

## A Proposed Definition of the Term “Lawyering”\*

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*Mr. Daniel examines the use of the term “lawyering” in both legal and non-legal literature. After noting that it has not been adequately defined, he provides a proposed definition.*

¶1 Beginning in the middle of the twentieth century, the gerund or participle<sup>1</sup> *lawyering* began its meteoric journey into the working vocabulary of legal scholarship and judicial decision making. With a constantly increasing frequency, the term appears in law school textbooks, law-related books and articles, and court decisions. Everyone seems to know what it means, but finding a published—and meaningful—definition of the word is exasperating. This essay surveys the use of the term and then proposes a definition of *lawyering*. By focusing on the agent-principal nature of the pertinent relationship and the agent’s result-accomplishing activities within the processes of the legal system, such a definition may enlighten the inquisitive reader and foster more accurate and informed discourse about the activities and outcomes comprehended by that term.

### Early Uses of the Term in Non-Legal Publications

¶2 Newspaper archival research<sup>2</sup> and a Google Book Search<sup>3</sup> query disclose that before the word *lawyering* achieved its first usage in American legal literature, it had long been used colloquially, albeit infrequently, both as a participle and as a gerund in fiction and nonfiction. In the earliest U.S. usage found in the research,<sup>4</sup> an 1842 biography titled *The Life of Peter van Schaack, LL.D.*, the author quoted from correspondence that “every faculty of [van Schaack’s] mind had full employment with building, farming, *lawyering*, &c.”<sup>5</sup> In 1852, an article in *The Cultivator* aphorized, “Doctoring and *lawyering* comes from education, and farming by nature . . . .”<sup>6</sup>

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1. See ¶16 and note 62, *infra*, for a discussion of gerund and participle.

2. Newspapers were searched for the term “lawyering” using NewspaperArchive.com, <http://www.newspaperarchive.com> (last visited Jan. 22, 2009) (subscription required).

3. Books were searched for the term “lawyering” using Google Book Search, <http://books.google.com> (last visited Jan. 22, 2009).

4. Even earlier and more frequent usage is found in British publications.

5. HENRY C. VAN SCHAACK, *THE LIFE OF PETER VAN SCHAACK, LL.D.* 404 (New York, D. Appleton & Co. 1842) (emphasis added).

6. *The Science of Agriculture*, 9 *CULTIVATOR* 137 (1852) (emphasis added).

¶3 One early incidence in short fiction is in *The Sealed Letter*, published in the *New York Times* in 1897. In the story, set during the French Revolution, the protagonist says to a condemned man, referring derogatorily to that famous lawyer Robespierre and other members of the ruling Directorate, “Those *lawyering* fellows have got a pretty strong grudge against you.”<sup>7</sup> A second example is an anonymous piece of short fiction in the *Washington Post* in 1905 titled *Long Parted Brothers Meet*, in which twin brothers, one in the U.S. Navy and the other in the British Navy, sit in a Honolulu bar “noisily sea *lawyering* as to the merits of their respective services.”<sup>8</sup> Yet another can be found in a short story in a rural Illinois newspaper, in which it is said of a farm, “It took a deal of looking after and *lawyering* and surveying to settle it. . . .”<sup>9</sup>

¶4 The term migrated into news reportage and column writing. An early use of the term is in a factual newspaper story, *Women At the Bar: Fair Ones Who Write Briefs and Argue Cases*, in the *Edwardsville Intelligencer* in 1892. It related that Sarah Wilkins, who was not a lawyer, brought an action for damages to her farm, and

[w]hen the case went up to the supreme court in Topeka the old lady was dissatisfied with her attorney’s presentation of the matter, and she got up, to the great surprise of the learned and dignified judges and took a hand at “*lawyering*” herself. She stated her case very clearly, and it is not believed that her action has injured her chances any.<sup>10</sup>

On a similar note, in a 1916 news commentary in the *Racine Journal-News* entitled “Rise of the Woman Lawyer,” the author used the participle to state that “a woman is as qualified for the *lawyering* job as a man is.”<sup>11</sup>

¶5 In yet another instance, a sports columnist reported in the *Washington Post* in 1932 that “Ray Gable is *lawyering* for Needham C. Turnage.”<sup>12</sup> Gable was a tennis player who became a lawyer and apparently worked for or appeared before Turnage, who was a United States Commissioner<sup>13</sup> (the position now known as U.S. magistrate judge). By then the word *lawyering* had made several initial inroads from popular literature into formal legal writing.

