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Legal Writing, Civil Litigation, and Agents in the 18th-Century Spanish Imperial World

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Summary and Keywords

This purpose of this essay is to reveal the diversity of writers responsible for creating the texts of lawsuits in the Spanish empire. It peeks behind the curtain of pages in civil complaints in an attempt to figure out how legal papers actually made it into the court record and who was doing their writing. While historians have recently thrown a spotlight on various official writers, from notaries to native procurators, in fact unidentified, unofficial writers penned quite a few petitions in civil suits. Knowing who wrote the filings in civil cases has a bearing on our understanding of Spanish imperial subjects, their interactions with the law, and ultimately how much of a hand they had in making their own historical record.

Keywords: law, literacy, civil litigation, courts, lawyers, scribes, notaries

Historians interested in the lives of ordinary people of British colonies in the New World can turn to the Puritan diary and the trans-Atlantic letter. Historians of ordinary folks in colonial Spanish America—historians like me—have the lawsuit.¹ While a Catholic deference to the interpretive authority of priests in the Hispanic world kept the number of people who could both read and write relatively low, this did not mean that ordinary Spanish imperial subjects were legally illiterate. Richard Kagan long ago noted that among early modern Castilians, the lawsuit was “something of a habit for peasants and noblemen and merchants alike.”²

My own work on the social and cultural history of 18th-century colonial Spanish Americans who usually could not read or write, including children, slaves, natives, and women, has profited enormously from my subjects’ habits in law. They lodged civil case records with relatively impressive uniformity at various jurisdictional levels, including before the royal high courts in viceregal capital cities such as Lima and Mexico City; in rural districts such as the hinterlands around Trujillo, Peru; in native town councils in the majority indigenous regions of Oaxaca, in the viceroyalty of New Spain; and among

peninsular judges from district magistrates in rural Castilla-La Mancha and the appeals courts of Valladolid, Spain. Judges at all of these levels oversaw business deals gone bad, family squabbles over inheritance, major land disputes, and petty debts. State and regional archives contain traces of beginnings of many more cases than were sentenced. But whether in fragments or whole, civil litigation holds out unique problems and promises for social and cultural historians of the Spanish empire.

Civil suits often force historians interested in everyday life to wade through text dedicated to subjects as soporific as emphysema and inheritance law. For this reason, many scholars have gravitated toward criminal trials, which are filled with duels, bloodshed, and steamy love affairs. The researcher still sitting in the reading room, frantically turning pages at the end of the archive's workday, hoping to find out whodunnit while a staff member taps her foot impatiently? Chances are she is reading a criminal not a civil dispute. Nonetheless, civil suits offer a certain advantage. Unlike in Spanish criminal law, where the state often served as plaintiff *de officio* in trials, individuals or communities almost exclusively initiated the cases that appear in the Spanish civil case record, making them better artifacts of ordinary people's decision to go to court.

Perhaps "go to court" is the wrong expression. The Spanish imperial courtroom was as much a textual as a physical place. Until its final stages, the lawsuit transpired mostly through the exchange of petitions, interim judgments, notary notifications, and witness testimony written up in various sites, including the streets, homes, and offices of imperial cities and villages. Many, perhaps most, lawsuits—rejected as groundless by judges, abandoned by litigants, or settled out of court—never even got to the later stages involving a hearing. Litigants and lawyers only rarely gathered in the lavishly decorated courtrooms of government buildings called *salas de justicia* that were crowned, at the back, by the judges' bench.

Perhaps understandably, we can find ourselves inherently suspicious of these legal texts, believing them to reveal more about institutions and power and far less about ordinary individuals than would a diary or letter. Indeed, legal records were produced according to rigid narrative dictates, and the stakes of getting the text right are exceptionally high. As the Discussion of Literature below details, historians recently have thrown a spotlight on various official Spanish imperial legal writers—notaries, attorneys, procurators, and legal defenders—whose job it was to align litigants' legal stories with the formula of the courts. But even as these legal representatives have stepped onto center stage, in my own work on lawsuits, I have been struck how often I still feel in the dark when reading civil suits. Contemporary manuals for notaries, scribes, and lawyers spell out the procedural details and definitional complexities that account for much of the writing that made up a lawsuit. But there is nonetheless a puzzling quality to the papers, especially concerning their writers. Pages upon pages of civil suits, particularly petitions turned over early in a dispute, are often not signed by attorneys or official notaries—or, often, anyone at all.

Instead, the petitions are frequently written in the first person, are signed in the name of the petitioner, or are unsigned altogether.

In pressing the papers that litigants brought to civil judges to reveal their authors, I hope to further demystify the process and writing of suing in the Spanish empire. The essay focuses on the making of the pages, particularly the early pages, of a civil complaint, tracing out the procedure for filing a dispute by drawing from research on six regions of the empire during the last century of Spanish rule. It also peeks behind the curtain of these pages to figure out who was doing all of this unattributed legal writing. Knowing who wrote the filings in civil cases has a bearing on our understanding of Spanish imperial subjects, their interactions with the law, and ultimately how much of a hand they had in their own historical record.

Paper and Procedure

In the Spanish empire, written laws and legal manuals scripted with precision, down to the minutia, the procedure for suing. They specified how parties should be notified of accusations against them, the number of days that could elapse between actions, formal procedures and regulations for appointing legal representatives, and even how much a judge should say about the rationale for his decision. Certainly, laws were ignored and rules flouted, and procedure and wording varied by region. But, in general, litigants and legal representatives across the empire followed prescribed procedure for civil suits with impressive uniformity. Those basic rules dictated not only what a suit would say but also on what and by whom.

