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STANDARDS OF CONDUCT FOR LAWYERS: AN 800-YEAR EVOLUTION

Carol Rice Andrews*

AMERICAN lawyers once again are facing revised standards to govern their conduct. The American Bar Association recently overhauled its Model Rules of Professional Conduct, in a project known as "Ethics 2000."¹ This effort, the fourth major set of model standards promulgated by the ABA,² is a comparatively modest step in the long evolution of standards of conduct for lawyers. The idea of legal ethics³ standards was not original to the ABA. The first set of ABA model standards—the 1908 ABA Canons of Ethics⁴—was largely a verbatim re-statement of the 1887 Alabama State Bar Association Code of Ethics.⁵ The 1887 Alabama Code itself relied upon leading nineteenth century

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1. See generally Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

2. The first set of ABA standards was the 1908 Canon of Ethics. See 33 REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, at 575-84 (1908) [hereinafter ABA REPORTS] (reprinting original 1908 ABA Canons). The second set, which replaced the 1908 Canons, was the ABA's 1969 Model Code of Professional Responsibility. See AMERICAN BAR ASSOCIATION, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS, at 179-269 (2002) [hereinafter ABA COMPENDIUM] (reprinting Model Code, as amended). The third set, which superceded the Model Code, was the ABA's 1983 Model Rules of Professional Conduct. See AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES (1987) [hereinafter LEGISLATIVE HISTORY] (reprinting the Model Rules, as originally adopted in 1983). Finally, in the Ethics 2000 project, the ABA, in February 2002, adopted wide-scale revisions to the Model Rules of Professional Conduct. See ABA COMPENDIUM, at 19-133 (reprinting current set of ABA Model Rules, as amended by the Ethics 2000 project in 2002). I discuss the four ABA models in greater detail *infra* at Part III(B).

3. The term "ethics" has a dual meaning, one that connotes standards of conduct for a profession and another that connotes aspirational or moral ideals. I use the former sense.

4. 33 ABA REPORTS, *supra* note 2, at 575-84.

5. See Carol Rice Andrews et al., GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 45-59 (2003) (reprinting 1887 Alabama Code) [hereinafter GILDED AGE]; see also HENRY S. DRINKER, LEGAL ETHICS (1953) (reprinting 1887 Alabama Code).

authorities, and they in turn built upon earlier works.⁶ This evolution continues back to at least thirteenth century Europe, where lawyers took oaths to abide by a list of ethical precepts.⁷ When viewed in isolation, any one of these historical sets of standards may seem quite different than a set from another era, but when viewed in context of their broader 800-year evolution, the standards are remarkably similar over time. The core concepts—litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service—have remained surprisingly constant. To be sure, modern codes have made significant advances, but the primary changes have come in the degree of detail and the regulatory effect of the standards of conduct, not in the core duties.

In this article, I outline the evolution of modern legal ethics standards, from medieval lawyer oaths to the current rules of professional conduct. My aim is to focus on the substantive standards of conduct and to give a broad overview of their evolution. I extensively cite to the work of other scholars—such as J. H. Baker,⁸ Josiah Benton,⁹ Paul Brand,¹⁰ Edmund B.V. Christian,¹¹ Anton-Hermann Chroust,¹² Geoffrey Hazard,¹³ William Holdsworth,¹⁴ John Leubsdorf,¹⁵ Roscoe Pound,¹⁶ Jonathan Rose,¹⁷ Charles Warren,¹⁸ and Charles Wolfram¹⁹—and isolate the portions of

6. See *infra* Part II (discussing works of David Dudley Field, David Hoffman and George Sharswood).

7. See *infra* Part I (discussing medieval advocates oaths).

8. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (1990) [hereinafter ENGLISH INTRODUCTION]; J.H. BAKER, THE ORDER OF SERJEANTS AT LAW (1984) [hereinafter SERJEANTS]; J.H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS (1986) [hereinafter LEGAL PROFESSION].

9. JOSIAH HENRY BENTON, THE LAWYER'S OFFICIAL OATH AND OFFICE (Rockwell and Churchill Press 1909).

10. PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION (1992).

11. EDMUND B. V. CHRISTIAN, A SHORT HISTORY OF SOLICITORS (1896).

12. ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965).

13. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (2001) [hereinafter HAZARD & HODES]; Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991) [hereinafter *Future of Legal Ethics*]; Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978) [hereinafter *Attorney-Client Privilege*].

14. W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (Little Brown 1927).

15. John Leubsdorf, *On the History of French Legal Ethics*, 8 U. CHI. SCH. L. ROUNDTABLE 341 (2001) [hereinafter *French Legal Ethics*]; John Leubsdorf, *Toward A History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 11 (1984) (collecting colonial fee statutes) [hereinafter *Attorney Fee Recovery*].

16. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953).

17. Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. SCH. L. ROUNDTABLE 137 (2000) [hereinafter *Ambidextrous Lawyer*]; Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998) [hereinafter *Medieval England*]; Jonathan Rose, *Medieval Attitudes Toward the Legal Profession: The Past as Prologue*, 28 STETSON L. REV. 345 (1998) [hereinafter *Medieval Attitudes*].

18. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR (1967).

19. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 954-1007 (1988) [hereinafter MODERN LEGAL ETHICS]; Wolfram, *Toward a History of the Legalization of Legal Ethics—I. Origins*, 8 UNIV. CHI. SCH. L. ROUNDTABLE 469 (2001) [hereinafter Wolfram, *Toward A History I*]; Wolfram, *Toward a History of the Legalization of Legal American Ethics—II.*

their work that report and discuss substantive standards of conduct for lawyers over time.²⁰ By collecting and organizing these materials, I provide a starting point for further detailed study of the substance of professional legal conduct standards. More importantly, I hope to inform modern readers of the long history and continuing core ethical values of lawyers.

In outlining the evolution of standards of conduct for lawyers, I use as a unifying theme six traditional “core duties”—litigation fairness, competence, loyalty, confidentiality, reasonable fees and public service. These six duties were the primary duties of lawyers in medieval England, and they continue as the central duties of modern lawyers. Today, there are fifty-five separate rules in the ABA’s Model Rules of Professional Conduct, but most of these rules, with a few exceptions such as the rules governing advertising, can be fairly characterized as amplifications of the six core duties. Indeed, a principal aim of this article is to explain how these six basic duties evolved into expansive modern codes.

In addition, I focus primarily on official standards of conduct, which are those standards to which a lawyer must conform at threat of punishment, professional or otherwise. Formal standards often have taken the form of positive law—statutes, oaths and bar rules—and modern scholarship, including this study, tends to focus on such positive law because it is relatively easy to access and is more familiar to modern readers. It would be a mistake, however, to assume that the absence of positive law meant a lack of standards.²¹ Conduct standards also are reflected, especially in the early periods, in the “received wisdom” of the law governing lawyers.²² Where possible, I cite sources, such as speeches and academic discussion, that reflect this received wisdom. Indeed, in some periods of the study, such as nineteenth century America, the academic discussions of

The Modern Era, 15 GEO. J. LEGAL ETHICS 205 (2002) [hereinafter Wolfram, *Toward A History I*]; Charles W. Wolfram, *Ethics 2000 and Conflicts of Interest: The More Things Change*, 70 TENN. L. REV. 27 (2002).

20. Although I cite to many original source documents, I cite primarily to secondary sources, the works of historians, often multiple historians for a single citation, in order to facilitate reference by modern non-historian readers. I recognize that some of the historical works, particularly those of Professors Chroust, Pound and Warren, have come under criticism. See Wolfram, *Toward a History I*, *supra* note 19, at 471-72 n.14 (summarizing criticism). Without joining that debate, I note that I rely on other scholars’ works principally for their reprinting of original source materials, such as colonial statutes, rather than their critical analysis.

21. Professor Rose succinctly warns against this false assumption: “the modern writer must be careful in unduly emphasizing positive sources of law such as statutes and cases as the sole or primary source of doctrine and in underemphasizing commonly held beliefs about the legal system and its operation as an important source.” See Rose, *Ambidextrous Lawyer*, *supra* note 17, at 143.

22. The term “received wisdom” has been applied generally to the English common law as well as more particularly to standards of conduct for English lawyers. See Rose, *Ambidextrous Lawyer*, *supra* note 17, 143 (quoting J.H. Baker lecture as to received wisdom of common law); Karen Miller, *Zip to Nil?: A Comparison of American and English Lawyers’ Standards of Professional Conduct*, American Law Institute-American Bar Ass’n, CA 32 ALI-ABA 199, at 213 (1995) (stating that barristers originally “relied on conduct and etiquette handed down by received wisdom”).

legal ethics were the primary source of standards of conduct for lawyers. Finally, although I do not focus on the regulatory effect of standards, I occasionally note it, especially where the aim of achieving regulatory effect directly influenced the substance of the standards, as in the case of the ABA model standards.

In Part I of this article, I outline the history of standards of conduct for lawyers in western Europe—with a focus on England before the nineteenth century. In this era, a principal source of standards was the lawyer's oath, which was in essence a "condensed code of legal ethics."²³ The oaths primarily focused on litigation fairness, but lawyers of the era also had duties of competence, loyalty, confidentiality, reasonable fees and service of the poor. In Part II, I move across the Atlantic ocean and examine the early development of standards of legal ethics in the United States. The original colonies regulated lawyers sporadically, but to the extent that the colonies and new states regulated lawyers' substantive conduct, that regulation primarily concerned litigation practice and fees. Even this modest regulation of substantive standards subsided, and by the early nineteenth century, there were few formal articulations of lawyer conduct standards in the United States.

In Part III, I discuss legal ethics standards in mid-nineteenth century America. I explore how legal academics, reformers and lawyers attempted to fill the void of the colonial and post-revolutionary eras through public discourse and debate on legal ethics. This discourse added considerable substance to the broad outlines of a lawyer's duties from previous eras, but most of the debate was academic. In Part IV, I discuss how substantive detail became part of the official statement of lawyer's standards, in the form of bar association code of ethics. This modern era of bar association codes began in 1887, when the Alabama State Bar Association adopted a code of ethics for its members, and the ABA soon followed with its model standards. The ABA standards evolved over the twentieth century into progressively more detailed "black letter" rules of conduct, and these rules have become binding law in most states.

In Part V, I conclude with an analysis of what this 800-year history tells us. The statement of ethics standards has evolved in subject matter, detail, and degree of enforcement, but the central elements of a lawyer's professional duty have remained substantially unchanged. Lawyers have long had the core duties of fairness in litigation, competence, loyalty, confidentiality, reasonableness in fees, and public service. The continuation of these standards suggests certain inherent characteristics of lawyers and society's reaction to them. The changes in basic subject matter tell us how the practice of law itself has evolved. The addition of detail in the

23. See BENTON, *supra* note 9, at 9 (stating that a lawyer's oath should "indicate the duties and responsibilities of those who take it;" "[i]n short, the lawyer's oath should be a condensed code of legal ethics"). See also Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST., 404, 409 (1967) (describing the old oath as a "rudimentary code of ethics").

statement of the core standards reveals uncertainty and division as to the underlying core duties. The added detail also reflects an increased regulatory environment, but the official statements of standards over time have been both regulatory, in reaction to specific abuses, and aspirational to inspire lawyers in their calling. This suggests that actual lawyer behavior typically falls between the two extremes. Finally, the 800-year tradition of the core standards suggests something far more fundamental: that lawyers always have played an important role in society and that society demands integrity in that role.