### The Accelerating Use of the Term in Legal Writing

¶6 Over the past century, the term *lawyering* has become employed more and more in legal articles and court decisions. A HeinOnline search<sup>14</sup> reveals the first incidence of the term in that venerable legal publication, *The Green Bag*, in a 1900

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7. I. Zangwill, *The Sealed Letter*, N.Y. TIMES, July 18, 1897, Illustrated Weekly Mag., at 6 (emphasis added).

8. *Long Parted Twin Brothers Meet*, WASH. POST, Nov. 5, 1905, at SM6 (emphasis added).

9. *How?*, THE DIXON (ILLINOIS) SUN, Nov. 5, 1873, at 6 (emphasis added).

10. *Women At the Bar: Fair Ones Who Write Briefs and Argue Cases*, EDWARDSVILLE (ILLINOIS) INTELLIGENCER, Mar. 23, 1892, at 2 (emphasis added).

11. Frederic J. Haskin, *Rise of the Woman Lawyer*, RACINE JOURNAL-NEWS, Dec. 19, 1916, at 6 (emphasis added).

12. Bob Considine, *Speaking of Tennis*, WASH. POST, Feb. 28, 1932, at 20 (emphasis added).

13. See *N.C. Turnage, Commissioner Since '23, Dies*, WASH. POST, June 19, 1949, at M16.

14. A search for the term “lawyering” was done in the Core U.S./Most-Cited Law Journals library. Hein Online, <http://heinonline.org> (last visited Jan. 22, 2009) (subscription required).

article *From Law to Literature*, in which the author mentioned that Heinrich Heine "tried banking, trading and *lawyering* before he gave himself up to poetising."<sup>15</sup> The next instance occurred twenty-eight years later in a commercial law article touting arbitration as "the one means of . . . avoiding at a single stroke the expense of *lawyering* [and] the verdict of unintelligent juries . . ."<sup>16</sup>

¶7 The third appearance of the term came in a 1934 *Columbia Law Review* article that referred to "rather sharp *lawyering*" by judges who "disliked enforcing . . . bonds against swindled municipalities . . ."<sup>17</sup> Four years later, an article in *The University of Chicago Law Review* included the sentence: "And every lawyer knows from his own *Lawyering* that there is more to law than rules."<sup>18</sup> Three more articles using the term followed, and then, in 1941, Karl Llewellyn used *lawyering* in two articles, confirming that it was now clearly acceptable in the legal academy. In the *Tennessee Law Review* he wrote that "[l]awyering is not and cannot be, done by machine,"<sup>19</sup> and in a review essay in *Harvard Law Review*, he criticized the "idea that a larger quantity of [case-method pedagogy is] better worth while *as training for lawyering* than is a smaller quantity of job done really right."<sup>20</sup>

¶8 By 1960, the term had been used in forty-one law journal articles, and usage was accelerating. Acceptance of the term by appellate judges came more slowly. Computerized searches on Loislaw<sup>21</sup> reveal that the first employment of the term in a reported federal case was the 1966 decision by the District Court for the Southern District of New York styled *Broadstone Realty Corp. v. Evans*, in which the court referred at one point to "the *lawyering* of a formal contract of sale, and documents of closing."<sup>22</sup> The first instance of the word in a state appellate decision was one year later in the Florida Court of Appeals case *Floro v. Parker*. There the court wrote that a typical attorney "usually goes through his career of '*lawyering*' without ever really understanding the basic theory of the [forcible entry and unlawful detainer action]."<sup>23</sup>

¶9 After the 1960s, the incidence of usage of the term *lawyering* both in court decisions and law review articles simply skyrocketed. From those earliest references up through 1969, 4 federal and state cases and 161 articles used the term at least once; from 1970 through 1979, 34 cases and 750 articles did; from 1980 through

15. George H. Westley, *From Law to Literature*, 12 GREEN BAG 446, 447 (1900) (emphasis added). The First Series of *Green Bag* was published from 1889 to 1914; the Second Series began in 1997 and is still being published. See The Green Bag, A Short Profile, <http://www.greenbag.org/about.php> (last visited Jan. 22, 2009).