If it began according to plan, a civil suit started on a piece of paper, preferably paper bearing the royal seal. *Papel sellado*, as it was known, came in various stock, each to be used for different kinds of official business. Judges' rulings (*autos*) and interim and final sentences (*fallos* or *sentencias definitivas*) were to be written on the highest grades of paper, as were some of the pages of witness testimony. But initial petitions came in on paper of the third degree of quality, which in the 18th century cost a peso a page. If the plaintiff was one of the "solemn poor," the official category of poor determined by the court, or was considered an "Indian," the cheapest official paper, of the fourth grade, or paper simply stamped with the official seal of a notary, would suffice.³

The first page of each subsequent filing by all plaintiffs and defendants, most consisting of back-and-forth motions in response to one another that moved the suit along, also were to be made on grade-four *papel sellado*, but the follow-up pages in a motion or filing could be composed on ordinary paper (*papel común*). The official design of the seal on the paper changed every two years and thus always bore two dates, ensuring both that it presented the most current royal insignia and, not coincidentally, that its sale would bring steady royal profits.

Detailing what kind of paper was used in lawsuits is simpler to do than figuring out who wrote on it, particularly who composed the opening petitions that were submitted to the courts to get the suit started. So before delving into the issue of authorship, we might skip ahead and follow the paper of the initial petition—called by various names, including a *memorial*, a *demanda*, and a *pedido*—as it made its journey to becoming the opening narrative atop a stack of paper that made up the lawsuit, which in Spanish was referred to not as a single object but a collection of “acts,” or *autos*.

The plaintiff (or her representative) submitted her opening petition to offices that were generally located in the central plaza of a city or town. Yet it should be noted that even in a capital city like Lima, the “court” could still be a metaphor. In a 1794 guide to the city of Lima, José Hipólito Unaue listed the names of all court personnel, including lawyers and court officials, as well as “the streets and houses where they live in the places corresponding to their employment, and they should be sought out there.”⁴ Thus, although the physical building of the court was in the city square, the point was to put the petition not just in the proper place but also in the hands of the proper person. That judges were said to have “seen” rather than to have “heard” motions in a case reveals how law was conceived of as the circulation of texts.

If the court was in a sizable and important district, the opening petition would be turned over to an official whose job it was to receive such paper (the *receptor*); otherwise, it would go to the court notary. The official verified the procedural accuracy of the petition with the words “before me” (*ante mí*) and a signature. The court notary’s signature usually appears on the verso side of single sheet of paper; most litigants submitted initial petitions that reached *almost* to the bottom of the back of one page, leaving space for the notary to sign. This kept *papel sellado* costs low. The court notary also might enter a few lines on behalf of the presiding judge, who, if the complaint was provisionally accepted, would generally order that the petition be communicated to the opposing party (*dar traslado*). The opposing party, in turn, had the opportunity to respond within a period of three days. If, for any of a number of established legal reasons, the opposing party needed more time, she could submit a petition for an extension.

Unless the judge ruled that the initial complaint was baseless in law (*no tiene lugar*, or *no ha lugar*, literally “has no place [in law]”), the suit began once the defendant responded.⁵ Along the way, the judge or panel of magistrates rendered interim decisions, copied by court scribes or sometimes penned by the judge himself, in the margins of the first pages of petitions and motions, facilitating the efficient review of what could become lengthy exchanges of legal papers. For the parties involved, the objective at this point was to accumulate evidence in the form of documentary proof and witness testimony (*probanzas*), and to discredit the opponent’s evidence and witnesses. At the end of a case, lawyers for the two sides would make grand final arguments resting their case upon written law or revered works of legal commentators. Attorneys sometimes delivered these statements before a public audience of the judge or panel of judges. In the civil law tradition, in which justice was to be fitted to the particularities of each case rather than

precedent, judges were not supposed to divulge too much of their legal thinking. So the judge rendered his ruling with a few curt words such as “the plaintiff proved his case and the defendant failed to prove his” and spelled out the general details of the settlement.

Litigants

Not just anyone could be a litigant. There was a detailed list of who could go to civil court, established primarily in the 13th-century medieval law code the *Siete Partidas* of King Alfonso X of Castile. The excommunicated, the demented, the mute, and the “totally” deaf were excluded, just as they were restricted from becoming lawyers. Slaves were only supposed to appear in civil courts on their own behalf for their freedom.⁶ The exclusion of two of these types of individuals, the mute and the deaf, were actually residuals from Roman law, and they signal something important about legal culture and writing in the Spanish empire. A fluidity in Roman civil procedure between oral and written actions endured in the Spanish civil law tradition, where verbal actions such as oaths were treated as binding.

In other words, while law did not necessarily transpire in the courtroom of our modern imaginings, it did take place out loud as well as on paper. Parties and legal personnel quite literally talked over the writing of the suit. Judges made verbal orders or suggestions or called in opposing parties for semiformal chats; court notaries went out to inform litigants of a development in a case and might become embroiled in a conversation that had bearing on the suit. Petitions, then, were not always inaugural texts. They often came bearing a prehistory of unwritten legal encounters that preceded the writing, including verbal promises, toasts and handshakes, undertaken only sometimes before judges or other authority figures. Spanish imperial inhabitants had a term for this parallel legal world of speech: “the extrajudicial,” *lo extrajudicial*.

Remaining prejudices about who could sue were less about speaking and writing than about the patriarchal order of society. Written law denied full civil juridical personality to a multiplicity of dependents—minors under the age of twenty-five, married women, slaves. But Spanish law did counter legal constraints on categories of people who were considered less than full juridical subjects by providing them some advantage in their clashes with superiors. Married women could sue their husbands for dowries or abuse in civil courts, minors could go to court against parents to be emancipated or to bring charges of mistreatment, and slaves could sue for mistreatment or for false enslavement. If petitioners fell into a protected category known as “*casos de corte*,” which included the “solemn poor,” widows, slaves, and minors, their civil suits could bypass the lower courts and be heard by the highest court available, the *audiencias*.⁷

After conquest, such legal categories of dependency, long recognized in medieval Spanish law and grouped as “*miserables*,” provided the basis for natives’ special legal treatment in court, and eventually slaves’ as well. In the 16th century, a special jurisdiction was

established for indigenous litigants and called the General Indian Court in the viceroyalty of New Spain, replete with named personnel for representing native cases; a “Defender of Natives” in Peru operated on natives’ behalf before a district judge or the *audiencia*. What is more, most of these legally dependent groups, including indigenous litigants, had other jurisdictional privileges, received pro bono counsel from designated legal representatives, and were to enjoy exemption from certain court costs.⁸

Thus the experience of a being a “litigant” could vary. It could involve invoking justice by right or seeking protection and gratis representation. It could range from a long-term commitment to seeing a case through to conclusion or a temporary affair, as happened when someone lodged a complaint mainly to provoke a nonlegal outcome. Even after a case went into the legal system, the litigant usually had to exhibit active engagement to ensure it was carried through.

