effective Legal Writing for Law Students &

 Lawyers (5th ed. 1999); Norman Brand & John O. White, Legal

 Writing: The Strategy of Persuasion (3d ed. 1994); Veda R.

 Charrow et al., Clear and Effective Legal Writing (4th ed.

 2007); John C. Dernbach et al., A Practical Guide to Legal

 Writing & Legal Method (3d ed. 2007); Michael D. Murray &

Christy H. DeSanctis, Legal Research and Writing (2005); Laurel

Currie Oates & Anne Enquist, The Legal Writing Handbook:

Analysis, Research, and Writing (4th ed. 2006).

 265 See, e.g., Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 334-47 (1991) (discussing how to effectively engage in written negotiation); Charles R. Calleros, Legal Method and Writing 521-35 (5th ed. 2006) (explaining how to write a demand letter); Edwards, supra note 261, at 245-46 (discussing demand letters and responses); Bryan A. Garner, The Redbook: A Manual on Legal Style 367-73 (2d ed. 2006) (providing examples of well-written demand letters); Neumann, supra note 56, at 273-78 (discussing the strategy and structure of persuasive demand-letters); Austen L. Parrish & Dennis T. Yokoyama, Effective Lawyering: A Checklist Approach to Legal Writing and Oral Argument 89-91 (2007) (offering quidelines for writing effective demand letter); Helene S. Shapo et al., Writing and Analysis in the Law 246-50 (5th ed. 2008)

(laying out the sections of a demand letter); Judith M. Stinson,

The Tao of Legal Writing 16 (2009) (explaining the three ways to persuade in demand letters).

See Stanchi, supra note 103, at 412 n.3 ("[T]he concept of integrating techniques gleaned from social science into legal writing is relatively new and largely unexplored."); infra notes 92-94 and accompanying text.

- See Edwards, supra note 261, at 245-46 (recommending a cursory demand-letter if settlement seems unlikely); Neumann,

 supra note 56, at 277 ("[U]se the minimum number of words needed to get the point across."); Parrish, supra note 265, at 90

 (advising lawyers to write demand letters "succinctly").
- See **Garner**, supra note 265, at 368 (explaining that the lawyer should include in a demand letter the client's

²⁶⁷ See <u>supra</u> note 275.

perspective and demand, among other detailed information);

Neumann, supra note 56, at 276, 278 ("[T]he demand should be

precise. Say exactly what the consequences should be.");

Parrish, supra note 265, at 90 (advising the lawyer to specify

the amount of money the client is seeking and the exact action

he wishes the opposing party to take); Stinson, supra note 265,

at 16 (noting that the demand letter should "include[] the most

basic facts").

Garner, supra note 265, at 368 (noting that a demand letter could become an exhibit in litigation); Neumann, supra note 56, at 273-74 (stating that there are three to four audiences to a demand letter); Parrish, supra note 265, at 89 (noting that a judge may read the demand letter). This advice is curious because, if the writers are trying to settle the case, there is no reason from them to be posturing for the litigation that may follow. Do authors focus on the judge as audience because the

authors have little faith that a demand letter can work? Is it because they view interactions between lawyers or parties as likely to be hostile and unprofessional, conduct that would eventually embarrass the lawyer if the judge was witness? This advice seems to lack faith in the power of demand letters to foster settlement.

- See Neumann, supra note 56, at 274; see also Garner, supra note 265, at 367 ("[Y]ou must get inside the recipient's head to understand what type of approach will succeed.").
- See Stanchi, supra note 103, at 413 (arguing that current information on persuasive legal writing fails to recognize the "growing body of research from other disciplines that would provide some evidence about whether the conventional wisdom is an accurate account of human decisionmaking [sic]").
- See, e.g., Calleros, supra note 265, at 526-27 (recommending that a lawyer engage in competitive behavior by never conceding

a weaker claim in a demand letter, but not mentioning anything about the benefits of collective bargaining).

- ²⁷⁴ **Garner**, supra note 265, at 367.
- 275 Id. at 370.
- Neumann, supra note 56, at 277.
- ²⁷⁷ Calleros, supra note 265, at 523.
- See Stanchi, supra note 103, at 415 ("Persuasive legal writers may not be familiar with the psychological term 'priming,' but much of the conventional wisdom of legal writing incorporates the concept.").
- ²⁷⁹ **Garner**, supra note 265, at 367-68.
- 280 <u>Id.</u> at 368; **Neumann**, <u>supra</u> note 56, at 275.
- Neumann, supra note 56, at 274.
- ²⁸² **Ray & Cox**, <u>supra</u> note 265, at 343.
- ²⁸³ **Shapo**, <u>supra</u> note 265, at 347.

284 See Dean G. Pruitt, Negotiation Behavior 22 (1981)

("Bargainers usually assume that they can compel the other to concede by the use of persuasive arguments, threats, delays and other competitive tactics[, but the] use of such tactics is ordinarily costly . . . [and] such costs are not worth the candle.").

- See Calleros, supra note 265, at 523; Neumann, supra note 56, at 274-77.
- ²⁸⁶ See Moffitt, supra note 50, at 739-40.
- 287 See supra note 278 and accompanying text.
- 288 Glenn & Susskind, <u>supra</u> note 7, at 118 (arguing for better negotiation training because the critical movements in a negotiation often happen quickly, with little time for reflection); Stanchi, <u>supra</u> note 103, at 413 ("Advocacy is most effective when the lawyer has the tools to make deliberate,

conscious decisions about the persuasive device to employ and how and when to employ it.").

- 289 William Ury, Getting Past No $32-33\ (1991)\ .$
- 290 Id. at 37-39.
- A lawyer writing a demand letter may have more control over her emotions before she sends the final product to the recipient because she would have time to reflect and revise without the pressures of an emotionally-charged environment. This assumes something that has not been tested, however.
- ²⁹² See Dijksterhuis, supra note 56, at 248-52.
- 293 See Subrin & Main, supra note 4, at 2002-03.
- ²⁹⁴ <u>See</u> <u>id.</u> at 2008.
- Michael J. Saks, Flying Blind in the Courtroom: Trying Cases without Knowing What Works and Why, 101 Yale L. J. 1177, 1191 (1992).

writing has been dominated by a kind of 'armchair psychology'—a set of conventions and practices handed down from lawyer to lawyer, developed largely from instinct and speculation.").

297 Saks, supra note 10, at 802 ("Effective answers about 'what works' will come not from reflection or intuition but from empirical inquiries: from concrete experience, from experimental tests of alternative techniques, and perhaps from borrowing findings about phenomena of persuasion from disciplines that study persuasion empirically.").