

LAWYERING

PRACTICE AND PLANNING

Third Edition



Roger S. Haydock

Peter B. Knapp

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West, a Thomson business, 2003

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610 Opperman Drive
St. Paul, MN 55123
1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-26603-3

TO
SOPHIE WOJCIK HAYDOCK
AND
SHARON PETERSON KNAPP

WHAT WE OWE YOU IS
BEYOND EVALUATION

Acknowledgements

Ann Juergens, David Herr, and Jeffrey Stempel co-authored the first edition of this book and deserve our great thanks and deep appreciation. Without their contributions, ideas, and work, you would not be reading and using this third edition. They are very good friends in addition to being very good colleagues, and what we owe them is also beyond evaluation.

We are grateful for the support we have received from our colleagues at The William Mitchell College of Law. We want to especially thank Dean Eric Janus and Associate Deans Niels Schaumann and Nancy Ver Steegh for their assistance and encouragement. Our colleague Mehmet Konar-Steenberg made helpful suggestions for this new edition. Another valued colleague, John Sonsteng, has promoted many of the ideas expressed in this book in his Legal Education Renaissance efforts at <http://renaissancereport.wordpress.com/>. We also want to thank Jean Backes, Sue McKenzie, Darlene Finch, and Jennifer Miller for their support. Our research assistants, Bhupesh Pattni and Adina Florea provided valuable help in the preparation of this edition.

This book promotes and continues the development of lawyering courses at law schools throughout America and abroad. Law professors who teach these courses have provided us with suggestions for this new edition. We hope this book inspires the addition of lawyering and related courses to other law school curriculums, as recommended in the MacCrate Report and once again in the Carnegie Foundation's report, *Educating Lawyers*, and CLEA's *Best Practices for Legal Education*. Law students need this essential theoretical and practical education to succeed in life after law school.

Many lawyers and judges have influenced us and contributed to ideas contained in this book. We especially want to thank the Honorable Michael Davis, Ed Anderson, Bradford Colbert, and all the adjunct professors at William Mitchell who teach with us. Roger also wants to thank members of the faculty and Associate

ACKNOWLEDGEMENTS

Dean Mary Jo Wiggins of the University of San Diego School of Law where he has taught as a visiting law professor and the staff at Forthright who provide dispute resolution services. The “Think Twice” feature of this edition adds a new dimension to the scope of this book, and allows us an opportunity to express ideas others have suggested.

Our families have always been sources of inspiration and aspiration for us. Our wonderful wives, Elaine Haydock and Lucinda Jesson, have taught us how best to negotiate, many times. And our charming children – Marni, Marci, Jeffrey and Brad, Chris, Nathan, John – have experienced our counseling efforts. All have witnessed our attempts at advocacy.

This book is primarily devoted to helping clients and parties who have legal needs and problems. We thank the many law students who have taken our courses and read the earlier editions, especially those who made constructive comments. We further acknowledge all of the clients we have represented, who provided the wide range of examples illustrated in this book. It has been—and continues to be—a privilege and honor for us to teach, practice, and write.

Preface

This book explains the fundamental lawyering skills, values, and relationships involved in the practice of law. There are three parts to this text: Part One explains how to interview and counsel clients. Part Two describes how to negotiate transactions and resolve disputes. Part Three explains how to prepare for advocacy. This text analyzes the theories, strategies, and tactics involved in client representation.

Chapter One begins with an explanation of professional relationships and the work of the lawyer. Chapter Two explores the business of practicing law successfully. Chapters Three and Four describe effective practices for interviewing and counseling clients. Chapters Five and Six focus on proper planning and preparation for transactional work and dispute resolution, and Chapter Seven discusses the process of obtaining information needed for effective planning and representation. Chapters Eight, Nine, and Ten cover successful negotiations and mediation. Chapter Eleven explains how to initiate claims effectively. Chapter Twelve discusses the scope of discovery and disclosure during dispute resolution, and Chapters Thirteen and Fourteen describe depositions and other effective discovery methods. The Epilogue concludes this book with the sometimes necessary transition to advocacy.

When the first edition of this book was published in 1996, the American Bar Association and the Association of American Law Schools had recently issued recommendations about teaching practice skills in law schools. The ABA MacCrate Report identified ten lawyering skills and four critical values essential for the competent representation of clients. The Wahl Commission recommended that law schools provide their students with training in these lawyering relationships. Since that time, the call for more practice-oriented education has grown louder. Two of the most important recent assessments of legal education are The Carnegie Foundation's report, *Educating Lawyers* (March, 2007), and the Clinical Legal Education Association's best practices project, Stuckey et al., *Best Practices for Legal Education* (2007) and <http://bestpracticeslegaled.albanylawblogs.org/>.