Official Agents

That is not to say, of course, that litigants represented themselves. For most, after the initial petition had been submitted, the legal process became increasingly dependent on official legal personnel and procedure. Theoretically, that dependency was even more pronounced if the litigant fell into one of the protected legal categories of imperial subjects, such as the indigenous and minors, whose very appearance in court and pro bono status was often predicated on being legally represented or authorized by others. But both paying and nonpaying litigants needed procurators and attorneys to direct their cases. Soon after the opposing party responded to the initial petition, litigant and defendant were to turn their cases over to legal representatives.

Two types of lawyers handled cases: procurators of the court (*procuradores de número*) and attorneys of the court (*abogados de número*). While both were licensed to practice law and both occupied a limited number of posts in each district, *abogados* were the more highly educated professionals, with post-baccalaureate degrees, and thus enjoyed greater prestige and pay. It was the *abogados* who stepped in at the end of the suit to offer final arguments based on the accumulated evidence, drawing from their broader command of Roman and Spanish written law and local legal practice. Procurators, on the other hand, were the drivers of the suit, linking additional paper cars to the train as it made its way through the court, steering it through to this final phase. Although procurators were more practitioners than theoreticians of the law, they were still, in a sense, “legal minds.” After being named, they drew up the majority of the documents that clients submitted, set the strategy of the suit, and often composed the questionnaires used to interview witnesses.

Litigants turned authority over to legal representatives in official documents called “*poderes*” (literally “powers,” or powers of attorney).⁹ *Poderes* for lawyers usually were specific to the case; general powers-of-attorney were used in other instances, as when

someone who lived in the countryside named another to take care of his legal business in the city. Native communities in Oaxaca called on a small number of bilingual individuals trained by priests in the genres of law to serve as representatives, or *apoderados*. These writers might have circulated through town councils as official writers but later worked as free agents.

Technically, litigants naming legal representatives—whether lawyers, notaries, or others—were to submit an official, notarized power-of-attorney to the court to be included with the rest of the *autos*. In practice, it was not unusual for these *poderes* to be kept separately from the case, filed in the tall ledgers of the public notary who authored the contract. Litigants often began suits with no idea of who would represent them, or they frequently found reason to switch legal representatives in the middle of a suit. As a result, they conveniently failed to turn over their “powers” in writing, saving themselves both the pesos the notary would charge for naming a representative and the trouble of formally naming a new one.

While later in the essay, I make the point that the wide range of amanuenses available to potential litigants has made it difficult to decipher who was doing the writing in civil suits, the work of official, licensed writers filled a lot of the pages. The highest-ranking official legal writer was the court notary (*escribano de corte, de cámara*). His job, in a manner of speaking, was to make the case. It was the court notary who collated various papers into *los autos*, the lawsuit. He testified to the legitimacy of petitions, motions, and judges’ interim rulings by co-signing them. He himself often went out into the community to notify the parties of developments, took witness depositions, and, finally, kept the archives of the case. The most prestigious posts of court notary were coveted: even the high court of Lima only had two official “*escribanos de cámara*” in each of the single criminal and civil *salas*. But it took far more than two men to accomplish all the legal work of a high court, so their offices employed assistant writers, variously called *escribanos habilitados* (authorized scribes), *plumeros* (quill-men), or *escribientes* (scriveners).

In addition to the court notaries and the assistants they directly employed, most larger cities and towns counted a number of public notaries. They had been trained and certified to fill their positions, commissioned to produce the thousands of pages of contracts collected in every archive in the region. The functions of public notaries included filling out wills, bills of sale, and I.O.U.s—sheets of thin white paper containing millions of written lines that drew the various regions of Spain’s vast empire into one legal system. The expertise of public notaries was such that procurators often trained at their sides, especially as lawyers, in the 18th century came to value practice more than book learning. It is unclear to me whether public notaries could officially pen opening petitions, but it is clear that in areas of the empire where legal personnel were scarce, such as Trujillo and the Montes de Toledo, public notaries frequently functioned as de facto procurators for litigants.¹⁰

Indeed, the lack of literate and trained personnel in the countryside meant anyone associated with the legal system might be roped into writing a petition. As the only legal officials around for miles, even Spanish judges in isolated regions could be called upon to help craft an initial petition opening a suit. When natives representing the pueblo of Choapán showed up one December day in 1742 in the district capital of Villa Alta, Oaxaca, in order to file a suit claiming that their community elections had been rigged, they found that there was no public or court notary within twenty-four leagues of the city. The magistrate of the jurisdiction, the *alcalde mayor*, had his personal assistant serve as their scribe, for the cost of one peso, and he himself had to formally receive the suit.¹¹

Theoretically, the natives of Choapán should have had access to a legal writer earlier. Each indigenous town council was supposed to count among its officials a notary responsible for recording local records and annals, and in central Mexico these often were kept in indigenous languages. The existence of native-language criminal testimony and some civil cases in Oaxaca reveals a cadre of indigenous intellectuals well trained in Spanish legal procedure. While the role of writer/advocate for native communities varied by region and differed between the viceroyalties of New Spain and Peru, in general the indigenous scribe can be viewed as a combination of court and public notary and legal adviser. He kept the records of the community, but he often also served as the primary counsel for its people, shaping petitions and complaints for Spanish jurisdictions. Many were called upon to sign edicts and other documents for native community officials. By the 18th century, the native town council in Lima had successfully secured for learned indigenous men alone the official positions of “procurador de indios,” one of two such posts designated to advocate for native litigants before a Spanish judge, who was counseled by a designated adviser known as the Defender of Natives.