I. THE HISTORICAL DEVELOPMENT OF LEGAL ETHICS STANDARDS IN EUROPE

The legal profession has a long history, likely dating back to ancient times,²⁴ and the conduct of early advocates was subject to regulation.²⁵ The use of professional pleaders was disfavored for many centuries in Europe, but they re-emerged in the thirteenth century.²⁶ I begin my historical account with this re-emergence, for almost as soon as advocates began to regularly assist litigants in Europe, standards for their conduct also appeared. Indeed, historians often characterize professional ethics or discipline as an essential element of the formation of the legal “profession.”²⁷ I focus my historical review on development of standards of conduct for lawyers in England before the nineteenth century, for it is that English system that had the most profound impact on development of standards in the United States. I also briefly discuss early French standards, for they too had an impact on the development of American legal ethics standards.

A. STANDARDS OF CONDUCT FOR LAWYERS IN ENGLAND

At most points in English history, the formal articulation of legal ethics standards distinguished between the type of lawyer at issue. The ecclesiastical lawyers had their own standards, separate from those applicable to lawyers practicing in the English lay courts. Even as to non-ecclesiastical lawyers, the standards often were stated as to the pleaders, serjeants, and barristers, on the one hand, or the attorneys and solicitors, on the other. The distinctions in conduct standards must not be overstated. Although many individual standards purported to address the conduct of only a specific type of lawyer, the basic ethical standards, when taken as a

24. Professor Pound reports the early beginnings of lawyers in both ancient Rome and ancient Greece. POUND, *supra* note 16, at 32-58.

25. For example, Roman laws, from the third century, addressed a variety of abuses, such as a pleader receiving fees and not conducting the case or a pleader taking fees from both sides, and shortly before the fall of the empire, Rome set fee scales for lawyers and provided for some sort of professional discipline. *Id.* at 54. See also *infra* notes 53-54 and 352-353 (discussing ancient advocates' oaths).

26. See *infra* notes 31-36 (discussing re-emergence of professional lawyers).

27. BAKER, INTRODUCTION, *supra* note 8, at 178 (“we cannot properly speak of a legal ‘profession’ until such time”).

whole, did not vary substantially between the various categories of English lawyers. Nevertheless, the distinction between the two fundamental types of English lawyers is useful in understanding the history of ethical standards of English lawyers, and I take each in turn. First, however, I give an overview of how each category of lawyer emerged and evolved in the English legal profession.

1. *The Emergence and Evolution of the Professional Lawyer in England*

The role, function, and even the name of the early English lawyer varied according to the nature of his work, including the court in which the lawyer practiced. Today, England divides its legal profession into two branches—the barristers and the solicitors. The barristers, generally seen as the upper branch, present the lay client's case to the court, while solicitors do most other legal work. The English legal system has long made such a rough distinction.²⁸ Before the seventeenth century, the more common distinction was between the pleaders or serjeants (the rough precursors to barrister) and the attorneys (the rough precursors to solicitors).²⁹ In the early ecclesiastical courts of England a similar distinction was made between advocates or doctors of law (the upper branch) and proctors (the lower branch).³⁰

After the fall of the Roman empire, the role of lawyers is obscured in the "dark ages."³¹ Anglo-Norman dispute resolution was a relatively primitive process that did not lend itself to formal assistance from outsiders.³² By the thirteenth century, several forces caused the emergence of a professional class of lawyer.³³ Courts became more formal and concen-

28. See generally Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900)*, 71 *FORDHAM L. REV.* 1357 (2003) (describing "the history of how the English legal profession developed two distinct branches") [hereinafter *Split English Legal Profession*]; HOLDSWORTH, *supra* note 14, at 432-44 (describing the evolving distinctions in the English legal profession).

29. See Rose, *Medieval England*, *supra* note 17, at 26-27 (noting that the attorney managed litigation, as opposed to the serjeant who was a pleader, and that "[t]his separation foreshadowed the later formal bifurcation of the English legal system into barristers and solicitors"); HOLDSWORTH, *supra* note 14, at 432 (stating that "the appointment by a litigant of an attorney, and the obtaining by the litigant of the assistance of a pleader, are two very different things" and that "English law has retained this distinction throughout its history").

30. Rose, *Medieval England*, *supra* note 17, at 29; POUND, *supra* note 16, at 67; BAKER, *INTRODUCTION*, *supra* note 8, at 193-94.

31. See HERMAN COHEN, *A HISTORY OF THE ENGLISH BAR AND Attornatus to 1450*, 1-19 (1929) (reviewing the possible role of lawyers in the Anglo-Saxon period and noting the "darkness" of the age and need for "guesswork").

32. POUND, *supra* note 16, at 61-62 (noting that "Germanic law brought back into Western Europe the ideas of primitive law as to representation in litigation" under which parties conducted their own cases). See generally FREDERICK POLLOCK & FREDERIC MAITLAND, *HISTORY OF ENGLISH LAW*, 598-610 (2d ed, Cambridge Press 1959) (describing the ancient modes of proof through ordeal, battle, and wager at law).

33. Although outsiders assisted litigants in the twelfth century and perhaps before, most historians cite the thirteenth century as the origin of the English legal profession. See BAKER, *INTRODUCTION*, *supra* note 8, at 177-179; BRAND, *supra* note 10, Ch. 1 ("Anglo-

trated in London, pleadings became more complex, and arguments became common.³⁴ As a result, litigants increasingly sought outside assistance, first by friends and then by professional lawyers,³⁵ so that by the early thirteenth century, professional lawyers were widely recognized and routinely permitted in court.³⁶

The early lawyers served two different functions and were known by two different names—attorney versus pleader. The attorney helped the litigant with the problem of appearing regularly in distant courts. The early English attorney stood in the place of the litigant so that the litigant himself need not attend.³⁷ Attorneys were literally the agent of the client and could bind the client.³⁸ By contrast, the pleader assisted with the other problem facing litigants of the day—increased complexity of the law and pleadings. The pleader, also known as a countor, stood beside the litigant (or his attorney) and advocated the substantive case of the client.³⁹ Unlike the attorney, the pleader could not bind the client.⁴⁰

The pleaders tended to be better educated than attorneys and were the “aristocrats” of the early profession. An elite class of pleaders became known as “serjeants,” and in early times, serjeants often (but not exclusively) represented the King.⁴¹ The serjeants formed the order of the coif and were the “cream of the profession.”⁴² Some serjeants were trained at the universities, but this education focused on Roman Civil and Canon

Norman England: A Land Without Lawyers”); Susan Reynolds, *The Emergence of Professional Law in the Long Twelfth Century*, 21 *LAW & HIST. REV.* 347, 350 (2003).

34. See generally BRAND, *supra* note 10, Ch. 2-3 (both chapters entitled “Creation of a Demand for Lawyers”).

35. See W.W. Boulton, *The Legal Profession in England: Its Organization, History and Problems*, 43 *A.B.A. J.* 507 (1957) [hereinafter *Legal Profession*] (noting that in “Norman times (eleventh-thirteenth centuries) it was quite common for a party to have assistance in the conduct of his case, but this was given by a friend, not by a professional expert”).

36. POLLOCK & MAITLAND, *supra* note 32, at 211 (noting that “[b]efore the end of the thirteenth century there already exists a legal profession, a class of men who take money by representing litigants before the courts and giving legal advice”); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 322 (1980) (reporting that “[l]itigants in the twelfth and thirteenth centuries had a great deal of help” and that “[p]leading was complex even then, and a strong legal profession was already in existence to help litigants through that stage of the proceedings”).

37. English courts at first demanded that litigants appear in person, but in 1235, the Statute of Merton first permitted parties in specified suits to appear by attorney, and subsequent statutes slowly extended the right. CHRISTIAN, *supra* note 11, at 6-7.

38. BRAND, *supra* note 10, at 43-46. POLLOCK & MAITLAND, *supra* note 32, at 212-13 (defining the attorney as having been “appointed, attorned (that is, turned to the business at hand), and for good and ill, for gain and loss . . . he stands in his principal’s stead”).

39. See C.W. Brooks, *The Common Lawyers in England: 1558-1642*, 44, reprinted in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* (Wilfrid Prest ed. 1981) (describing the distinction in the Elizabethan age as being “between the attorneys who handled the procedural aspects of a suit and the counsellors and serjeants-at-law who were students of substantive law”).

40. Rose, *Medieval England*, *supra* note 17, at 21.

41. Boulton, *Legal Profession*, *supra* note 35, at 508 (noting that the serjeants “were primarily the King’s own advocates and legal advisers, though they were free to take cases other than on behalf of the Crown”). See generally BRAND, *supra* note 10, at 46-65 (describing the emergence of serjeants).

42. BAKER, *LEGAL PROFESSION*, *supra* note 8, at 78; see also Rose, *Medieval England*, *supra* note 17, at 19 (describing serjeants as the “aristocrats of medieval lawyers”).

law, not the common law.⁴³ Serjeants trained themselves as to common law and pleading, and serjeants-in-training at the Inns of Court were called apprentices.⁴⁴ Because there was a limited number of serjeants, not all apprentices could become serjeants, and by the fourteenth century, senior apprentices had begun their own form of practice.⁴⁵ By the seventeenth century, apprentices became known as barristers.⁴⁶ Meanwhile, the role and prominence of serjeants faded, and their order disappeared by Victorian times.⁴⁷

The attorney function did not remain static either. Solicitors began to appear in the fifteenth century, and their name was descriptive of their function of "soliciting" or helping clients through the "jurisdictional jungle."⁴⁸ By the seventeenth century, solicitors had become a separate form of lawyer who were agents who assisted clients in chancery courts, as the attorneys assisted in the law courts.⁴⁹ In the late nineteenth century, attorneys and proctors (from the ecclesiastical courts) merged into what is now known as the solicitor branch of the legal profession.⁵⁰ Thus, the rough equivalent of the early pleader or serjeant is the modern barrister, and the early attorney has become the modern solicitor.

2. *The Ethics Oaths in the Ecclesiastical Courts of England*

The ecclesiastical courts of England and other parts of western Europe⁵¹ apparently were the first medieval courts to formally set standards of conduct for legal advocates. They did so through oaths. Oaths are an ancient tradition.⁵² They are a form of regulation, in that the oath-taker

43. BAKER, INTRODUCTION, *supra* note 8, at 194-195 (noting that most law graduates from the universities became parsons or advocates in the ecclesiastical courts).

44. *Id.* at 182-85 (discussing role of inns in education and training of serjeants and apprentices); Rose, *Medieval England*, *supra* note 17, at 22-23 (discussing apprentices).

45. Rose, *Medieval England*, *supra* note 17, at 23-24; BAKER, INTRODUCTION, *supra* note 8, at 182.

46. Rose, *Medieval England*, *supra* note 17, at 23-24; *see also* POUND, *supra* note 16, at 84 (noting origins of apprentices); *id.* at 101 (noting that the term "barrister" replaced the term "apprentice" by the seventeenth century).

47. "No more serjeants were appointed after 1877 and the last of their order died in 1921." Boulton, *Legal Profession*, *supra* note 35, at 508. *See generally* BAKER, SERJEANTS, *supra* note 8, ch. 7 ("Decline of the Order"), ch. 8 ("The End").