We reprint here the MacCrate Report's list of those ten fundamental lawyering skills and four critical values. The breadth and depth of these values and skills is a reminder of just how challenging it is to represent clients effectively and responsibly. Acquiring these skills and honing these values is the work of a career. This book has been created and designed to explain these lawyering values and to help law students and novice lawyers begin their acquisition of these professional skills.

Fundamental Lawyering Skills

Skill 1: *Problem Solving*

In order to develop and evaluate strategies for solving a problem or accomplishing an objective, a lawyer should be familiar with the skills and concepts involved in:

- 1.1 Identifying and Diagnosing the Problem;
- 1.2 Generating Alternative Solutions and Strategies;
- 1.3 Developing a Plan of Action;
- 1.4 Implementing the Plan;
- 1.5 Keeping the Planning Process Open to New Information and New Ideas.

Skill 2: *Legal Analysis and Reasoning*

In order to analyze and apply legal rules and principles, a lawyer should be familiar with the skills and concepts involved in:

- 2.1 Identifying and Formulating Legal Issues;
- 2.2 Formulating Relevant Legal Theories;
- 2.3 Elaborating Legal Theory;
- 2.4 Evaluating Legal Theory;
- 2.5 Criticizing and Synthesizing Legal Argumentation.

Skill 3: *Legal Research*

In order to identify legal issues and to research them thoroughly and efficiently, a lawyer should have:

- 3.1 Knowledge of the Nature of Legal Rules and Institutions;
- 3.2 Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research;
- 3.3 Understanding of the Process of Devising and Implementing a Coherent and Effective Research Design.

Skill 4: *Factual Investigation*

In order to plan, direct, and (where applicable) participate in factual investigation, a lawyer should be familiar with the skills and concepts involved in:

- 4.1 Determining the Need for Factual Investigation;
- 4.2 Planning a Factual Investigation;
- 4.3 Implementing the Investigative Strategy;
- 4.4 Memorializing and Organizing Information in an Accessible Form;
- 4.5 Deciding Whether to Conclude the Process of Fact-Gathering;
- 4.6 Evaluating the Information That Has Been Gathered.

Skill 5: *Communication*

In order to communicate effectively, whether orally or in writing, a lawyer should be familiar with the skills and concepts involved in:

- 5.1 Assessing the Perspective of the Recipient of the Communication;
- 5.2 Using Effective Methods of Communication.

Skill 6: *Counseling*

In order to counsel clients about decisions or courses of action, a lawyer should be familiar with the skills and concepts involved in:

- 6.1 Establishing a Counseling Relationship That Respects the Nature and Bounds of a Lawyer's Role;
- 6.2 Gathering Information Relevant to the Decision to Be Made;
- 6.3 Analyzing the Decision to Be Made;
- 6.4 Counseling the Client About the Decision to Be Made;
- 6.5 Ascertaining and Implementing the Client's Decision.

Skill 7: *Negotiation*

In order to negotiate in either a dispute-resolution or transaction context, a lawyer should be familiar with the skills and concepts involved in:

- 7.1 Preparing for Negotiation;
- 7.2 Conducting a Negotiation Session;

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- 7.3 Counseling the Client About the Terms Obtained From the Other Side in the Negotiation and Implementing the Client's Decision.

Skill 8: *Litigation and Alternative Dispute-Resolution Procedures*

In order to employ—or to advise a client about—the options of litigation and alternative dispute resolution, a lawyer should understand the potential functions and consequences of these processes and should have a working knowledge of the fundamentals of:

- 8.1 Litigation at the Trial-Court Level;
- 8.2 Litigation at the Appellate Level;
- 8.3 Advocacy in Administrative and Executive Forums;
- 8.4 Proceedings in Other Dispute-Resolution Forums.

Skill 9: *Organization and Management of Legal Work*

In order to practice effectively, a lawyer should be familiar with the skills and concepts required for efficient management, including:

- 9.1 Formulating Goals and Principles for Effective Practice Management;
- 9.2 Developing Systems and Procedures to Ensure that Time, Effort, and Resources Are Allocated Efficiently;
- 9.3 Developing Systems and Procedures to Ensure that Work is Performed and Completed at the Appropriate Time;
- 9.4 Developing Systems and Procedures for Effectively Working with Other People;
- 9.5 Developing Systems and Procedures for Efficiently Administering a Law Office.

Skill 10: *Recognizing and Resolving Ethical Dilemmas*

In order to represent a client consistently with applicable ethical standards, a lawyer should be familiar with:

- 10.1 The Nature and Sources of Ethical Standards;
- 10.2 The Means by Which Ethical Standards are Enforced;
- 10.3 The Processes for Recognizing and Resolving Ethical Dilemmas.