This intermediate position between community advocate and colonial functionary led more than one Indian village to become suspicious of a native notary or procurator. This suspect social positioning made indigenous notaries similar in many ways to non-indigenous notaries and procurators, whose control over legal papers gave them margin to play with the truth. In fact, when playwrights and essayists needed a stock shady character, they reached for the scribe.

At least in theory, however, a strong code of honor bound licensed legal writers. Handbooks for scribes, notaries, and lawyers of all stripes—produced throughout the centuries but appearing with ever more frequency in the 18th century—universally emphasized the importance of professional integrity for official legal writers. Legal manuals were not, of course, neutral texts. Their authors described procedure in such a way that court notaries and lawyers could monopolize forensic knowledge. Manual writers had an interest in ensuring that litigants followed the rules, particularly the rules that pointed to the indispensability of official, licensed personnel (such as them) in the processes of the law.¹² For example, Josef Juan y Colom, writer of the popular 1736 *Instruction to Scribes*, felt he could not overemphasize the critical importance of the official *poder* to name a procurator.¹³ Another 18th-century manual writer, this one a *novohispano*, neglected to put into precise writing the format of a civil petition at all, but

in his list of formats for various legal documents, he did put power of attorney for the procurator at the very top.¹⁴ Alonso Villadiego Vascañana y Montoya's *Instruction in Judicial Policy and Practice, Conforming to the Style of the Councils*, which was perhaps the most widely known legal manual in the empire, in fact stipulated that naming a procurator constituted one of only five elements that legitimized an initial petition, though in other manuals the requirement to name a procurator was omitted as part of an opening petition and prescribed for a later point in the suit.¹⁵

Until now I have referred to the first page of the suit, the complaint, as an "opening petition." But, in Spanish, there were several names assigned this piece of paper or act: *demanda*, *pedimiento*, *memorial*, *libelo*. Why so many terms? After all, legal manuals locked in the generic constraints of the opening petition, and most petitions submitted to the court came in on the appropriate *papel sellado* and accorded with prescribed form. But opening petitions' seeming compliance to bureaucratic formula obscures the multiple ways in which imperial subjects actually produced them.

Some litigants showed up at the court with a complaint to voice, but otherwise empty-handed. In fact, many plaintiffs, like the natives of Choapán, lodged their complaints verbally. The authors of legal manuals tried, of course, to undermine the validity of verbal complaints since they eliminated the middlemen—namely, them. Manual writer Juan y Colom, in treating the broad category of a "*demanda*," or complaint, allowed that judges could admit verbal complaints, "but the [current] practice is to only admit it if it is in writing, which we commonly call a *pedimiento*." Thus he attempted to fix the definition of a *demanda* to paper, defining it as "a brief writing that the plaintiff presents in court against a defender."¹⁶

Court personnel were responsible for seeing to it that verbal complaints were transferred to writing when litigants came in without a written petition. It appears that in some instances, they drew up the documents themselves; in others, they sent the litigant to a local writer. The professional expertise and grasp of law these local writers had ran the gamut. In the case of the solemn poor, natives and others, a judge might admit a petition that was less than perfect: on ordinary paper, perhaps written not in the proper form. The original petitions in some suits were penned as letters to the judge—primarily complaints from rural areas where access to *papel sellado*, official legal writers, and the cash to pay for either was in short supply. It is often easy to detect the creases where they had been folded up into a small square for delivery to a far-away magistrate. Informally called "*esquelitas*" (notes), after these papers were accepted as legal petitions, they were known as "*memoriales*." In some instances, court notaries and receptors helped correct these documents, aligning them with legal protocol.

Literate litigants might, from time to time, pen their own papers. For example, when in 1799 the Gallego immigrant Don Antonio de Espineira was thrown out of his room in a boarding house in Lima for falling behind on rent, he seems to have written most of the petitions he filed to reclaim his seized belongings.¹⁷ But he was a rarity; before suffering

paralysis, he had been an accountant specializing in jewels and gems and thus probably had more exposure to official writing than the average imperial inhabitant. Most litigants came ready to sue armed with papers written by someone else.

Unofficial Agents

In many instances, the only signature on petitions turned over to courts appeared as if it were the litigant's. However, that signature usually matched the handwriting of the text, indicating that the writer had signed for the litigant. Sometimes the petition writer signed his own name, occasionally accompanied by "*a ruego de,*" or "at the request of" the litigant. This most frequently happened when the writer was a legal counselor, namely, a procurator. It is also easy to see which petitions were written by procurators or attorneys by analyzing the text since they usually wrote about clients in the third person. Alternately, both the petition writer and the petitioner might sign their own names to a complaint written in the first person, or the litigant would etch out a cross ("+") as a signature. Other times, the petition writer explicitly stated that the client "*no sabe firmar*" (does not know how to sign), whether or not the writer identified himself (or herself).

In one other category of written petitions, the petitioner would sign in her own hand an anonymously composed document, as Doña María Micaela Vega, who went to Mexico City to sue her husband for alimony, did repeatedly in her case. Her petitions and motions were written in the first person and contained no traces of the identity of the individual who penned them though this person clearly was not María Micaela, whose large, clunky signature revealed her discomfort in wielding the quill. That María Micaela signed each petition is no guarantee that she knew how to read it.