16. B.H. Hartogensis, *A Ready Means to End Commercial Disputes*, 33 COM. L. LEAGUE J. 665, 665 (1928) (emphasis added).

17. Walter Nelles, *Towards Legal Understanding: II*, 34 COLUM. L. REV. 1041, 1055 (1934) (emphasis added).

18. D.J. Swift Teufelsdröckh, *Jurisprudence, The Crown of Civilization: Being Also the Principles of Writing Jurisprudence Made Clear to Neophytes*, 5 U. CHI. L. REV. 171, 176 (1938) (emphasis added).

19. Karl N. Llewellyn, *The Uncovered Needs for Legal Service*, 16 TENN. L. REV. 641, 642 (1941) (emphasis added).

20. K.N. Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 780 n.1 (1941).

21. Loislaw, <http://www.loislaw.com> (last visited Jan. 22, 2009) (subscription required).

22. *Broadstone Realty Corp. v. Evans*, 251 F. Supp. 58, 60 (S.D.N.Y. 1966) (emphasis added).

23. *Floro v. Parker*, 205 So. 2d 363, 365 (Fla. Dist. Ct. App. 1967) (emphasis added).

1989, 266 cases and 2,301 articles used it; from 1990 through 1999, 659 cases and 5,493 articles did; and from 2000 through 2008, 925 cases and 5,630 articles employed the term. Clearly the term has struck an increasingly mellifluous chord in the ears of lawyers, judges, and commentators.

¶10 A small sample of numerous book titles featuring the word *lawyering* follows:

- *Lawyering: Practice And Planning*<sup>24</sup>
- *The Law and Ethics of Lawyering*<sup>25</sup>
- *Cause Lawyering: Political Commitments and Professional Responsibility*<sup>26</sup>
- *Lawyering: A Realistic Approach to Legal Practice*<sup>27</sup>
- *Progressive Lawyering, Globalization and Markets*<sup>28</sup>
- *Lawyering and Ethics for the Business Attorney*<sup>29</sup>
- *The Essential Little Book of Great Lawyering*<sup>30</sup>
- *Lawyering For the Railroad: Business, Law, and Power In The New South*<sup>31</sup>
- “Colored Men” and “Hombres Aquí”: *Hernández v. Texas and the Emergence of Mexican American Lawyering*<sup>32</sup>
- *Sources of the History of the American Law of Lawyering*<sup>33</sup>

¶11 The following smorgasbord of article titles illustrates an even more diverse and widespread utilization of the term *lawyering* in law and scholarly journals:

- *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*<sup>34</sup>
- *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*<sup>35</sup>
- *Big-Deal Lawyering*<sup>36</sup>
- *Toward a Lawyering Jurisprudence*<sup>37</sup>
- *Lawyering, Husbands’ Rights, and “the Unwritten Law” in Nineteenth Century America*<sup>38</sup>

24. ROGER S. HAYDOCK ET AL., *LAWYERING: PRACTICE AND PLANNING* (1996).

25. GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* (4th ed. 2005).

26. *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998).

27. JAMES C. FREUND, *LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE* (1979). *See also* JAMES C. FREUND, *SMELL TEST: STORIES AND ADVICE ON LAWYERING* (2008).

28. *PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS* (Clare Dalton ed., 2007).

29. MARC I. STEINBERG, *LAWYERING AND ETHICS FOR THE BUSINESS ATTORNEY* (2002).

30. JAMES A. DURHAM, *THE ESSENTIAL LITTLE BOOK OF GREAT LAWYERING* (2006).

31. WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* (1999).

32. “COLORED MEN” AND “HOMBRES AQUI”: *HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING* (Michael A. Olivas ed., 2006).

33. *SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING* (Michael H. Hoeflich ed., 2007).

34. Bryn Vaaler, *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*, 61 *UMKC L. REV.* 23 (1992).

35. Carrie Menkel-Meadow, *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*, 21 *PACE L. REV.* 365 (2001).

36. W. John Moore, *Big-Deal Lawyering*, *NAT’L J.*, Jan. 14, 1989, at 76.

37. Robert S. Redmount, *Toward a Lawyering Jurisprudence*, 2 *J. LEGAL PROF.* 23 (1977).

38. Hendrik Hartog, *Lawyering, Husbands’ Rights, and “the Unwritten Law” in Nineteenth-Century America*, 84 *J. AM. HIST.* 67 (1997).