48. BAKER, INTRODUCTION, *supra* note 8, at 186 (noting that originally solicitors were often both attorneys and barristers).

49. POUND, *supra* note 16, at 107.

50. The 1873 Judicature Act merged the functions of solicitors, attorneys and proctors under the single classification of solicitor, but in practice, they had merged earlier, for many lawyers had been sworn both as an attorney and solicitor. MICHAEL ZANDER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 553-54 (7th Ed. 1996); HOLDSWORTH, *supra* note 14, at 51.

51. The ecclesiastical courts transcended the jurisdiction of England; they were transnational and under the Pope's ultimate authority. *See* BAKER, INTRODUCTION, *supra* note 8, at 147 (Chapter 8: "The Ecclesiastical Courts").

52. *See generally* JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE AND HISTORY (1834). The content of the ancient oaths varied in detail and by subject and function. For example, the "Hippocratic oath," dating from the fifth century (B.C.) Greece, has stated the basic ethical principles of the medical profession for more than 2000 years. *See* CHARLES J. MCFADDEN, MEDICAL ETHICS 461-62 (6th ed. 1968) (reprinting Hippocratic

by swearing to God typically invites both punishment by lay authorities and retribution by the higher authority if the oath is violated. Ancient Rome required an advocate to take an oath that reportedly included obligations “to avoid artifice and circumlocution,”⁵³ to “only speak that which he believed to be true,” and to not use “injurious language or malicious declamations against his adversary” or “any trick to prolong the cause.”⁵⁴ When professional lawyers began to reappear in the early thirteenth century, the ecclesiastical courts revived the ancient practice of the advocate’s oath.⁵⁵

I discuss the oaths in the ecclesiastical courts of France, in Part I(B) below. In England, the ecclesiastical courts started by setting an oath for advocates, as opposed to proctors. In 1237, the council in St Paul’s, London, decreed an oath for ecclesiastical advocates that addressed their litigation conduct.⁵⁶ The St. Paul’s oath required an advocate to swear that he “will plead faithfully, not to delay justice or to deprive the other party of it, but to defend his client both according to law and reason.”⁵⁷ The decree also warned that advocates who “suborn witnesses, or instruct the parties to give false evidence, or to suppress the truth” would be suspended from office and subjected to additional punishment for repeated violations.⁵⁸

The St. Paul’s advocate oath was modified and supplemented throughout the thirteenth century.⁵⁹ In 1273, Archbishop Kilwardy introduced a detailed oath for advocates in the Court of Arches in London.⁶⁰ This oath retained litigation fairness as its central theme by requiring advocates to reject unjust causes, to not seek unjust delays, and to not knowingly infringe on ecclesiastical liberties.⁶¹ It also added duties owed to the client by requiring advocates to swear that they would diligently and faithfully serve their clients, not charge excessive fees, and not take a stake in the litigation.⁶² In 1274, the Second Council of Lyons commanded that all lawyers in the ecclesiastical courts of Europe be subject

oath). Oaths commonly were used by ancient litigants and others who needed to swear to the veracity of their evidence or statements. See Tyler, at 7 (“Through all the diversified stages of society, from the lowest barbarism to the highest cultivation of civilised life . . . recourse has been had to Oaths as affording the nearest approximation to certainty of evidence, and the surest pledge of the performance of a promise.”).

53. BENTON, *supra* note 9, at 19.

54. Joseph Cox, *Legal Ethics*, 19 THE WEEKLY LAW BULLETIN AND OHIO L.J. 47, 49 (1888) (reporting ancient Roman oath); see also *id.* (quoting ancient Greek oath as to “represent the bare truth, without any ornament or figure of rhetoric, or insinuating means to win the favor or more the affection of the judges”).

55. See BRAND, *supra* note 10, at 146 (noting that while “admission oaths had been required of advocates in late antiquity,” they “were not revived in Western Europe until the thirteenth century” and the revival came first in the ecclesiastical courts) (citing unpublished papers of James A. Brundage).

56. See BENTON, *supra* note 9, at 14-15 (reprinting 1237 St. Paul’s Council decree).

57. *Id.*

58. *Id.*

59. BRAND, *supra* note 10, at 147.

60. *Id.*

61. *Id.*

62. *Id.*

to oaths.⁶³ In England, this meant that the oath used in the Church of Arches extended to proctors as well as advocates.⁶⁴

Professor Brand reports that in 1295, the archbishop for the Court of Arches in London "laid down a detailed code of professional conduct for lawyers practicing in that court."⁶⁵ The code addressed serious litigation abuses, such as suppression or alteration of evidence and subornation of witnesses, as well as deportment concerns, such as talking too much or lack of courtesy.⁶⁶ The 1295 regulations also provided for appointment of counsel for indigent litigants.⁶⁷ In 1312, regulations in Durham imposed a professional duty of ecclesiastical lawyers to represent the poor at no cost⁶⁸ and required reasonable fees in other cases.⁶⁹ Some ecclesiastical courts of this era set maximum fee schedules.⁷⁰

Ecclesiastical courts continued in England for centuries, even after the Church of England separated from the church in Rome. Their jurisdiction and influence eventually declined, and Parliament abolished the last areas of ecclesiastical jurisdiction—defamation and marriage—in the mid-nineteenth century.⁷¹ I do not attempt to recount the standards of conduct of the English ecclesiastical lawyers in these later periods. The primary significance of the ecclesiastical courts, for purposes of this study, is that they were early leaders in setting ethical standards of conduct for lawyers. By the fourteenth century, the lawyers in the ecclesiastical courts of England had a broad range of professional standards, including litigation fairness and candor, diligence, reasonable fees and service to the poor.

3. *Standards for Pleaders, Serjeants and Barristers*

Parliament was not far behind the ecclesiastical courts in setting ethical standards for lawyers in the King's courts. The first Statute of Westminster in 1275, commonly described as the first formal regulation of English lawyers, set forth a variety of legal reforms.⁷² A few sections dealt with

63. *Id.* at 152-53.

64. *Id.* at 153.

65. *Id.*

66. *Id.*

67. *Id.* at 154.

68. *Id.* Professor Brundage cites evidence of a duty of ecclesiastical advocates to serve the poor as early as the twelfth century. See James A. Brundage, *Legal Aid for the Poor and the Professionalization of Law in The Middle Ages*, 9 J. LEGAL HIST. 169 (1988).

69. BRAND, *supra* note 10, at 154.

70. Regulations issued in 1311 by the ecclesiastical court in York set a maximum fee of 50 shillings for advocates and 10 shillings for proctors. *Id.* at 153.

71. BAKER, INTRODUCTION, *supra* note 8, at 151-52.

72. See BRAND, *supra* note 10, at 120 ("The first legislation specifically concerned with the behaviour of members of the nascent English legal profession was . . . the Statute of Westminster I of 1275."). The statute was one of several reforms during the reign of Edward I (1272-1307), and the statute dealt with a number of legal issues in addition to lawyer conduct. Rose, *Medieval England*, *supra* note 17, at 34-35, 49-50.

specific issues, such as champerty or maintenance⁷³ and court delays,⁷⁴ but Chapter 29, entitled “Deceits by Pleadings,” more broadly regulated the conduct of lawyers.⁷⁵ Chapter 29 was in response to reported abuses by lawyers, and it provided for imprisonment of “any Serjeant-Countor or other” who was guilty of “any manner of deceit or collusion” in the King’s courts.⁷⁶ Despite the seemingly narrow “deceit” language, Chapter 29 in practice set a wide range of conduct standards for serjeants.

Professors Brand and Rose report that English courts broadly applied Chapter 29.⁷⁷ As the term “deceit” suggests, candor to the court was a fundamental duty under the statute.⁷⁸ Chapter 29 also encompassed duties to the client. Professor Rose reports that a significant body of lawyer misconduct cases in this era involved disloyalty or “ambidexterity.”⁷⁹ Significantly, the disloyalty cases also reflected a duty of confidentiality.⁸⁰ According to Professor Rose, breach of confidentiality constituted disloyalty in cases decided under both Chapter 29 of the 1275 statute and the court’s inherent power.⁸¹ Indeed, a fourteenth century form of writ for deceit was premised on improper disclosure of confidential client information by a lawyer.⁸²

73. Rose, *Medieval England*, *supra* note 17, at 53; *see also infra* notes 94-97 (discussing champerty laws).

74. Chapter 40 barred “false and wrongful vouching, which prolonged lawsuits.” Rose, *Medieval England*, *supra* note 17, at 83.

75. Chapter 29 provided:

It is Provided also, That if any Serjeant-Countor or other, do any manner of Deceit or Collusion in the King’s Court, or consent to do it in deceit of the Court, for to beguile the Court, or the Party, and thereof be attainted, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead in the Court for any Man; and if he be no Pleader, he shall be imprisoned in like manner by the Space of a Year and a Day at least; and if the Trespass require greater Punishment, it shall be at the King’s Pleasure.

Rose, *Medieval England*, *supra* note 17, at 57-62.

76. *Id.* *See also* EDWARD COKE, SECOND INSTITUTE OF THE LAWS OF ENGLAND 212-13 (1809) (reporting that before the 1275 statute lawyers filed suits that were “cunningly contrived . . . in deceit of the King’s courts”); *see generally* Rose, *Medieval Attitudes*, *supra* note 17.

77. BRAND, *supra* note 10, at 135; *see generally* Rose, *Medieval England*, *supra* note 18, App. III (collecting and classifying cases decided under Chapter 29).

78. BRAND, *supra* note 10, at 127 (reporting that courts developed “detailed norms” of conduct for serjeants under Chapter 29, which, among other things, “prohibited serjeants from knowingly misleading the court, persisting with lines of argument which the court had told them were unacceptable or wasting the time of the court”). *See also* Rose, *Medieval England*, *supra* note 17, App. III (reporting cases involving false pleading and other misconduct before the court).

79. *See generally* Rose, *Ambidextrous Lawyer*, *supra* note 17.

80. For example, Professor Brand details a 1282 case in which a serjeant named William of Wells allegedly breached his duties of loyalty and confidentiality, in violation of the 1275 statute. The former clients charged that William had not only switched sides without their permission but also had revealed their “consilium” (likely strategy) to their opponent. BRAND, *supra* note 10, at 123-24.

81. Most of the disloyalty cases involved lawyers switching sides, but in some the lawyer did not switch sides but instead improperly revealed client information. Rose, *Ambidextrous Lawyer*, *supra* note 17, at 195.

82. *Id.* at 194-95.