The insistent imperfection of María Micaela's signature at the bottom of each motion places her, rather than the writer, at the center of the suit. Indeed, anonymous writers for hire were everywhere. Litigants often turned to these unlicensed, unnamed legal agents to craft their initial petitions. This practice clashed with the notion that writing petitions was the job of licensed procurators, who variously competed with or established connections to local attorneys in directing litigants' cases to their final stages. Still, even the manual writer Villadiego, who otherwise insisted on the importance of court-appointed official writers, conceded that litigants could not be compelled to hire a *procurador* against their will.¹⁸ So freelance legal writers abounded, especially in the cities of the empire.

In the 17th century, Felipe IV tried to rein in these anonymous amanuenses by replacing them with a restricted number of supervised "business agents" (*agentes de negocios*).¹⁹ But unlicensed legal writers would not disappear. Disparagingly called "*agentes intrusos*" (intrusive agents), "*tinterillos*" (little ink spillers), or "*picapleitos*" (pettifoggers), their numbers in the cities grew throughout the 18th century,

creating particular controversy and prompting experimental imperial reform in 18th-century Mexico City. The official procurators of the viceregal capital waged a decades-long struggle to register stray agents in the city and to limit their number. When they took their efforts to the Council of the Indies, they ultimately met only tempered crown support. Carlos III decided that imperial courts could provide registered agents to his litigating subjects, but would not prevent litigants from choosing anyone they wished to pen the pages of their suits as long as that writer was not shown to be incompetent or immoral.

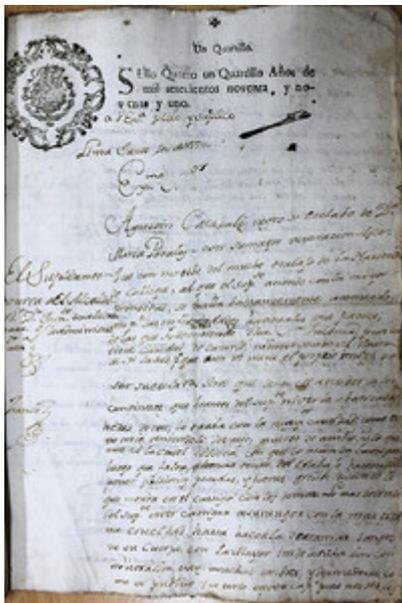
Given how much of the archive these shadowy legal agents created as they scratched out petitions and motions before the lawyers got involved, it is remarkable that most parties remained silent about their identities. The narrative practice that reigned throughout the empire made many legal documents, particularly those submitted at the beginning of the suits, appear as the unmediated words of the litigant. It is true that Spanish officials insisted over and over again that petition writers sign their names to the papers they filed.²⁰ Court notaries and receptors were repeatedly asked not to accept filings where the name of the writer did not appear. Yet no one paid much attention; receptors and court notaries kept taking petitions without the names of the writers appended.

Sometimes, however, the identity of the agent peeks through. When agents did not act anonymously and signed their own names, they often demonstrated that they held a bachelor's or master's degree by using their title as a prefix, usually as "*licdo,*" or "*licenciado.*" Many of these educated men were ad-hoc procurators, trained in the law and engaged in piecework paperwork but not officially assigned to a case. Among those who displayed their titles, they typically demonstrated a level of education that matched, and at times surpassed, the level achieved by official, "numbered" procurators of the court, who by the 18th century often held only a bachelor's degree. Thus these educated individuals functioned as legal counselors, occupying a kind of parallel (para?) legal world where they were legal agents but technically not "procurators" or "abogados" by trade.

Agents who failed to sign their names to petitions also could be of more humble backgrounds. When a group of *agentes de negocios* acted to formalize their posts during the controversy in Mexico City in 1747, they excluded several kinds of petition writers known to be working in the city, including the *mulato* slave of an older, respected *agente de negocio* who could no longer work, four natives, a person of "unknown quality," and five priests. Indeed, priests of the regular orders who broke cloister and interacted in the cities and small towns of the empire seem to have provided a good deal of legal advice to commoner litigants. In 1668, King Carlos II complained of missionaries and monks who were "introducing themselves in the business and dependencies of the secular world (*el siglo*), under the title of agents or procurators or solicitors of the Realms, communities, relatives or unrelated persons."²¹

These diverse writers operated in a kind of underground legal circuit. Evoking the Ángel Rama's poetic reference to the political monopoly of educated elites in Spanish American cities, Kathryn Burns beautifully calls this paralegal world "the back alleys of the 'lettered

city.”²² The African-born slave Agustín Carabali, who charged his owner with abuse in civil court, wandered these back alleys. He first paid a popular legal writer—whose name he could not later remember—to pen an opening petition for him. Apparently, the rough language or legal faults of the petition caught the eye of the court receptor when Agustín attempted to submit it, so the receptor told the slave to have the petition rewritten. While the court receptor probably referred him to an official writer, Agustín ended up finding his next legal amanuensis in a tavern. A “*negro criollo*” named José, who rented a room in the house of one of the city’s licensed attorneys, was a frequent customer in the establishment. Presumably, José’s residence with the lawyer gave him access to legal knowledge. Putting this know-how to use, José rewrote the petition in the third person, signing at the end with squiggles and flourishes that were supposed to replicate the *escudo*, or coat of arms, a public notary might use to distinguish his signature, as shown in Figures 1 and 2. It appears that the receptor accepted this second, more elaborate but still rough, copy, making a few amendments and grammatical corrections.



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Figures 1 and 2: The first and last page of the rewritten petition the African-born, nonliterate slave Agustín Carabali submitted to the court receptor in Lima in 1790. Notice the two places at the top of the final page where his *agente*, José, signed the first-person petition for him, the second preceded by “Yo,” or “I.” Also note the minor correction in the text, probably introduced by the court receptor to improve the grammar and formality of the petition.

Reproduced by permission from Autos seguidos por Agustín Caraveli [sic], esclavo de Dna. María Perales, sobre sevicia, Archivo General de la Nación, Perú Real Audiencia, Civile., Leg. 289, C. 2568-B, 1790, f. 1; 2.