- *Lawyering the New Urbanism*<sup>39</sup>
- *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*<sup>40</sup>
- *Lawyering and Public Policy*<sup>41</sup>
- *The Religious Lawyering Critique*<sup>42</sup>
- *E-Lawyering 2000*<sup>43</sup>
- *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*<sup>44</sup>
- *Lawyering for Social Justice*<sup>45</sup>
- *On Long-Haul Lawyering*<sup>46</sup>
- *Is Altruism Possible in Lawyering?*<sup>47</sup>
- *Political Lawyering: An Introduction*<sup>48</sup>
- *Lawyering in the Supreme Court*<sup>49</sup>
- *Lawyering in China's Wild West*<sup>50</sup>

Yet none of those books and articles defines the term *lawyering*. Indeed, the term is so commonly used that it apparently is assumed to need no definition.<sup>51</sup>

### Lexicographical and Grammatical Inquiries

¶12 The starting point in the search for a definition is the legal dictionaries, but they are of little help. Until 1999 *Black's Law Dictionary* did not define the term. At that point, legal lexicographer Bryan A. Garner, as *Black's* new editor, included the term in the definition of the noun and verb forms of "lawyer":

lawyer, *n.* One who is licensed to practice law.

....

lawyer, *vb.* 1. To practice as a lawyer <Mike spends his days and nights lawyering, with little time for recreation>. 2. To supply with lawyers <the large law-school class will certainly help lawyer the state>. -lawyering, *n.*<sup>52</sup>

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39. Seth G. Weissman, *Lawyering the New Urbanism*, URBAN LAND, Oct. 2000, at 84.

40. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995).

41. Harold A. MacDougall, *Lawyering and Public Policy*, 38 J. LEGAL EDUC. 369 (1988).

42. Bruce A. Green, *The Religious Lawyering Critique*, 21 J.L. & RELIGION 283 (2005–2006).

43. William G. Paul, *E-Lawyering 2000*, 86 A.B.A. J. 6 (2000).

44. Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1 (2005).

45. Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009 (1997).

46. Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URBAN L.J. 771 (1997–1998).

47. Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992).

48. Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996).

49. Rex E. Lee, *Lawyering in the Supreme Court: The Role of the Solicitor General*, 1985 Y.B. SUP. CT. HIST. SOC'Y 15.

50. Peng Wu, *The Good, the Bad and the Legal: Lawyering in China's Wild West*, 21 COLUM. J. ASIAN L. 183 (2008).

51. For other examples of authors freely using the term but unexpectedly neglecting to define it, consider: JAMES C. FREUND, *LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE 1* (1979) ("[H]ere's how you do it."); HELENE E. SCHWARTZ, *LAWYERING*, at ix (1975) ("[This book is] about the art of lawyering.").

52. BLACK'S LAW DICTIONARY 895 (7th ed. 1999).

Similarly, the *New Oxford American Dictionary* defines the term in five words: “the work of practicing law,”<sup>53</sup> and *The American Heritage Dictionary of the English Language* in seven words: “The profession or work of practicing law.”<sup>54</sup>

¶13 In his *Dictionary of Modern Legal Usage*, published in 1987, Garner offered a slightly larger, but still bland, explanation of the term’s use: “[A]lthough *lawyering* may be used disparagingly in some quarters, many lawyers use it as a *neutral term to describe what they do*, and even as a term of praise in the collocation *creative lawyering*.”<sup>55</sup> However, in the raft of books and articles listed above, the authors do not use the term *lawyering* either disparagingly or neutrally; they use it as shorthand for something. But shorthand for what? What is it that lawyers really “do,” to use Garner’s operative verb?