While courts were broadly interpreting Chapter 29 to include specific duties, a 1280 London ordinance expressly set its own detailed ethical standards.⁸³ The London ordinance addressed seemingly all categories of lawyers who practiced in the courts of London, including serjeants, pleaders, countors, attorneys and “essoiners,”⁸⁴ but most of its substantive standards of conduct addressed countors (serjeants). Complaining of “ignorant” and “foolish” pleaders who created a “great scandal,” the first portion of the ordinance established a new procedure by which the Mayor and “substantial men” would regulate admission of lawyers.⁸⁵ This section of the ordinance also required that each category of lawyer—the countor (serjeant), attorney and essoiner—maintain “his own estate” and not intrude on the other’s work.⁸⁶

More importantly, the second section of the 1280 London ordinance set ethical “duties” of countors (serjeants).⁸⁷ Although some of the ordinance’s references are obscure to modern readers, the ethical standards are strikingly familiar. The ordinance stated a lawyer’s duty of respect for the court and other litigants (“make proffers at the bar without baseness and without reproach and foul words and without slandering any man”), duty of competence (“well and lawfully he shall exercise his profession”), the duty to avoid conflicts of interests (shall not “take pay from both parties in any action”), and the duty to not engage in champerty (shall not “undertake a suit to be a partner in such suit”).⁸⁸ The final section provided that all persons who violated the act were subject to a variety of penalties, ranging from short suspensions to permanent disbarment and

83. See Rose, *Medieval England*, *supra* note 17, App. IV, at 131-32 (reprinting ordinance).

84. An essoiner was “a type of attorney whose function was to appear in court and make excuses (“cast an essoin”) for the nonappearance of a party” and their use was popular during the thirteenth and fourteenth centuries due to a number of “strategic advantages.” *Id.* at 27-28.

85. *Id.*, App. IV, at 131.

86. *Id.*

87. The 1280 London ordinance stated the “duty of a countor is a follows:”

–standing, to plead and to count courts and to make proffers at the bar without baseness and without reproach and foul words and without slandering any man, so long as the Court lasts. Nor shall serjeants or attorneys go further in front beyond the bar or the seat where their sitting is, nor shall anyone be assessor or sit near the bailiff for delivering pleas or judgments, unless it so be that the principal bailiff who is holding the Court shall call him unto him [to consult], and in such case he shall make oath that he will support neither side. Nor shall any countor or any other man counterplead or gainsay the records or the judgments, but if it appear to them that there is some error therein, according to the law and usage of the city, let them make complaint or representation unto the Mayor, who shall redress the error, if there be one, in the matter.

No countor is to undertake a suit to be partner in such suit, or to take pay from both parties in any action but well and lawfully he shall exercise his profession. No countor or other is to gainsay the judgments of the Hustings or to go about procuring how to defeat the acts and the awards of the community. And that this they will do the countors shall make oath.

Id. at 131-32.

88. *Id.*

imprisonment.⁸⁹

The 1280 ordinance required serjeants to take an oath that they would abide by the duties of the ordinance.⁹⁰ In addition, serjeants seemingly took a more general oath of office. For example, in discussing the 1275 statute, Sir Coke reported that serjeants took the following oath:

That he shall well and truly serve the king's people as one of the serjeants of the law. That he shall truly counsel them, that he shall be retained with after his cunning. That he shall not defer, tract, or delay their causes willingly, for covetousness of money, or other thing that they may tend to his profit. That he shall give due attendance accordingly.⁹¹

The precise origin of this oath is unknown, but a form similar to this was used by at least the late fifteenth century⁹² and a similar oath continued until the Victorian era, when the order of serjeants itself ended.⁹³

Chapter 29 of the 1275 statute and the 1280 London ordinance were the primary statutes that broadly addressed the conduct of serjeants, but other statutes touched on serjeant's behavior. Parliament, for example, repeatedly enacted laws against champerty and maintenance.⁹⁴ The relevance of such laws to the professional standards of serjeants is open to question. Professor Rose claims that the champerty laws were aimed at abuses by lawyers.⁹⁵ Professor Radin argues that the prohibitions against champerty and maintenance initially grew out of a rejection of feudal dominance and a distaste for any form of speculation and that they were not targeted, and in some cases not applicable, to medieval lawyers.⁹⁶ He argues that lawyers were distrusted by medieval society for other reasons—their indifference to justice and large fees—"not the readiness of lawyers to speculate on whether they will get a fee or not."⁹⁷

A few court rules also directly addressed the conduct of serjeants. For example, in the late fifteenth century, the English chancery courts re-

89. *Id.* at 132. Despite this authorization of penalties, the 1280 London ordinance did not spawn an expansive body of cases as the 1275 statute had done. See BRAND, *supra* note 10, at (noting only three cases); Rose, *Medieval England*, *supra* note 17, at 71.

90. Rose, *Medieval England*, *supra* note 17.

91. COKE, *supra* note 76, at 213.

92. Benton reports that an "ancient Roll of Oaths," dating back to at least the reign of Queen Elizabeth I (1558-1603), contained the "earliest authentic forms of the lawyer's oaths," including a serjeant's oath similar to that quoted by Sir Coke, *supra* note 91. BENTON, *supra* note 9, at 25. See also BAKER, SERJEANTS, *supra* note 8, at 88 (reporting that the wording of the serjeant's oath varied but was "settled" by the late fifteenth century, to a form similar to that recited by Sir Coke).

93. BAKER, SERJEANTS, *supra* note 8, at 88 (discussing the oath and noting exceptions made during "Victorian times").

94. See generally Rose, *Medieval England*, *supra* note 17, at 80-82, 86-87; Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935). The 1275 statute had a champerty provision, see *supra* note 73, and the 1280 ordinance did also. See *supra* note 87.

95. Rose, *Medieval England*, *supra* note 17, at 81-82.

96. Rabin, *supra* note 94, at 60.

97. *Id.* at 66. Professor Radin claims that only in more modern times (the nineteenth century) were champerty and maintenance statutes used to attack the perceived evil, often perpetrated by lawyers, of stirring up litigation, thereby justifying a ban on contingent fees. *Id.* at 70.

quired counsel to sign each bill and attest to its form.⁹⁸ The application and effect of this attestation are subject to some uncertainty. "Counsel" in this era is ill-defined, but it likely referred to the upper branch of the profession, such as the serjeants, who performed the pleading function,⁹⁹ and in any event, it clearly applied to lawyers, as opposed to the litigants themselves.¹⁰⁰ Justice Story reported that the attestation meant that the lawyer had good ground to support the bill, thus reinforcing the counsel's oath not to present false claims or defenses.¹⁰¹

Other, more informal sources also outlined the ethical standards of serjeants. A particularly expansive listing of a serjeant's duties was in the *Mirror Des Justice*, or *Mirror of Justices*, which is believed to have been written about 1285.¹⁰² Although scholars differ in their characterization of this work, some calling it a treatise and others calling it a critique or parody of lawyers, the *Mirror* lists duties of a pleader that correlates well with other contemporaneous materials, such as the 1275 statute and 1280 London ordinance.¹⁰³

The *Mirror* explained four essentials of the business of a pleader or serjeant. The first dealt with qualifications for practice.¹⁰⁴ The second

98. See JOSEPH STORY, EQUITY PLEADINGS ch. II § 47 (1838) (tracing the origin of the practice rule to "at least as early as the time of Sir Thomas More. [1478-1535]").

99. BAKER, LEGAL PROFESSION, *supra* note 8, 100-01 (noting that the name "counselor" "eventually became synonymous with barrister . . . while some counselling came in fact to be done by attorneys and solicitors); see also *id.* at 114 (noting that solicitors did not assume active roles in chancery litigation until the seventeenth century).

100. Most court rules, however, did not focus directly on the attorney and instead aimed their regulation and penalties at the parties. See Carol Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO STATE L.J. 665, 692-98 (2000) (discussing early English litigation penalties, including fines, payment of costs and striking of pleadings).

101. Justice Story explained that the "great object of this rule" was "to secure regularity, relevancy, and decency" and "the responsibility and guaranty of counsel, that upon the instructions given to him, and the case laid before him, there is good ground for the suit . . ." STORY, *supra* note 98, ch. II § 47. Some scholars claim that the signature requirement was merely as to form and was just a boon for lawyers by requiring their retention. See D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 6 MINN. L. REV. 1, 9-13 (1977) (arguing that "the requirement of counsel's signature was originally a boon rather than a burden to counsel, for it ensured that there were consulted before a Bill was filed").

102. THE MIRROR OF JUSTICES (Selden Society 1893). The author and date are unknown, but scholars believe it was written in the late thirteenth century. See CHRISTIAN, *supra* note 11, at 11 (dating the *Mirror* to 1285-1290).

103. The introduction to the 1893 Selden Society version, MIRROR, *supra* note 102, discusses these issues in detail. See also Rose, *Medieval England*, *supra* note 17, at 39 (describing the *Mirror* as a "public manifestation" of popular anti-lawyer sentiments, including "ridicule and satire"). Christian, in his history of solicitors, reports that critics of his day (1896) declared the *Mirror* "to be both unauthoritative and unreliable," but he questions why anyone would fabricate some of the basic points in the *Mirror* dealing with lawyers. CHRISTIAN, *supra* note 11, at 11. Sir Coke cites and quotes from the *Mirror* in his history of English Law. E.g., COKE, *supra* note 76, at 213 (quoting the *Mirror*).

104. MIRROR, *supra* note 102, at 46 ("a person receivable in court, . . . no heretic, nor excommunicate, nor criminal, nor man of religion, nor woman, nor ordained clerk above the order of subdeacon, nor beneficed clerk with the cure of souls, nor infant under twenty-one years of age, nor judge in the same cause, nor open leper, nor man attained of falsification against the laws of his office").

was the oath by which a serjeant swore that he “will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing.”¹⁰⁵ The third point expanded on the serjeant’s duties of fairness and candor in litigation as well as his duties of competence and loyalty:

... that he will never have recourse to false delays or false witnesses, and never allege, proffer, or consent to any corruption, deceit, lie, or falsified law, but loyally will maintain the right of his client, so that he may not fail through his folly, or negligence, nor by default of him, nor by default of any argument that he could urge; and that he will not by blow contumely, browl, threat, noise, or villain conduct disturb any judge, party, serjeant, or other in court, nor impede the hearing or the course of justice.¹⁰⁶

Finally, the fourth point detailed the duty of the serjeant to set reasonable fees, including the factors that he should consider in setting his fees: “the amount of the matter in dispute, the labour of the serjeant, his value as a pleader in respect of this (learning), eloquence, and repute, and lastly the usage of the Court.”¹⁰⁷

Similarly, the broader ethical standards of serjeants were reflected in speeches given to and by serjeants.¹⁰⁸ Indeed, such academic discourse likely was the most common method by which serjeants passed on the “received wisdom” of proper conduct. This is an area in need of further research, but Professor Baker has collected original speeches given to serjeants from the early fifteenth century to the late seventeenth century.¹⁰⁹ These speeches, among other things, implored serjeants to abide by ethical obligations such as truth in litigation,¹¹⁰ exploring settlement alternatives before filing suit,¹¹¹ and serving the poor.¹¹²

105. *Id.* at 48.

106. *Id.*

107. *Id.* at 48.

108. According to Benton, “[w]hen the degree of a serjeant-at-law was conferred, it was the custom for the Lord Commissioner appointed by the King to confer it, to address the candidates upon the character of their office and its duties.” BENTON, *supra* note 9, at 35.

109. BAKER, SERJEANTS, *supra* note 8, at 253-429.

110. A speech of the Chief Justice of the Common Pleas during the reign of Henry VIII (1509-1547) stated “ye shall never dole the utterance of your knowledge withe other consideration than of verite and justice.” *Id.* at 292. A 1623 speech urged serjeants to “be ware that for noe man nor for any cause whatsoever you plead any untruth.” *Id.* at 352.