Fundamental Values of the Profession

Value 1: *Provision of Competent Representation*

As a member of a profession dedicated to the service of clients, a lawyer should be committed to the values of:

- 1.1 Attaining a Level of Competence in One's Own Field of Practice;
- 1.2 Maintaining a Level of Competence in One's Own Field of Practice;
- 1.3 Representing Clients in a Competent Manner.

Value 2: *Striving to Promote Justice, Fairness, and Morality*

As a member of a profession that bears special responsibilities for the quality of justice, a lawyer should be committed to the values of:

- 2.1 Promoting Justice, Fairness, and Morality in One's Own Daily Practice;
- 2.2 Contributing to the Profession's Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them.
- 2.3 Contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.

Value 3: *Striving to Improve the Profession*

As a member of a self-governing profession, a lawyer should be committed to the values of:

- 3.1 Participation in Activities Designed to Improve the Profession;
- 3.2 Assisting in the Training and Preparation of New Lawyers;
- 3.3 Striving to Rid the Profession of Bias Based on Race, Religion, Ethnic Origin, Gender, Sexual Orientation, or Disability, and to Rectify the Effects of These Biases.

Value 4: *Professional Self-Development*

As a member of a learned profession, a lawyer should be committed to the values of:

- 4.1 Seeking Out and Taking Advantage of Opportunities to Increase His or Her Knowledge and Improve His or Her Skills;
- 4.2 Selecting and Maintaining Employment That will Allow the Lawyer to Develop As a Professional and to Pursue His or Her Professional and Personal Goals.

This book explores and analyzes many of these skills and values so that students of the law can learn to be competent, confident, ethical, and responsible practitioners.

Learning how to be a lawyer also requires observing and experiencing how attorneys practice. This can be accomplished by studying videos of lawyers conducting skills, by observing professionals in practice through internships, by participating in lawyering skills courses, and by taking clinical courses that bring to life these experiences. We hope you involve yourselves in these types of courses during law school.

Learning about lawyering requires reading about how lawyers represent clients. We encourage you to read and re-read this text and other books and literature about lawyers, clients, and cases to obtain a broad view of practice. Lawyering is portrayed, sometimes realistically, in movies, on television, and in the theater. You can further explore lawyer relationships and experiences through these mediums.

The conceptual and pragmatic considerations addressed in this book provide an overview of the dynamics of practice. This text is based upon the authors' experiences as practitioners and professors, the contributions of colleagues and commentators, common sense, and the law. We offer our view of what practice is and should be with the hope that you will develop your own view.

The representation of clients involves a sequence of events that typically occur in a reasonably patterned order. The table of contents of this book outlines that pattern, although this outline is certainly no guarantee that every case will unfold in this order. You should not presume that the real world reflects this precise sequence.

PREFACE

Our occasional attempts at humor that appear throughout the text may, with the right timing, even be funny. We often take ourselves and the practice of law too seriously, and an occasional chuckle or groan may help put things in proper perspective.

We now begin this book with the hope that you will discover the excitement and adventure that accompany the practice of law. We encourage you to send us comments, suggestions, stories, anecdotes, and examples that we can include in our next edition.

ROGER S. HAYDOCK
PETER B. KNAPP

January, 2011

Companion Materials

Videos and transcripts of videos provide demonstrations and examples of lawyering skills. Some of these videos include:

Lawyering Skills Video Series by Professors Peter Knapp, Ann Juergens, and Roger Haydock

Interviewing, Counseling and Negotiation illustrates effective client interviewing and counseling and successful negotiation strategies, tactics, and techniques.

Mediation and Arbitration demonstrates essential stages of a mediation and the presentation of an arbitration.

Depositions and Trial presents effective deposition questioning and the trial of a case before a judge.

Additional educational titles for law students include:

Fundamentals of Pretrial Litigation, 8th Edition by Roger S. Haydock, David F. Herr, and Jeffrey W. Stempel (West) extensively covers pleadings, discovery, motions, and litigation practice.

Trial: Advocacy Before Judges, Jurors and Arbitrators, 4th Edition by Roger S. Haydock and John O. Sonsteng (West) contains explanations and examples of effective trial, arbitration, and hearing practice.

Trialbook, 3rd Edition by John O. Sonsteng and Roger S. Haydock (National Institute for Trial Advocacy) presents a systematic way to prepare and present a case for trial.

COMPANION MATERIALS

Additional informative titles for lawyers include:

Fundamentals of Litigation Practice by David F. Herr, Roger S. Haydock, and Jeffrey W. Stempel (West).

Discovery Practice, 5th Edition by Roger S. Haydock and David F. Herr (Aspen).

Motion Practice, 5th Edition by David F. Herr, Roger S. Haydock, and Jeffrey W. Stempel (Aspen).

These texts explain and describe pleading, discovery, and motion practice in litigation, arbitration, and administrative hearings and effective strategies, efficient tactics, and economical techniques.

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