¶14 Breaking down the word *lawyering* syllable by syllable with the aid of the dictionaries helps but does not answer the question. The root is “law.” As Garner has pointed out in his entry on that word in his *Dictionary of Modern Legal Usage*, while “law” or “the law” can signify “something . . . general and abstract,” it usually “means or includes the institutions and persons who represent and administer the law, the complex of courts and prisons, judges, lawyers, clerks, and police.”<sup>56</sup> In fine, “law” is the legal system as a whole, the congeries of government-sanctioned rules and the governmental units such as courts and administrative agencies, and non-governmental or private institutions and organizations such as arbitration tribunals, all of which determine and resolve the disputes and effectuate the agreements and transactions that parties make and present within that system.<sup>57</sup>

¶15 When the first suffix “-yer,” which means “one who,” is added, the term becomes the word “lawyer.” As noted above, *Black’s* defines *lawyer* as a noun to mean “[o]ne who is licensed to practice law.”<sup>58</sup> While that is too narrow, because it is limited to those who hold law licenses, this definition at least focuses on the human who—somehow—deals with the law on a special basis on behalf of other persons. As a noun, “*lawyer*” and “*attorney*” are “not generally distinguished,” Garner notes, “even by members of the profession.”<sup>59</sup>

53. THE NEW OXFORD AMERICAN DICTIONARY 966 (2001).

54. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 993 (4th ed. 2000).

55. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 332 (1987) (emphasis added).

56. *Id.* at 330. Garner includes a much expanded definition of law in the second edition of his book. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 501–02 (2d ed. 1995).

57. See also BLACK’S LAW DICTIONARY 900 (8th ed. 2004) (“The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system . . .”).

58. *Id.* at 895. The *Oxford English Dictionary* defines *lawyer* as: “One versed in the law; a member of the legal profession, one whose business it is to conduct suits in the courts, or to advise clients, in the widest sense embracing every branch of the profession, though in colloquial use often limited to attorneys and solicitors.” 8 OXFORD ENGLISH DICTIONARY 720 (2d ed. 1989).

59. GARNER, *supra* note 55, at 74. Garner continues: “Today there seems to be in the U.S. a notion that *attorney* is a more formal (and less disparaging) term than *lawyer*. Technically, *lawyer* is the more general term, referring to one who practices law. *Attorney* literally means “one who is designated by another to transact business for him.” *Id.*

¶16 As a verb,<sup>60</sup> to *lawyer* means "[t]o practice as a lawyer," according to *Black's*.<sup>61</sup> Adding the suffix "-ing" to create *lawyering* changes the verb into its progressive tense when used with an intransitive verb such as "is" or "are," into a present participle when it functions as an adjective, or into a gerund when the -ing form is used as a noun.<sup>62</sup> Thus, gerundizing the verb *lawyer* as defined in *Black's* results in a limited concept of "practic[ing] as a lawyer."

¶17 While that law-practice focus is unsatisfactory because it is too limited, *Black's* definitions of *law* and *lawyer* do point toward a key element, namely the *relationship* of the lawyer with the person whom he or she serves: the client. The lawyer-client relationship is one species of the broad agent-principal relationship.<sup>63</sup> The existence of an agency relationship is indeed a *sine qua non*,<sup>64</sup> the *lawyering* of a transaction or of a litigated matter does not occur in a vacuum, and recognition of that agency relationship should be a central feature of the definition of *lawyering*.

### Partial Definitions in Legal Literature

¶18 Additional help can be found in bar and law school texts. In 1989, the American Bar Association created a task force to study and report on how to improve the process by which law students are prepared for practice.<sup>65</sup> The task force noted that

any *problem presented by a client* may be amenable to a *variety of types of solutions* of differing degrees of efficacy; a lawyer cannot capably represent or advise the client or other entity unless he or she has the breadth of knowledge and skill necessary to perceive, evaluate, and begin to pursue each of the options.<sup>66</sup>

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60. As one author has explained, "People love turning nouns into verbs (about a third of all verbs were once nouns)." Paul McFedries, *World Wide Web of Words*, <http://www.pbs.org/speak/words/sezwho/cyberspace> (last visited Jan. 3, 2009).

61. BLACK'S LAW DICTIONARY, *supra* note 57, at 905.

62. See H. RAMSEY FOWLER & JANE E. AARON, *THE LITTLE, BROWN HANDBOOK* 271 (8th ed. 2001). Fowler writes:

A gerund is the verbal noun identical in form with any participle, simple or compound, that contains the termination -ing. Thus the verb write has the participles writing, having written, going to write, being about to write, about to write, written, having been written, going to be written, about to be written, being about to be written. Any of these except written, about to write, about to be written, may be a gerund also; but while the participle is an adjective, the gerund is a noun, differing from other nouns in retaining its power (if the active gerund of a transitive verb) of directly governing another noun.