To be sure, anonymous writers were not always anonymous to the litigant, as Agustín claimed his first agent was. Legal writers could be relatives, acquaintances, or patrons who did not identify themselves in the records. A slave called Andrea testified the year after Agustín’s suit that she had asked an elite Spanish patron to craft the early petitions in her freedom suit for her daughter until the court appointed her a pro bono lawyer. She swore, “the deponent does not know how to write and thus cannot sign, but neither does she know who signed them for the deponent but [only] that she was in charge of the case since it concerns her (*ella a corrido el pleito*

como que [sic] a quien le interesa)...”²³

Andrea's insistence that, although she did not write or sign her petition, she still was "in charge of the case since it concerns her" is key, and is a fitting place to exit the back alleys of the lettered city and to assess what learning about the process of writing in civil suits means for our understanding of Spanish colonial history.

Reading It Back

Again and again, litigants made sure to emphasize that, even when others did the writing for them, they managed the suits. Even if protocol dictated that lawyers were to take over early in the case, legal agents—unlicensed, unidentified, sometimes hired counselors-cum-penmen, some priests, others lovers, a few drinking buddies—remained involved well into the middle of the case. Together, litigant and agent worked out strategy and filed motions until, or even in some cases beyond, the point in the suit when an attorney was appointed. Whatever the preset formula for positioning oneself as litigant, official, licensed legal writers came to rely quite heavily on the groundwork legal agents and litigants laid in those early petitions written in the first person.

In fact, there was often as much copying going on in court as there was converting of litigants' words into legalese. Petitions on *papel sellado* often simply repeated the exact wording that had been presented by a litigant in a prior, more informal letter or *memorial* accepted by the court. In the Chancillería de Valladolid, lawyers submitted many formal *demandas* in marital disputes that copied verbatim the wording of an earlier narrative petition submitted to the court. The procedure for this high court seems to have followed quite closely the notarial protocol that held a first-person *pedimiento* to be distinct from an attorney-authored *demanda*, and that not until the second was submitted was a case kicked off. But even in this more formal order of things, the lawyers' words depended on the litigants' words (or at least the words they initially had written up), not the other way around.

In lower-level courts throughout the empire, many original petitions appear at the beginning of the autos, or they are tucked in alongside statements rewritten by court scribes or presented in the name of high-powered attorneys. Digging through the papers, it becomes obvious that the less formal *memorial* or *pedimiento* often gave rise to the more formal *demanda*. An assigned or hired lawyer could find a lawsuit already so well developed and petitions so complete that he would not even bother to pull out a fresh sheet of paper. This included the lawyer of one woman who initiated a suit before the *audiencia* of Mexico against her Spanish immigrant lover after he won the lottery in 1799. Her lawyer simply changed the "I's" in her original petition to "my clients" and altered the ending of the verbs, originally written in the first person, to match the third person. He did not catch all the verbs, however, and thus left the petition a grammatical garble.²⁴

While litigants had the greatest room for agency in the early part of a suit, that space did not contract completely after a lawyer had been named. A few cases reveal that litigants took, and retook, their cases into their own hands when their representatives failed to move quickly enough for them or employed strategies that the litigants disliked. In some instances, litigants simply moved matters along and submitted on their own a motion or two that had been penned by an agent. Sometimes they would place their own signature next to the words “for my procurator” (*por mi procurador*) and signed the name of that procurator.²⁵

Other times, even when a procurator was doing the work, it could be clear that a litigant was still in charge. A common practice in petitions was to correct a text and indicate in a series of “*tachas*” the corrected “errors” that had been revised. Often, *tachas* appeared at the end of copyists’ versions. But at times, writers simply used the form of the *tacha* to explain rewrites or corrections made in an original petition, noting at the end any obvious changes. I encountered this practice in all regions, but for reasons I have not identified it seems to have been most common in Mexico City. Often, the *tachas* simply represented the corrections to spelling that a writer caught on his own while writing or reviewing. The corrected words or letters would be listed at the end of the petition in a nonsensical string of authorial algebra, such as “on=8=v=r=gn=rro=vis=s=fi=x” preceded by the words “amended” and followed by “okay” (*vale*).²⁶

The more substantive of these corrections reveal an ongoing narrative negotiation between litigant and legal counselor. As part of the process of reviewing a prewritten petition and signing off on it, a lawyer or court notary might correct the spelling or the names of litigants, which often could be mistaken or confused in an agent’s version. Or a lawyer would reconcile breaches in the use of honorific titles for judges by making sure the right “your excellencies” and “your superiorities” were used with the proper magistrates. If a petition or motion was already composed, the lawyer was limited to making only a few small alterations or additions. A procurator added the phrase “speaking with all due respect” to the petition the inhabitants of San Pablo de Cajones brought against the subdelegate of the Intendancy of Oaxaca in 1791. This was the best he could do to soften the defiant tone of the native community’s already-composed petition, whose writer remained anonymous (it was signed, for the community, by a member of the town council whose penmanship stands out as poor even among a sea of similarly tentative signatures.)²⁷

What is more, when the writing of a petition was finished, it often was read aloud to the litigant, either immediately upon completion or after filing. In the former instance, this gave an involved petitioner the opportunity to make the writer go back and change features of the statement. One apparently literate and forceful female litigant in Lima seems to have made her petition writer amend a motion by adding whole phrases.²⁸ In other instances, after a petition had been submitted to the court, the court notary sought out the petitioner to confirm that the petition was hers or his, and ensured it was “read [aloud] *de verbo ad verbum*,” or word for word. Many litigants continued to have access to agents and their writings even after a procurator and attorney had been named to their

case. This made it possible, if rare, for a litigant to file legal papers against the advice of their attorneys. One Doña María García of Mexico City went rogue in precisely this way. In her complicated church divorce and alimony case against her husband, Doña María filed a separate case in the royal court, apparently without any advice from her chosen counsel.²⁹

All of this is, of course, not to say that litigants in the Spanish empire had unfettered ability to use the courts to create themselves from a “blank slate.” There were formulas and procedures to be followed, lawyers to be paid, and judges to be persuaded. But legal writing in court cases is a topic that historians must approach with care, attentive to who was writing each page. Simply knowing the legal formulas and identifying official writers will not tell us the whole story. Litigants—many of whom could not read or write alphabetically—still could be legally literate and shape the papers they submitted to the civil courts of the Spanish empire. In short, whoever their *agentes* might have been, they themselves can rightly be viewed as agents of their own histories.