111. A 1623 speech urged serjeants to exhaust all opportunities for settlement before filing suit: “direct no suits, but first advise your clyents to attempt all the meanes possible to procure his right, and to seeke it by mediation and treatate. Lett suite be the last remedie, and enforced therto by necessity.” *Id.* at 352.

112. BAKER, LEGAL PROFESSION, *supra* note 8, at 106 n.47 (reporting that a serjeant’s speech in the sixteenth century recognized the ethical duty to represent poor persons for free). The duty likely dates back to the thirteenth century. Professor Brundage argues that recognition of the duty to serve the poor was a key step in the move of English lawyers from being mere practitioners to professionals. He claims that the ecclesiastical duty to serve the poor extended to civil advocates—apparently both serjeants and attorneys—after 1250. Brundage, *supra* note 68, at 175. See also HOLDSWORTH, *supra* note 14, at 491 (noting serjeant’s duty in thirteenth century); and see Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 97 (2002) [hereinafter *Lawyers’ Pro Bono Responsibilities*] (ar-

A comprehensive statement of a serjeant's duties was given in 1648 by Lord Commissioner Whitlocke, when conferring the degree upon new serjeants.¹¹³ Lord Whitlocke's list was quite expansive. Lord Whitlocke started with three "general" duties of a serjeant—secrecy, diligence and fidelity.¹¹⁴ He discussed "particular" litigation duties to respect the courts,¹¹⁵ be truthful with the courts,¹¹⁶ preserve client confidentiality,¹¹⁷ act with competence and diligence,¹¹⁸ and maintain loyalty to the client.¹¹⁹ Lord Whitlocke also noted a serjeant's duties to communicate fully and candidly with clients¹²⁰ and to maintain professional integrity.¹²¹ These and other duties extended to matters other than litigation. In discussing diligence, for example, Lord Whitlocke noted that "much is required" "in perusing deeds, in drawing conveyance and pleas."¹²² Finally, Lord Whitlocke reiterated that a serjeant had the duty to serve the poor.¹²³

guing that the serjeant's oath language regarding "covetous of money" and "profit," *supra* note 91, includes a duty of service to the poor).

113. In his *Memorials of the English Affairs of the King Charles the First (1625-1649)*, Lord Whitlocke reprints a speech that he gave when the new serjeants appeared at the chancery bar in 1648. WHITELOCKE'S MEMORIALS, 352 (1732).

114. *Id.*

115. *Id.* ("To the courts of justice he owes reverence, they being the high tribunals of law;" "great respect and reverence is due to them from all persons, and more from advocates than from any other.")

116. *Id.* at 355 ("An advocate owes to the court a just and true information. The zeal of his client's cause, as it must not transport him to irreverence, so it must not mislead him to untruths in his information of the court.")

117. *Id.* ("For secrecy: advocates are a king of confessors, and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, sub sigillo, and he ought not to discover them to his client's prejudice; nor will the law compel him to it.")

118. *Id.* ("For diligence: much is required in an advocate in receiving instructions, not only by breviate, but by looking into the books themselves, in perusing deeds, in drawing conveyances and pleas, in studying the points in law, and in giving a constant and careful attendance and endeavour in his clients' causes."); *id.* ("Remember that in your oath for one verb [you shall serve] you have two adverbs [well and truly].")

119. *Id.* ("For fidelity: it is accounted vinculum societatis. The name of unfaithfulness is hateful in all; and more in advocates than others, whom the client trusts with his livelihood, without which his life is irksome; and the unfaithfulness or fraud of the one is the ruin of the other.")

120. *Id.* ("Some clients are of mean capacity; you must take more to instruct yourself to understand their business. Some are of quick capacity and confidence, yet you must not trust to their information. Some are peaceable, detain them not, but send them home the sooner. Some are contentious, advise them to reconciliation with their adversary.")

121. *Id.* ("Amongst your clients and all others, endeavour to gain and preserve that estimation and respect which is due to your degree, and to a just, honest, and discreet person. Among your neighbours in the country, never foment but pacify contentions.")

122. See *supra* note 118; see also CHRISTIAN, *supra* note 11, at 90-91 (noting that in the seventeenth century, "[c]onveyancing and the giving of advice were still in the hands of counsel—the serjeants and the apprentices" and that attorneys handled litigation only).

123. WHITELOCKE, *supra* note 113, at 355 ("For your duty to particular clients you may consider, that some are rich, yet with such there must be endeavour to lengthen causes, to continue fees. Some are poor, yet their business must not be neglected if their cause be honest; they are not the worst clients, though they fill not your purses, they will fill the ears of God with prayers for you, and he who is the defender of the poor will repay your charity.")

Thus, starting in the late thirteenth century and continuing until at least the seventeenth century, serjeants had a number of sources of standards that governed their conduct. Serjeants were subject to only a few formalized laws—the 1275 First Statute of Westminster and the 1280 London Ordinance—but the cases interpreting those laws, the serjeant's oath, and academic discourses and speeches all gave further meaning to the serjeant's duties. All in all, the list of serjeant's duties was remarkably comprehensive. The most obvious and oft-stated duties were the litigation duties of candor, fairness, and respect for the court. Almost as prevalent were the client-directed duties of competency and loyalty. Confidentiality, reasonableness in fees and service to the poor were not as frequently or as prominently stated, but they were part of a serjeant's core duties from early times.

The record of early standards for apprentices and barristers is less clear. By the seventeenth century, when Lord Whitlocke spoke to the serjeants, apprentices had long trained in the Inns of Court and were becoming known as barristers. They undoubtedly received ethical instruction as part of this training, and the received wisdom of etiquette and ethics almost certainly came, at least originally, from the serjeants.¹²⁴ The more difficult question is the development of standards, if any, separate from the serjeant's understanding of proper conduct.

Most historians describe barristers, from their early days, as being left alone by Parliament, and instead governed and disciplined by courts and the Inns of Court.¹²⁵ Although courts occasionally recognized and applied duties, such as confidentiality and loyalty, to barristers, the courts seemingly were not actively developing standards.¹²⁶ The bar itself was a better source, not necessarily through discipline¹²⁷ but through educational discourse in which barristers passed on ethical traditions and developed new ones. Barristers unquestionably developed new standards

124. ANTHONY THORNTON, *Responsibility and Ethics of the English Bar*, at 55, reprinted in LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (Cranston ed. 1995) [hereinafter Cranston, LEGAL ETHICS] (noting that until 1980, "the Bar had no code of conduct" and that professional Standards of Conduct were instead "passed on by word of mouth, mainly during pupillage, and were based on tradition [as well as more modern edicts]"); see also Miller, *supra* note 22 (noting barristers' early reliance on "received wisdom")

125. POUND, *supra* note 16, at 99-100 (reporting that barristers were under the discipline of the Inns in the seventeenth century and that "Parliament made no attempt to supersede or supplement the control by the Inns of Court."); ABEL, *infra* note 129, at 37 (noting that Inns controlled discipline in the bar from the sixteenth century); HOLDSWORTH, *supra* note 14, at 14 (noting that it was "through the Inns that King's counsel, barristers and students were disciplined").

126. Ross Cranston, *Legal Ethics and Professional Responsibility*, at 2-3, 7-30, reprinted in Cranston, LEGAL ETHICS (noting role of courts in setting "the specific standards of good professional conduct" and discussing selected cases addressing barrister's duty of confidentiality and loyalty).

127. The reported cases of discipline by the Inns tend to relate to misconduct in the Inns themselves, more of the nature of school boy infractions than professional misconduct. See WILFRED R. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS: 1590-1640 Ch. V. ("Discipline and Disorder") (describing the often violent misbehavior in the Inns); HOLDSWORTH, *supra* note 14, at 27 (surveying Inn disciplinary cases, including that of a dog brought into the hall).

unique to the bar; these standards tended to address the unique role and superior station of barristers.¹²⁸ For example, the bias against advertising purportedly started as an etiquette concern handed down in the Inns by barristers who perceived themselves as above the mere trade work of attorneys and solicitors.¹²⁹ Likewise, barristers developed standards demanding that they separate themselves from the lay client and not sue lay clients to collect fees.¹³⁰ These and other practices were not recorded as formalized standards until the late nineteenth century.¹³¹ Today, the barrister's formal code of conduct addresses many of the special concerns of barristers, but it also continues to reflect the core traditions of serjeants.¹³²

128. Professor Maute concludes that the "[Bar] Council's most delicate work was handling the etiquette of relations between the branches, and within its own ranks, between junior barristers and silks." Maute, *supra* note 28, at 1370; *see also id.* at 1363-65, 1368-70 (describing the evolving differences in practice and etiquette between solicitors and barristers).

129. The professional conduct standards for advertising, or publicity or touting as it is known in England, have an uncertain history. Professor Drinker's brief account is commonly cited as the lone authority for the origin of the advertising ban. He reports that barristers naturally felt themselves above the need to advertise because they had their Inns of Court and viewed themselves as elite members of the English society. DRINKER, *supra* note 5, at 210-11. Barristers incorporated a ban into their modern codes but have recently allowed some advertising. THORNTON, *supra* note 124, at 93-94 (describing relaxation of advertising restrictions for barristers); ZANDER, *supra* note 50, at 551-52. Interestingly, solicitors at some point also adopted the ban, but they too have relaxed their position. *See* John B. Attanasio, *Lawyer Advertising in England and the United States*, 32 AMER. J. COMP. L. 493, 495-98 (1984) (describing history of ban against solicitor advertising and noting that the first formal ban was promulgated in 1934); RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 139, 189-93 (1988) (discussing solicitor rule on advertising and its changes since nineteenth century).

130. The notion that barristers should not confer directly with lay clients did not become a "formal rule of professional etiquette until the late nineteenth century," but "it had been observed as a practice since the sixteenth century when, due to the expansion of legal business and the introduction of written pleadings, some of the busiest and most successful members of the bar ceased to consult directly with clients as a time-saving device." Daniel Duman, *The English Bar in the Georgian Era*, 101, *reprinted in* LAWYERS IN EARLY MODERN EUROPE AND AMERICA (Wilfred Prest ed. 1981). *See also* BAKER, *LEGAL PROFESSION*, *supra* note 8, at 116-23 (describing early seventeenth century origins of honoraria doctrine under which barristers could not sue lay clients for fees). Professor Baker notes that these new customs thus overrode the serjeant's former duties of fully communicating and counseling his lay client. *Id.* at 115-16.

131. In 1895, the General Counsel of the Bar began issuing annual statements on matters relating to professional conduct and etiquette. *See* W.W. BOULTON, *A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES* 1 (1953). In 1953, Sir William Boulton began collecting the annual statements in a concise guide of etiquette, and "Boulton's Guide" was a primary source of ethical conduct for more than a generation of barristers. *Id.* In 1980, the Bar Council enacted a formal code—the "Code of Conduct of the Bar of England and Wales." *See* Inns of Court School of Law, *PROFESSIONAL CONDUCT*, App. One, at 131-56 (2002-2003) (reprinting *CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES* (7th Ed. 2000) [hereinafter *CODE OF CONDUCT*]).