H.W. FOWLER, *THE KING'S ENGLISH* 107–08 (1906) (emphasis omitted).

63. The *Restatement (Third) of Agency* states: "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

64. Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEG. ETHICS 73 (2007) ("[L]awyers arguably are just clients' agents, in a strictly legal sense, and should act in accordance with common law agency principles.").

65. See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3 (1992) (the "McCrate Report").

66. *Id.* at 124.

The task force's report delineates the "fundamental lawyering skills essential for competent representation" as problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, and litigation and alternate dispute resolution.<sup>67</sup> This laundry list does not constitute a definition of lawyering, but the report does helpfully indicate that the essence of the work of lawyers is the solving of problems for clients.

¶19 Even more useful is a statement in a law school text on the craft of lawyering. The authors, Stefan H. Krieger and Richard K. Neumann, Jr., cogently posit the instrumental, cause-and-effect nature of lawyering in their prescription that a "lawyer's job is *to find a way*—to the extent possible—for the client to gain control over a situation."<sup>68</sup> While this sentence is not a complete definition of *lawyering*, it contains the two kernels of this essay's proposal by identifying that what lawyers "do" is to work on behalf of clients ("to find a way for the client") to accomplish results for them ("to gain control over a situation").

¶20 Mining the texts of law review articles turns up some workable material, although still no satisfactory definition. In one often-cited article, Gerald López states simply, "Lawyering means problem-solving. Problem-solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction."<sup>69</sup> That statement is much too diffuse to serve as a useful definition, but a nugget in a footnote in another article is a substantial step forward. In a footnote in a 2003 article entitled *Popular Culture as a Lens on Legal Professionalism*, Alexander Scherr and Hillary Farber wrote, "For purposes of this article, we use the following definition of *lawyering*: a process of decision-making, in collaboration with clients, that uses legal concepts, methods and institutions to resolve disputes or manage opportunities."<sup>70</sup> That definition has never been quoted or cited, and it has several deficiencies; but it is the best available, and it can be used as a starting point.

### The Proposed Definition

¶21 The Scherr-Farber definition has three central deficiencies. First, it is not client-centered enough; the client is the lawyer's principal, not a "collaborat[or]" or colleague. Second, the phrase "process of decision-making" in a legal setting usually connotes judicial or tribunal adjudication; even when the phrase is read to refer to a lawyer's mental processes, nouns such as "work" or "activities" and more encompassing descriptors indicating active effort, not just thoughts, would be a better description of what the lawyer "does." Third, the reference to dispute resolution

67. *Id.* at 135.

68. STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 9 (3d ed. 2007) (emphasis added). For an inferior formulation, see [QY: ITAL?] Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 25, 26 (2005) ("Traditional lawyering . . . focuses on courtroom and client advocacy in an adversary system. . . . Where a lawyer advocates for a client, the lawyer's duty is *to help the client win by creatively arguing that the client has complied with law or has a stronger case than the opposing party.*" (emphasis added)).

69. Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 2 (1984).

70. Alexander Scherr & Hillary Farber, *Popular Culture as a Lens on Legal Professionalism*, 55 S.C. L. REV. 351, 352 n.1 (2003) (emphasis added).

works well as one possible goal of lawyering, but the second goal of “manag[ing] opportunities” is too amorphous.

¶22 A better definition of *lawyering*, one that is realistic and result-oriented and is grounded on the relationship of agent and principal, would be:

“Lawyering” is the work of a specially skilled, knowledgeable, or experienced person who, **servicing** by mutual agreement as another person’s agent, **invokes** and **manipulates**, or **advises** about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the *status quo* for his or her principal.