Discussion of Literature

While ordinary colonial subjects' interaction with the law is part of a venerable historiographical tradition, with ethnohistorians and women's historians having exploited the legal records to particularly good effect, attention to legal writers is a more recent phenomenon, exploding since the early 2000s. Legal history proper has generated some of this attention, with scholars such as Tamar Herzog, Víctor Gayol, and Renzo Honores undertaking studies of the everyday working of courts and court functionaries and advancing our general knowledge of figures such as *escribanos* and *procuradores*. Literary scholars along with historians have taken up the questions of genres of legal writing and the physical movement of legal texts across the expanse of the Spanish empire. Kathryn Burns's book on notaries in colonial Cuzco, particularly those who recorded contracts, bridges these legal and cultural approaches, and her lively prose and unparalleled eye for details make her work mandatory reading for anyone interested in legal writing in colonial Spanish America.

Burns's separate foray into the study of the *quilcaycamayoc*, an Andean native notary, demonstrates that legal writing among indigenous peoples in the viceroyalty of Peru was more restricted than in New Spain because of the legacy of Francisco de Toledo, a 16th-century viceroy who attempted to shuttle native litigants into Spanish institutions and genres. But those laws could not effectively stop natives from recognizing that control of the plume could give them control over justice and the operation of power. In that respect, Burns joins a growing group of historians and anthropologists who are revisiting Uruguayan theorist Ángel Rama's concept of the "Lettered City," or the mastery of a few educated men over the papers of empire and nations. A wide range of colonial Spanish Americans, including natives and slaves, helped produce the archives and influenced the outcome of the law even without being "literate" in the Spanish sense of the term. Joanne Rappaport and Tom Cummins urge us to go "beyond the lettered city," to understand literacy as more than the "production and reception of alphabetic writing" but also as a practice linking the visual and the oral in colonial Spanish America. Such a historiographic turn can aid those who are interested in the social interactions between litigant and legal writer.

Even with this expansion of the grid of the lettered city, Burn's argument about the relative difference between legal writing traditions of the Andes and central Mexico still obtains. This is in part because historians of New Spain do have access to legal writings in native languages, and perhaps due to early modern institutional design. Several decades ago, Woodrow Borah suggested that New Spain provided a unique forum for native with its famed tribunal, the *Juzgado de Indios*, while in Peru native relied until late in the colonial period on representation by Spanish officials and writers. Thus much recent history writing on writing orbits Mexico as "New Philologists" decipher native-language documents and trace their cultural implications. Notable in this field is the work of Yanna Yannakakis on Villa Alta, Oaxaca, whose attention to native intermediaries of all

types is balanced with attention to Spanish as well as native legal genres and jurisdictions. Future research on native concepts of law and litigation, as it was captured in both native and Spanish language documents, promises to further reveal how the legal archive has been shaped by interactions between litigants and an array of writers, including interpreters and those who held power of attorney, as well as the kinds of anonymous agents explored in this essay.

Primary Sources

If it is daunting for a 21st-century historian to navigate the dispersed laws governing the procedures and formulas of a civil lawsuit in the Spanish empire, luckily, it seems to have been a complicated task for contemporaries, as well. For this reason, many manuals for judges, lawyers, and notaries were published to help guide legal writing and standardize procedure. Two important manuals published in the early 17th century found their way onto many learned men's bookshelves: one the work of Alonso Villadiego Vascañana y Montoya, which was reprinted many times over throughout the empire; the second, the *Curia Filípica*, first published in Lima and attributed to a Juan de Hevia Bolaños, a Spaniard who had traveled to the New World. There was a boom of new, more regionally specific works in the 18th century, but Josef Juan y Colom's 1736 *Instrucción a escribanos* became a standard guide and undoubtedly contributed to the uniformity of legal practice and formulas used in litigation throughout the empire.

These manuals, often published in dozens of editions, can easily be found on internet searches, but archives that contain the handwritten, unpublished lawsuits themselves still are the best places to find information about everyday interactions over legal writing, such as the fascinating case of the African slave who had his drinking companion rewrite his opening petition. Upper-level courts in Spain, including Council of Indies or the Chancillería of Valladolid, often employed copyists, making it impossible to scrutinize handwriting or otherwise trace litigation back to the earliest petitions the same way a historian can when consulting the holdings from lower-level courts, such as city and village *alcaldes*, and district magistrates such as *corregidores* and *alcaldes mayores*. But because the high courts, or *audiencias*, of colonial capital cities were to hear the cases of "miserables" in the first instance, even the records of civil lawsuits in these more elevated jurisdictions contain pages marked by a diverse array of hands, from those of anonymous writers to the grand and eloquent closing arguments of attorneys.

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Notes:

(1.) Portions of this essay draw from chapter 1, "Agents and Powers," of my *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire* (New York: Oxford University Press, 2017).

(2.) Richard Kagan, *Lawsuits and Litigants in Early Modern Spain* (Chapel Hill: University of North Carolina, 1981), xxi.

(3.) "Cédula de 20 de enero [1795] sobre el uso del papel sellado en los Tribunales y Juzgados Eclesiásticos de estos Reynos, incluso los de Inquisición," reprinted in Sánchez Santo, *Colección de todas la Pragmáticas, Cédulas, Provisiones, Circulares ... publicadas en el actual reinado del Señor Don Carlos IV*, vol. 2 (Madrid: Viuda e Hijo de Marín, 1793), 88.