132. The obligation of litigation fairness is particularly evident in the modern barrister's code. *CODE OF CONDUCT*, *supra* note 131, ¶ 3.02 (providing that a barrister has "an overriding duty to the Court to act with independence in the interests of justice" and "must not deceive or knowingly or recklessly mislead the Court"); *see also id.* ¶¶ 7.04 & 7.08 (stating standards for drafting of documents and conduct in court). The duties of competence and confidentiality also are explicit. *Id.* ¶ 7.01(b)(i) (providing that a barrister "must not undertake any task which . . . he knows or ought to know that he is not competent to han-

4. Standards for English Attorneys and Solicitors

The two primary statutes governing the conduct of serjeants—the 1275 First Statute of Westminster and 1280 London ordinance—by their literal terms addressed the conduct of serjeants rather than attorneys.¹³³ Professor Rose, however, has studied the cases under the Chapter 29 “deceit” prohibition of the 1275 statute and found a number involving attorneys, rather than serjeants.¹³⁴ This would suggest that attorneys were subject to all of the standards of conduct developed under at least the 1275 statute,¹³⁵ including professional competence, loyalty, confidentiality, and truth in litigation. Indeed, all seventeen cases that Professor Rose collects from this era concerning diligence and competence involved attorneys, rather than serjeants.¹³⁶

In addition, Parliament repeatedly regulated attorneys, particularly their admission. In 1402, for example, Parliament passed an act to rectify “the great number of Attornies, ignorant and not learned in the Law.”¹³⁷ The 1402 act regulated admission of attorneys, provided for judicial ex-

ple”); *id.* ¶ 7.02 (providing, among other things, that a barrister “must preserve the confidentiality of the lay client’s affairs”). The obligation of public service is less obvious but is reflected in part by the “cab-rank” rule which requires a barrister to accept an engagement, even if the client or his cause is “objectionable to him or to any section of the public.” *Id.* ¶ 6.01. The concepts of loyalty and reasonable fees are reflected to some degree in the modern code, but the code’s statement of these duties is not traditional and is influenced by the fact that the solicitor is the client of the barrister. See Miller, *supra* note 22, at 221-23 (discussing the modern solicitor-barrister relationship and the different fee practices); see also *supra* note 131. The modern code permits independent barristers to charge whatever fee is permitted by law so long as it not a wage or salary. CODE OF CONDUCT, *supra* note 131, ¶ 4.05. Nevertheless, themes of fee fairness and accuracy are referenced in other standards governing barrister’s conduct. See PROFESSIONAL CONDUCT, *supra* note 131, 329-30 (“Guidance on Counsel’s Fee Notes” from Professional Standards and Remuneration Committee). The concept of loyalty is reflected in the barrister’s other duties, such as confidentiality, but in terms of conflicts of interest the concern of the modern barrister is seemingly the potential conflict between the lay client and the solicitor. See CODE OF CONDUCT, *supra* note 131, ¶ 7.03 (addressing duty of barrister to inform lay client of any potential conflict between lay client and solicitor or other intermediary).

133. Christian reports that the prohibitions applied primarily to serjeants because “[f]or some time it was the serjeants of whom the bitterest complaints were made.” CHRISTIAN, *supra* note 11, at 14.

134. Rose, *Medieval England*, *supra* note 17, App. III (collecting cases decided under the 1275 statute and reporting type of misconduct and type of lawyer at issue). See also *supra* notes 77-81 (discussing Chapter 29 of 1275 statute).

135. Professors Brand and Rose discuss only three cases applying the standards of the 1280 London ordinance; one involved an attorney. See *supra* note 89.

136. Rose, *Medieval England*, *supra* note 17, App. III (reporting that at least eight of the seventeen were brought pursuant to Chapter 29).

137. The preamble to the 1402 act stated “[f]or sundry Damages and Mischiefs that have ensued before this Time to divers Persons of the Realm by a great number of Attornies, ignorant and not learned in the Law, as they were wont to be before this Time.” Rose, *Medieval England*, *supra* note 17, at 135 (reprinting 1402 act). Christian reports that the Commons complained of a number of abuses by attorneys: falsehoods, negligence, ignorance, and collusion. CHRISTIAN, *supra* note 11, at 18-19. The 1402 Act was not the first effort of Parliament to address attorneys. In 1292, Parliament sought to limit the number of attorneys. Rose, *Medieval England*, *supra* note 17, at 133 (reprinting 1292 ordinance); *id.* at 73-80 (discussing the significance of the ordinance of 1292); BRAND, *supra* note 10, at 115-17 (discussing 1292 act); see also CHRISTIAN, *supra* note 11, at 15-16 (discussing attempts to limit the number of attorneys).

amination of all attorneys, and maintenance of a roll of attorneys, but it did not set forth standards of conduct other than to require that attorneys be "sworn well and truly to serve in their offices."¹³⁸

In practice, the oath that attorneys used under the 1402 act went beyond the statutory language and stated the attorney's ethical duties in more detail. Attorneys reportedly took the following oath:

You shall doe no Falsehood nor consent to any to be done in the Office of Pleas of this court wherein you are admitted an Attorney. And if you shall know of any to be done you shall give Knowledge thereof to the Lord Chief Baron or other his Brethren that it may be reformed you shall Delay no Man for lucre Gain or Malice you shall increase no fee but you shall be contented with the old Fee accustomed. And further you shall use your self in the Office of Attorney in the said office of Pleas in this Court according to your best learning and discretion. So help you God.¹³⁹

The exact date of origin of the "do no falsehood" oath is uncertain, but some version of it likely was used pursuant to the 1402 act and perhaps as early as the thirteenth century.¹⁴⁰ The "do no falsehood" oath persisted for hundreds of years.¹⁴¹ The language varied, but this oath typically included a prohibition against false evidence and claims, an obligation to report other known falsehoods, a duty not to delay litigation, a duty to charge reasonable fees and an obligation to competently represent clients.¹⁴²

Although the "do no falsehood" oath did not mention the important duties of service to the poor, loyalty and confidentiality, English attor-

138. Rose, *Medieval England*, *supra* note 17, at 135 (1402 act).

139. BENTON, *supra* note 9, at 28.

140. *Id.* at 28 (noting that the "do no falsehood" oath was "doubtless framed and in use certainly from the time of the Act of Henry IV in 1402 and may have been used as early as 1246").

141. See CHRISTIAN, *supra* note 11, at 97-98 (noting that the "do no falsehood" oath was considered obsolete in 1630 but reinstated by 1676); see also *infra* note 165 (noting English adoption of shortened oath in 1729). The oath carried over to the United States and continues in varied form in some American courts today. See WARREN, *supra* note 18, at 26 (noting that the oath used in early American colonies—the "do no falsehood" oath—was based on the oath framed under the 1402 English Act); see *infra* notes 521-525 (discussing oaths in current use).

142. The 1649 *Book of Oaths*, which purports to list "ancient" oaths, reported a version of the "do no falsehood" oath almost identical to that quoted in the main text, see *supra* note 139 and accompanying text, but added the following language after the clause ending "old fee accustomed:"

You shall plead no Forraigne Plea, nor suffer no Forraigne suits unlawfully to hurt any man, but such as shall stand with order of the Law, and your conscience: You shall seale as such Process as you shall sue out of the Court with the Seale thereof, and see the Kings Majesty, and my Lord Chief Justice discharged for the same; You shall not wittingly or willingly sue, nor procure to be sued any false Suit, nor give aide nor consent to the same, in pain of being expelled from the Court forever.

THE BOOK OF OATHS 29-30 (1649) (full title: THE BOOK OF OATHS AND THE SEVERAL FORMS THEREOF, BOTH ANCIENT AND MODERN FAITHFULLY COLLECTED OUT OF SUNDRY AUTHENTIC BOOKS AND RECORDS NOT HERETOFORE EXTANT, COMPILED IN ONE VOLUME).

neys likely had these duties. Just as a serjeant's duties exceeded the minimal litigation duties of his oath, the attorney's duties probably were broader than those stated in his oath of office. First, English attorneys had a duty to serve the poor. As with serjeants, the ecclesiastical duty to serve the poor reportedly extended to attorneys as early as the thirteenth century.¹⁴³ In 1494, Parliament acted "to help and speed poor people in their suits," which, among other things provided for appointment of attorneys to represent the poor "which shall do their duties without any reward for their counsels, help, and business."¹⁴⁴

English attorneys also had duties of loyalty and confidentiality. As noted above, English courts used both their inherent power and the 1275 statute to impose a duty of loyalty and confidentiality on attorneys.¹⁴⁵ In addition, the history, albeit a somewhat uncertain history, of the evidentiary rule of attorney-client privilege suggests an underlying duty of confidentiality owed by attorneys. Professor Wigmore, for example, traces the history of the attorney-client privilege to the reign of Elizabeth I (1558-1603),¹⁴⁶ and he claims that the original policy behind the privilege was to preserve the honor of the attorney and his duty to maintain client confidences.¹⁴⁷ Wigmore's historical account and purported justification for the privilege are subject to question,¹⁴⁸ but the uncertainty does not extend to the early existence of the underlying professional duty of confidentiality. Indeed, a principal case relied upon for the different accounts of the privilege—*Annesley v. Anglesea*,¹⁴⁹ decided in 1743—refused to extend the privilege in the case at hand but recognized that "it is certainly

143. See *supra* note 112 (discussing duty of civil advocates to serve the poor).

144. CHRISTIAN, *supra* note 11, at 33. This statute continued without substantial modification until the nineteenth century and reportedly reflected both paternalistic and Christian charitable views. Mauro Cappelletti, *Legal Aid: Modern Themes and Variations*, 24 STAN. L. REV. 347, 352-53 (1972).

145. See *supra* notes 77-81 (discussing cases).

146. 8 WIGMORE, EVIDENCE § 2290, at 542 (1961) (noting that the privilege already appears "unquestioned" by the reign of Elizabeth I and citing cases, dating from 1577 through 1693, that recognize the lawyer-client privilege).

147. *Id.* at 543 (noting that the rationale for the privilege was different in early times and was "a consideration for the oath and the honor of the attorney rather than for the apprehensions of his client") (emphasis in original).

148. One uncertainty extends to Wigmore's purported rationale. Some authorities claim that the privilege arose from the fact that attorneys were the literal agent of the client: before the sixteenth century, litigants generally could not be compelled to testify as to facts known only to them, and when litigants began to appear through attorney, this privilege was extended to the attorney. See *Whiting v. Barney*, 30 N.Y. 330 (N.Y. 1864) (summarizing history and theories of privilege). This theory is not necessarily inconsistent with Wigmore's account. See Wigmore, *supra* note 146, at 543 (noting that the right against testimonial compulsion did not give way until Elizabeth's reign and that the privilege "commended itself at the very outset as a natural exception to the then novel right of testimonial compulsion"). Another criticism extends to the accuracy of Wigmore's account of history. Professor Hazard acknowledges that Elizabethan cases refer to the privilege, but he claims that recognition of the privilege in English courts was "slow and halting until after 1800." Hazard, *Attorney-Client Privilege*, *supra* note 13, at 1070.