Echoes of Garner’s “what [lawyers] do” and Krieger and Neumann’s “find[ing] a way—to the extent possible—for the client to gain control over a situation” should be apparent in this formulation.<sup>71</sup>

¶23 The proposed definition is, of course, quite general, and, for the sake of clarity, it could go on to exclude explicitly the activities of juridically well-known and -understood agency roles such as trustee, guardian, bailee, broker, accountant, union steward, attorney-in-fact, and personal representative. The work of those sorts of agents is not *lawyering* because, while those relationships are clearly agencies, those types of representatives do not, in the scope and course of their duties, specifically exert specialized knowledge to invoke and manipulate legal processes within the legal system on behalf of clients (rather they often hire lawyers to do so for them and for their principals). Similarly, those types of agency relationships and dealings that may involve interacting with legal processes but are limited to truly routinized efforts such as filling in the blanks on a tax return, a real estate closing statement, or a freight-loss claim form, and perhaps other similarly rote and circumscribed activities, are not *lawyering*.

¶24 Several other clarifications can be stated. For example, while the client may be an artificial person, the lawyer necessarily is a natural person. In addition, the term *lawyering* is not synonymous with litigation strategy or trial tactics. As Stephen Schwarcz<sup>72</sup> and Marc Steinberg<sup>73</sup> have pointed out, lawyering occurs in the transactional, as well as the litigation, arena and involves negotiations, and contract formulation and drafting for clients.

¶25 Nor is *lawyering* synonymous with the “practice of law,” legal ethics, and professionalism; rather, it subsumes them. The practice of law is widely regarded as a profession because its practice “requires substantial intellectual training and the use of complex judgments,” the clients must have trust because they “cannot adequately evaluate the quality of the professional’s work,” the lawyer subordinates personal interest to the client’s best interest, and the group of such practitioners

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71. See also Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 133 (2006) (“Given the central role our society assigns lawyers to *help pursue and resolve disputes and to facilitate interactions*, it is imperative that lawyers be able to work effectively with all clients. . . .” (emphasis added)).

72. Schwarcz, *supra* note 68, at 25, 26.

73. See generally MARC I. STEINBERG, *LAWYERING AND ETHICS FOR THE BUSINESS ATTORNEY* (2d ed. 2007).

typically engage in self-regulation.<sup>74</sup> While the legal agent who engages in lawyering necessarily must have special experience and ability to invoke and exert legal processes, such person might not have received a law school education, might not be charging fees, and might not even be formally designated as a lawyer.<sup>75</sup>

¶26 Certainly before the twentieth century, and even at the present time, some persons who engage in lawyering may not hold a license from a court or governmental agency to conduct their activities on behalf of clients. Examples include “jailhouse lawyering” and pro se lawyering. Felice Batlan has well demonstrated that lawyering need not be restricted to professionals in her study of the women of a late nineteenth-century New York civic group<sup>76</sup> who, “without formal legal training, essentially functioned as cause lawyers”<sup>77</sup> in pursuing legal remedies to cause the cleanup of urban pollution, steering prosecutors, grand juries, and other public officials to enforce existing laws, serving as experts, witnesses, courtroom observers, and court-appointed inspectors, lobbying for and against legislation, and using legal processes skillfully for the good of their neighborhood.<sup>78</sup>

¶27 On the other hand, state legislatures and state bars and bar associations have created specific definitions of the practice of law so that they can regulate it. In Texas, for example, the State Bar Act defines the “practice of law” as

the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.<sup>79</sup>

The courts have with some difficulty construed the practice of law to include certain activities but not others. The practice of law is a subset of, not a synonym for, *lawyering* under the definition proposed in this essay.

## Conclusion

¶28 The term *lawyering* entered the popular press in the United States during the nineteenth century as a colloquial term to describe a legal agent’s occupation or to denote “arguing.” Beginning early in the twentieth century, legal commentators imported the word into legal writing, and during the 1960s judges adopted its usage. Following that, the term rapidly invaded the parlance of the legal world for a good reason—even without a formal definition, the word seemed to communi-

74. PAUL T. HAYDEN, *ETHICAL LAWYERING: LEGAL AND PROFESSIONAL RESPONSIBILITIES IN THE PRACTICE OF LAW 1* (2d ed. 2007).

75. “People who are formally designated as lawyers do not, of course, make up the entire complement of persons engaged primarily in conflict resolution. . . .” Ian R. Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 NW. U. L. REV. 900, 909 n.35 (1984–1985).