(4.) José Hipólito Unanue, *Guia política, eclesiástica y militar del virreynato del Perú para el año de 1794* (Lima: Imprenta Real de los Niños Huérfanos, 1794), 61. A similar guide to lawyers in the city, complete with their street addresses, is found in the 1817 publication of the newly created "bar" in Lima, Bernardo Ruíz, *Colegio de Abogados de Lima (Peru). Abogados del ilustre Colegio de la excma. ciudad de Lima, con expresión de las calles y casas en que viven, año de 1817* (Lima: np, 1817).

(5.) As the *Siete Partidas* put it, "the summons [of the defendant] is the root and beginning of every suit." 3:7.

(6.) *Siete Partidas* 2:3:5–11.

(7.) *Siete Partidas* 3:23; 20; 3:18:41.

(8.) *Recopilación de Indias* 2:6:1; 6:5:3.

(9.) *Recopilación de Indias* 2:28:13.

(10.) Kathryn Burns refers to a ban in *Into the Archive: Writing and Power in Colonial Peru* (Durham, NC: Duke University Press, 2010), 32. Official procurators were likely to fight any official endorsement of public notaries as their rivals. See the case of the unique post of the “*amanuence nombrado*,” who was appointed to the city court of Trujillo because procurators were overworked and reluctant to give up petition writing, Expediente promovido por don Felix Valez, Procurador de número y Amanuence nombrado por el Ilustre Cabildo: sobre aumento de salario. Archivo Regional de La Libertad (Trujillo) (ARL), Cabildo, Asunto de Gobierno, Leg. 109, C. 1997, 1812.

(11.) Los naturales del pueblo de Choapan piden se anulen las elecciones de alcaldes que se llevo a cabo ya que este fue impuesto y no fue electo por pueblo, Archivo Histórico Judicial de Oaxaca (AHJO), Villa Alta, Civil, Leg. 11, Expediente (exp.) 13, 1742, f. 4.

(12.) *Recopilación de Indias* 2:28:1 and 2; 2:28:3.

(13.) Joseph Juan y Colóm, *Instrucción de Escribanos, en orden a lo judicial* (1736; reprint, Madrid: Imprenta de Antonio Marin, 1761), 4–5.

(14.) Juan Ricardo Jiménez Gómez, *Un formulario notarial mexicano del siglo XVIII: La Instrucción de escribanos de Juan Elías Ortiz de Logroño* (Mexico City: Universidad Autónoma de Querétaro, 2005).

(15.) Alonso de Villadiego Vascañana y Montoya, *Instrucción política y práctica judicial conforme al estilo de los Consejos* (Madrid: Antonio Marín, 1766), 2.

(16.) Juan y Colom, *Instrucción a Escribanos*, 6; *Siete Partidas* 3:2:40 and 41.

(17.) Autos seguidos por el Marqués de Casa Concha contra D, Juan Antonio Espineira, sobre pago de los alquileres de la casa en que habita, Archivo General de la Nación del Perú (AGN-P), Real Audiencia (RA), Civ., Leg. 380, C. 3490, 1799.

(18.) Villadiego, *Instrucción política*, 1766 edition, 5.

(19.) “Agentes de Negocios,” in *Diccionario universal del derecho español constituido*, vol. 4, ed. Don Patricio de la Escosura (Madrid: Publicaciones de Ultramar, 1853), 185–186.

(20.) *Recopilación de Castilla*, Lib. 2, Tít. 16, leys 13 and 14; Ruíz, *Colegio de Abogados*, 15.

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(21.) Los Religiosos y Sacerdotes seculares no sean agentes ni solicitadores de causas ajenas ... D. Carlos II, en Madrid, por dec. de 13 de Agosto de 1668, y en 1 de Dic. de 675 a cons. de Consejo, recompiled in the *Nueva Recopilación*, Lib. 1:XXVI:1, 184.

(22.) Kathryn Burns, *Into the Archive: Writing and Power in Colonial Peru* (Durham, NC: Duke University Press, 2010), 94.

(23.) Autos seguidos por don Antonio Arburúa con su esclava, Andrea Escalante [*sic* Arburúa], sobre la libertad de ésta (*sic*; su hija), AGN-P, RA Civ, Leg. 203, C. 2616, 1791, f. 21v-22.

(24.) Malinalco. Expediente formado a pedimiento de Da. María Josefa Bermúdez, vecina de Tenancingo sobre que Don Francisco Cecilia le dé alimentos, Archivo General de la Nación, México (AGN-M,), Civ., Volumen (vol.) 981, exp. 5, 1799, f. 1.

(25.) Two examples: Expediente seguido por Alberto Chosop, Procurador de Naturales, en nombre de los naturales del Pueblo de Santiago de Cao sobre ortogación de libertad de los 12 indios que se hallan presos, ARL, Corr., CO, Leg. 231, C. 2025, 1769, 2.

(26.) This string is from Diligencias criminales fechas por Mariana Vidarte contra su marido, D. Fernando Trelles, vecinos de Xochimilco, AGN-M, Bienes Nacionales, vol. 1090, exp. 15, 1776, f. 3.

(27.) Diligencias practicadas par la división de tierras entre el pueblo de San Pedro Cajonos y San Miguel Cajonos y descontento de los naturales de San Pedro sobre la forma en que se realice la división, Archivo del Poder General del Estado de Oaxaca (APGEO), Intendencia, Leg. 1 exp. 3, 16, 1791, 7v.

(28.) Autos seguidos por Clara Gutiérrez, negra, contra doña Marcelina Gutiérrez de Coz sobre su libertad, AGN-P, Real Audiencia, Civil, Leg. 287, c. 2554, 1790, 6.

(29.) Sobre el divorcio que pide Don Francisco Pila, del matrimonio que contrajo con Doña María García, México, AGN-M BN, vol. 292, exp. 1, 1790.

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