149. 17 HOW. ST. TRIALS 1139 (1743). Professor Hazard claims that the *Annesley* case "nearly wiped out" the privilege. See Hazard, *Attorney-Client Privilege*, *supra* note 13, at 1073.

undoubted in the law, that attornies ought to keep inviolably the secrets of their clients."¹⁵⁰

Despite this wide range of duties, litigation and fee abuses were the primary concern of Parliament, and these concerns extended to both attorneys and their new counterpart, the solicitors. In 1605, Parliament acted to cure fee and collection abuses in "An Act to Reform the Multitudes & Misdemeanors of Attorneys & Solicitors at Law, and to Avoid Unnecessary suits and Charges at Law."¹⁵¹ The 1605 Act complained of "abuse" of clients through "excessive fees" and "extraordinary delays" by lawyers to extract those fees.¹⁵² The act therefore required lawyers to submit "subscribed tickets" and "true bills" for all charges,¹⁵³ and it provided for disbarment and treble damages for lawyers who delayed their client's cases for their private gain.¹⁵⁴ Finally, the act imposed general competency and honesty standards for admission.¹⁵⁵

Soon thereafter, in 1654, the Court of Common Pleas ordered that a "jury of able and credible officers, clerks and attornies" be impaneled every three years to oversee discipline of attorneys.¹⁵⁶ Their specific charge was to inquire as to falsities, contempt and other offenses by attorneys, to punish or remove "notoriously unfit" attorneys, and to set a table of "due and just fees."¹⁵⁷ Judge Cardozo, in a review of the history of English courts, cites the 1654 order as illustrative of the English system of "announcing rules of conduct to be adhered to in the future."¹⁵⁸ Yet, the only examples that Judge Cardozo gives are those in the original order—falsities and fees—and two other rules, one to prevent maintenance or

150. See Hazard, *Attorney-Client Privilege*, *supra* note 13, at 1079 (quoting *Annesley v. Anglessea*); *Whiting v. Barney*, 30 N.Y. at 333 (same).

151. 3 Jam. I, chap. 7, Statutes At Large, Vol. VII, at 175-76 (1763).

152. The preamble to the 1605 Act provided:

For that through the abuse of sundry attornies and solicitors by charging their clients with excessive fees, and unnecessary demands such as were not, re ought by them to have been employed or demanded whereby the subjects grow to be much overburdened, and the practice of the just and honorable Serjeant and counsellor at law greatly slandered; and for that to work the private gain of such attornies and solicitors, the client is oftentimes extraordinarily delayed

Id. at 175.

153. *Id.* ("[N]o attorney . . . shall be allowed . . . any fee . . . unless he have a ticket subscribed . . . testifying how much he hath received for his fee; and that all attornies and solicitors shall give a true bill unto their . . . clients . . . of all charges.").

154. *Id.* ("[I]f the attorney or solicitor do or shall willingly delay his clients' suits to work his own gain, or demand by his bill any other sums of money . . . the party grieved, shall have his action against such attorney or solicitor, and recover therein costs and treble damages, and the said attorney or solicitor shall be discharged from thenceforth from being an attorney or solicitor any more.").

155. *Id.* at 176 ("[T]o avoid the infinite number of Solicitors and Attornies be it enacted . . . That none shall from henceforth be admitted attornies in any of the King's courts of record . . . but such as have been brought up in the same courts, or otherwise well practised in soliciting of causes, and have been found by their dealings to be skillful and of honest disposition").

156. See *Ex rel. Karlin v. Calkin*, 162 N.E. 487, 491 (1928) (Judge Cardozo) (reviewing English history of attorney discipline).

157. *Id.*

158. *Id.* at 490.

champerty and another to not permit others to file pleadings in the attorney's name.¹⁵⁹ Most all of the judicial oversight of attorneys during the seventeenth century seems to have addressed attorney qualifications and admissions.¹⁶⁰

In 1729, Parliament reformed regulation of attorneys and solicitors in "An Act for the Better Regulation of Attorneys and Solicitors."¹⁶¹ Although the 1729 Act has been hailed as a significant improvement in the regulation of attorneys and solicitors,¹⁶² it primarily addressed admission procedures and abuses by persons who avoided licensing fees by working as clerks rather than sworn attorneys or solicitors.¹⁶³ A few of its provisions arguably addressed matters of lawyer conduct. It barred attorneys from assisting in the unauthorized practice of law, and it set fee procedures.¹⁶⁴ Interestingly, the 1729 Act also required lawyers to swear to a shorter oath "instead of the oath heretofore usually taken by the attorneys of such courts respectively."¹⁶⁵

By shortening the oath, the 1729 act eliminated what had been the single broadest official statement of ethical standards for English attorneys—the "do no falsehood" oath—and created a void in written articulation of these standards. Holdsworth reports that the eighteenth century statutes, such as the 1729 act, presupposed that attorneys and solicitors, as officers of the court, were subject to discipline by the courts, including rules "as to their professional conduct."¹⁶⁶ Yet, Holdsworth notes only a few disciplinary matters, such as one involving an attorney who stated a fictitious case,¹⁶⁷ a judicial warning that attorneys who press frivolous cases might have to pay costs,¹⁶⁸ and a variety of rules as to fee

159. *Id.*

160. See CHRISTIAN, *supra* note 11, at 80-82.

161. "An Act for the Better Regulation of Attorneys and Solicitors," 2 Geo. II, ch. 23, §§ 13 & 14 (1729).

162. Christian characterizes the 1729 Act as "the first really effective enactment for the regulation of the profession, and the primary cause of the undoubted improvement in their status, and of their gradual rise in general esteem." CHRISTIAN, *supra* note 11, at 111.

163. The 1729 act "was to a degree connected with public concerns about the quality of legal services, but there also were a number of professional and fiscal considerations which in effect meant that the statute had more to do with using formal proof of apprenticeship as a way of collecting government revenue in the form of stamp duties than with reforming legal training." Christopher W. Brooks, *LAWYERS, LITIGATION & ENGLISH SOCIETY SINCE 1450*, at 155 (Carnegie Pub. 1998). Legal practitioners reportedly had avoided payment of the stamps on the oath for attorneys by becoming clerks to prothonotaries, rather than sworn attorneys. *Id.*

164. Section 17 provided that an attorney, upon penalty of disbarment, could not knowingly assist another person to sell out a writ if the other were not a sworn attorney. 2 Geo. II, ch. 23, § 17. Section 23 set out elaborate provisions and conditions on an attorney suing for his fees. *Id.* at § 23.

165. *Id.* at § 17. The new oath provided: "that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability." *Id.*

166. HOLDSWORTH, *supra* note 14, Vol. 12, at 59. See also CHRISTIAN, *supra* note 11, at 80 (noting that "[a]lthough Parliament was idle" the courts found "frequent occasion to issue rules for the further regulation of the profession").

167. HOLDSWORTH, *supra* note 14, Vol. 12, at 59.

168. *Id.* at 60.

and billing procedures.¹⁶⁹ Indeed, Holdsworth concedes that although the courts “pressed hardly” on attorneys and solicitors, development and oversight of standards of conduct and discipline were better achieved later, through self-governance by lawyers.¹⁷⁰

Self-governance took time.¹⁷¹ The attorney-solicitor branch of the English legal profession was not as well organized as the serjeant-barrister branch. The attorneys were expelled from the principal Inns of Court in the sixteenth century.¹⁷² In 1739, they formed a professional group—the “Society of Gentlemen Practisers in the Courts of Law and Equity.”¹⁷³ The Law Society probably contributed to the ethical training of solicitors from its inception,¹⁷⁴ but it was not until 1986, that the Law Society formed a committee to collect and draft principles of professional conduct.¹⁷⁵ The result, *The Guide to the Professional Conduct of Solicitors*, now spans several hundred pages, with a considerable amount of “technical” regulation,¹⁷⁶ but it also reflects the core ideals of modern solicitors which mirror those of attorneys centuries earlier.¹⁷⁷

169. *Id.* at 60. See also JOHN MERRIFIELD, *THE LAW OF ATTORNIES*, ch. VIII, 77-95 (1830) (discussing duties of attorneys and court cases addressing attorney misconduct, such as abusive pleading and neglect).

170. HOLDSWORTH, *supra* note 14, Vol 12, at 59.

171. ANDREW BOON & JENNIFER LEVIN, *THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES*, 101-02 (1999) (describing the long “battle” of the Law Society to gain power over discipline of attorneys); CHRISTIAN, *supra* note 11, at 106 (stating that the organization of solicitors occurred only after a “long interval, during which the profession fell very low in popular esteem”).

172. CHRISTIAN, *supra* note 11, at 88 (noting that attorneys participation in Inns “abruptly discontinued” on June 22, 1557); WARREN, *supra* note 18, at 28-29. Holdsworth laments this development as depriving clients of the safeguards of professional standards and discipline. Holdsworth, *supra* note 14, Vol. 6, at 442.

173. HOLDSWORTH, *supra* note 14, Vol. 12, at 52.

174. See *Split Legal English Profession*, *supra* note 28, at 1362-63 (stating that solicitor self-regulation began with the formation of the Law Society, “which denounced trickery and unfair practice, considered irregularities of professional conduct and sought to protect their practice turf from outside competition”); HOLDSWORTH, *supra* note 14, Vol. 12, at 52 (describing the Society as doing “what the legislature could not do” including the exercise of “a very wholesome discipline over its members”). See also *The Records of the Society of Gentlemen Practisers in the Courts of Law and Equity*, 48 & 62-64 (1897) (discussing distribution of a booklet of “Friendly Hints” to clerks). Although a purpose of the society was striking from the rolls those lawyers who committed egregious misconduct, courts still retained authority to discipline attorneys, while the Law Society was merely allowed to be heard. ABEL, *supra* note 129, at 242 & 248.

175. ABEL, *supra* note 129, at 248; BOON & LEVIN, *supra* note 171, at 104 (noting that the “Law Society’s collection of rules and principles, *The Guide to the Professional Conduct of Solicitors*, is more comprehensive and has grown rapidly in the last few years [the late 1990s] . . . [but that] it does not currently aspire to be a ‘code.’”).

176. See generally Alison Crawley & Christopher Bramall, *Professional Rules, Codes and Principles Affecting Solicitors’ (or What Has Professional Regulation to do with Ethics)*, reprinted in Cranston, *LEGAL ETHICS*, *supra* note 124, at 99-113 (describing modern solicitor’s *Guide*).

177. Rule 1 states six broad ethical concepts: the solicitor’s independence and integrity, the client’s freedom of choice in solicitor, the solicitor’s duty to act in the best interest of the client, the good repute of the solicitor and profession, the proper standard of work and the solicitor’s duty to the court. *Id.* at 106 (quoting Practice Rule 1). These six principles do not exactly match the six core duties, but they obviously include at least loyalty, competence and litigation fairness. The *Guide* elsewhere specifies reasonable fees and confiden-

In sum, England has a long tradition of setting ethical standards for its lawyers. The standards appeared in the thirteenth century almost as soon as lawyers themselves emerged as a profession. The standards came from many sources—oaths of office, statutes, court cases, and academic discourse—with formal articulation of standards ebbing in the seventeenth century. The standards were both regulatory, to curb abuses, and aspirational to inspire lawyers to better themselves.¹⁷⁸ Both branches of the English legal profession had the same core duties over the centuries—litigation fairness, competency, loyalty, confidentiality, reasonable fees and service to the poor. These duties continue to be central to modern English lawyers. Indeed, Professor Cranston, writing about modern English standards of legal ethics, identified Lord Whitlocke's statement of duties—particularly his statement of the three duties of “secrecy, diligence and fidelity”¹⁷⁹—as “the pegs for an exposition of the central rules of professional responsibility.”¹⁸⁰

B. THE FRENCH TRADITION OF LEGAL ETHICS STANDARDS

The French also had a comprehensive statement of a lawyer's duties, beginning in the thirteenth century. A series of French ordinances required lawyers to take an oath to abide by specific ethics standards. These standards were remarkably similar to those in England. Moreover, the French oaths were the antecedent of an 1816 Swiss oath, which in turn was a primary model for legal ethics standards in nineteenth century America.