76. Felice Batlan, *The Ladies Health Protective Association: Lay Lawyers and Urban Cause Lawyering*, 41 AKRON L. REV. 701 (2008).

77. *Id.* at 704.

78. *See id.* at 704–31.

79. TEX. GOV’T CODE ANN. § 81.101(a) (Vernon 2005).

cate a definite meaning for persons knowledgeable about the law and legal agency. At this point in the history of the term's usage, the formulation of a definition along the lines proposed here may be useful.

¶29 The proposal easily trumps the thin Garner definition, and it builds on and improves the apparently unknown Scherr-Farber definition. A meaningful definition of *lawyering*, whether the one proposed above or a better one promulgated in the future, will be valuable if it facilitates analysis of the work, activities, and mentalities of lawyers (for example, the "ethics of lawyering,"<sup>80</sup> "transnational lawyering"<sup>81</sup> "lawyering systems,"<sup>82</sup> "lawyering jurisprudence,"<sup>83</sup> "comparative lawyering,"<sup>84</sup> and the "philosophy of lawyering"<sup>85</sup>); focuses attention on clients or principals for whom lawyering is performed or conducted ("cause lawyering,"<sup>86</sup> "political lawyering,"<sup>87</sup> "community lawyering,"<sup>88</sup> "cross-cultural lawyering," "jailhouse lawyering,"<sup>89</sup> "lay lawyering,"<sup>90</sup> "pro se lawyering," "collaborative lawyering,"<sup>91</sup> and "preventive lawyering"<sup>92</sup>), and informs an appreciation and understanding of the

80. See, e.g., Broadus A. Spivey, *Ethics: Lawyering and Professionalism*, 33 ST. MARY'S L.J. 721 (2002).

81. Catherine J. Iorns Magallanes, *Teaching for Transnational Lawyering*, 55 J. LEGAL EDUC. 519 (2005).

82. Stuart Gullickson, *Lawyering Systems*, 4 U. TOL. L. REV. 391 (1973).

83. Redmount, *supra* note 37.

84. Louis M. Brown, *Comparative Lawyering: Visits to Lawyers and a Proposal for Continued Study. A Hitherto Unpublished Diary of Visits to Lawyers*, 4 J. LEGAL PROF. 7 (1979).

85. Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (2000).

86. See, e.g., CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 26; Patrick J. Bumatay, *Causes, Commitments, and Counsels: A Study of Political and Professional Obligations Among Bush Administration Lawyers*, 31 J. LEGAL PROF. 1 (2007) (examining the contours of conventional and cause lawyering).

87. One author writes:

All lawyers use words and actions to influence power. Most are concerned with securing immediate benefits for clients, while also assuring their own professional and economic advantage along with the efficacy of the legal system itself. When "political" modifies lawyering, it must refer to some extra elements. . . . [P]olitical lawyering involves deliberate efforts to use law to change society or to alter allocations of power. . . .

....

History provides cogent examples . . . [such as] the National Association for the Advancement of Colored People. . . .

Minow, *supra* note 48, at 288–89 (1996) (footnote omitted).

88. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Angelo N. Ancheta, Review Essay, *Community Lawyering*, 81 CAL. L. REV. 1363 (1993).

89. The Supreme Court has written:

Although some jailhouse lawyers are no doubt very capable, it is not necessarily the best amateur legal minds which are devoted to *jailhouse lawyering*. Rather, the most aggressive and domineering personalities may predominate. And it may not be those with the best claims to relief who are served as clients, but those who are weaker and more gullible.

Johnson v. Avery, 393 U.S. 483, 499 (1969) (White, J., dissenting) (emphasis added).

90. Batlan, *supra* note 76; López, *supra* note 69.

91. Zachary Z. Annable, Comment, *Beyond the Thunderdome—The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Model Rules of Professional Conduct*, 29 J. LEGAL PROF. 157 (2004–2005).

92. See LOUIS M. BROWN, *LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW* (1986).

outcomes generated by these agents' work for their principals. And with even the United States Supreme Court now using the term,<sup>93</sup> everyone should better comprehend that accolade that Garner referred to as "*creative lawyering*."<sup>94</sup>

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93. *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201, 2208 (2007) (quoting a lower court's use of that collocation).

94. See GARNER, *supra* note 55, at 332.