As in England, the ecclesiastical courts in France were early leaders in setting advocates' oaths. In 1231, the Council of Rouen issued a decree imposing an oath upon ecclesiastical advocates,¹⁸¹ and, in the same year,

tiality. *See id.* at 109 (table setting out rules); *see also* Cranston, *supra* note 126, at 7 n.25 (citing solicitor's rule on confidentiality). Public service is not as obvious and may be an omission in the modern rules for solicitors. *Cf.* Cappelletti, *supra* note 144, at 374-76 (discussing modern legal aid concepts in England).

178. Some, such as the oaths, served both regulatory and aspirational aims. Even the medieval statutes have been characterized as aspirational. *See* CHRISTIAN, *supra* note 11, at 21 (stating that statutes in the Middle Ages tended to state “ideals” rather than practical criteria).

179. *See supra* notes 113-119 (excerpting Lord Whitlocke's speech).

180. Cranston, *supra* note 126, at 6.

181. The Council of Rouen decreed:

Every single advocate shall swear that he will faithfully perform his duties; that he will not support cases that are unjust or militate against his conscience; that he will not abstract (embezzle) documents of his party (client), nor cause such to be abstracted; that he will not, to his knowledge, use false pleas, or such as have been maliciously excogitated; that he will not bring it about that falsehoods and surreptions be made, or that false documents be produced in his case; nor that he will prolong (delay) the case of his client as long as he believes that he is acting in the interest of the client himself; and that in those matters which shall be transacted in court and concerning which requirements are made of him by the Judges, he will not silence the truth according to his belief; and that if he become convinced of being inadequate to the handling of the case, he will have conference with the procurators; and that he will prepare with his own hand a journal and the acts in cases which

the Bishops at the Council of Chateau-Gontier, in Reform Canon 36, also required an oath.¹⁸² These oaths were similar in form and detailed proper conduct of the ecclesiastical advocate in litigation. Together, these oaths included an advocate's duty to not bring unjust cases, to not embezzle documents from his client, to not use false pleas, to not offer false documents, to monitor his own competence,¹⁸³ to not suborn perjury, to expedite the case, to not burden judges with undue objections and to maintain the honor of the court.

In 1274, King Phillip III ("Phillip the Bold") enacted an ordinance that regulated lawyers in the general courts. His stated purpose was to give his subjects the "lawful right in cases at law" and "to deter those who . . . offer their professional services, from maliciously protracting legal contests or charging immoderate fees."¹⁸⁴ As in the ecclesiastical courts, its principal mode of regulation was an oath, by which the lawyer swore every year¹⁸⁵ to abide by litigation fairness and competency principles.¹⁸⁶

he has taken, as faithfully as possible; or that he will cause them to be written out, in case he be neither able nor willing to do so himself.

BENTON, *supra* note 9, at 20-21.

182. The Reform Canon 36, "concerning the Oath of the Advocates," stated:

The advocates who in accordance with usage receive pay, shall by no manner of means be admitted, unless they have been sworn in. The formula for such an oath is thus: That they shall not favor (take) knowingly cases that are not just; nor shall they bring about, with malice aforethought, undue delay or haste in the conduct of cases by means of false oath, rather than stand by the truth. Nor shall they instruct their client toward malicious answer or statement; nor shall they after the published attestations, or at any stage of the trial, nor even before the oath suborn witnesses, or cause them to be suborned. Nor shall they permit their client to produce false witnesses; and if they should gain knowledge thereof, they shall reveal such to the court. If memorials (briefs) are to be made they shall do so in good faith, and not withdraw from court maliciously, until the memorial be completed and admitted in court. Clients they shall expedite to the best of their ability, and in good faith. Nor shall they bother (literally burden) the Judge with objections, believing that they will give in to them. They shall sustain the honor of the court, nor perpetrate in court a falsehood.

Id. at 21-22 (parenthetical explanation in Benton's version).

183. In 1278, the Synod of Langeais added another competency standard to the oath by decreeing that advocates must swear that they will give "their clients as faithful defense as is in their power" and must have minimum expertise and study before being admitted to practice before the ecclesiastical courts. *Id.* at 22-23.

184. *Id.* at 16.

185. *Id.* at 16-17 ("that aforesaid oath shall be renewed by all attorneys every single year").

186. The ordinance stated:

That in all cases which are being tried in said courts before which they have practiced in the past or shall practice, they will perform their duties bona fide diligently and faithfully as long as they have reason to believe their case to be just.

They shall not bring any case into said courts either as defending or counseling lawyers unless they shall have believed it to be just; and, if at any stage of the trial the case appears to them unjust, or even intrinsically bad, they shall discontinue to further defend it, withdrawing from said case entirely as defending or counseling lawyers.

Whosoever declines to swear in accordance with this formula, shall take cognizance, that in said courts they are disbarred, as long as they persist in this state of mind.

The 1274 ordinance also set maximum fees,¹⁸⁷ and provided that if the lawyer violated the oath, he was “branded with the stigma of perjury and infamy” and “forever disbarred.”¹⁸⁸

Over the next several centuries, French ordinances supplemented the 1274 oath with additional detail. In 1344, an ordinance added, among other things, prohibitions against “false citations” and postponements “by subterfuge,” limits on the amount of fees, and, apparently, a ban on contingent fees.¹⁸⁹ In 1536, an ordinance added a provision on conflicts of interest¹⁹⁰ and a duty to serve the poor.¹⁹¹ In 1816, a duty of secrecy seemingly became a part of the oath.¹⁹² Thus, French lawyers had a broad set of ethical duties that included all of the core duties of English

Id. at 14-15.

187. The fee provisions of 1274 French ordinance were as follows:

Now, concerning the fee of attorneys, we have held it a statute that fees should be received in accordance with the importance of the case and the merits of the attorney; and this for each case that is being argued. But for an entire case argued either before our tribunal or yours, or that of any of our aforesaid justiciaries, the fee of one attorney shall not exceed the amount of 30 francs.

The attorneys shall swear also that neither under the guise of pension or stipend or present or favor, nor under any kind of pretext of their own, nor by device of others; nor by any scheme of whatever color planned in the past or being planned even without fraudulent intent, they shall acquire any amount beyond the one stated afore.

Id. at 15.

188. *Id.*

189. Benton reports the 1344 oath as follows:

to fulfil their duties with fidelity and exactitude; not to take charge of any causes which they know to be unjust; that they will abstain from false citations; that they will not seek to procure a postponement of their causes by subterfuge, or malicious pretexts; that whatever may be the importance of a cause, they will not receive more than thirty livres for their fee, or any other kind of gratuity over and above that sum, with liberty, however, to take less; that they will lower their fees according to the importance of the cause and the circumstances of the parties; and that they will make no treaty or arrangement with their clients depending on the event of the trial.

Id. at 14. One source has the 1344 ordinance adding only the following to the oath: “[t]hey will not speak injurious words against adverse parties or others.” Edward S. Cox-Sinclair, *The Bar In the United States*, 33 *LAW MAGAZINE & REV.*, 164, 193 (reporting 1344 addition in French).

190. Benton reports that the 1536 ordinance provided that “advocates must not give advice to both parties under punishment of being heavily fined by financial penalties, suspension or loss of all their property.” BENTON, *supra* note 9, at 18.

191. The 1536 ordinance stated:

[I]f there should happen some poor and wretched people, who on account of their poverty or because of the sway and fear of their parties (i.e., opponents), cannot obtain counsel, we enjoin the judges to provide counsel for them, and to punish and fine the attorneys (advocats) and barristers (procourenurs) who without reasonable ground, should have refused to take charge of them.

Id. at 18-19 (parenthetical explanations in Benton’s version).

192. Cox-Sinclair, *supra* note 189, at 193 (written in French). The form of the oath was changed during this era. In 1810, Napoleon reportedly moved the standards into a separate statement of the lawyer’s duties, coupled with a simple form of oath. RAYMOND PERROT, *LE SERMENT DE L’AVOCAT* 13-14 (2d Edition 1980) (written in French). See also BENTON, *supra* note 9, at 120-21.

lawyers of the era: litigation candor and fairness, competence, loyalty, confidentiality, reasonable fees and service to the poor.

The early French tradition of legal ethics has had a lasting influence outside of France. In 1816, the Canton of Geneva, Switzerland, instituted a new oath based upon the duties in the medieval French oaths:¹⁹³

I swear, before God, to be faithful to the Republic and the Canton of Geneva. To never act without the respect due to the Tribunal and the Authority. To not counsel or maintain any cause that I do not feel is just or equitable, as long as it does not refer to a criminal defense. To not knowingly use any means outside of the truth, in order to maintain the causes brought before me, and to never trick Judges by any means, nor by any false presentation of facts and laws. To absolve myself from any offensive personality, and to not advance any fact contrary to the honor and the reputation of the parties, unless it is a necessary for the advancement of our cause. To not encourage or commence any lawsuit because of any personal interest. To never refuse counsel based on personal considerations, causes of feeble, foreigners, or oppressed. May God punish me if I break these rules.¹⁹⁴

This Swiss oath may seem to little significance in the general evolution of legal ethics standards. It is litigation-oriented, and it omits four of the core duties—competence, loyalty, confidentiality and reasonable fees. Yet, the 1816 Swiss oath is important to American legal ethics because it was the direct model for the 1850 Field Code statement of a lawyer's duties that was widely adopted by American states in the late nineteenth century.¹⁹⁵

I thus end my review of European standards of legal ethics and move to the practice in America. The review shows that at the time of American colonization, in the seventeenth and eighteenth centuries, ethical standards for lawyers were pervasive in England and other parts of Europe.¹⁹⁶ The early statements of standards did not resemble modern codes of conduct—they were not detailed or collected in one source—but they were surprisingly comprehensive for their time. The principal focus of the standards was the litigation conduct of lawyers with a central duty of truth and fairness in litigation superior to any obligation to the client. The formulations of the litigation duties were at times rather intricate, including specific pleading standards, an obligation to inform the court of other falsehoods and a duty to explore settlement alternatives. Most of the lawyer's other basic duties—competency, diligence, loyalty, confiden-

193. The Geneva bar traces the history of the 1816 oath to the original French oaths from Phillip the Bold, in 1274. See Geneva Bar, *CAHIERS DE L'ORDRE*, 7-11 (February 1984) (written in French).

194. 31 ABA REPORTS, *supra* note 2, Report of the Committee on Professional Ethics, App. E, at 715-16 (reprinting 1816 Swiss oath).

195. See *infra* notes 278-281.

196. Other European countries also stated ethical standards in oaths. See 31 ABA REPORTS, *supra* note 2, at 735-36 (reprinting oath used in Germany in 1908); see also *id.* at 716-17 (reprinting oath used in Denmark in 1688).

tiality, reasonable fees and service to the poor—originated in the litigation context, but they ultimately had broader application to all aspects of a lawyer's practice. In more modern times, a few additional concepts, such as advertising, began to appear in the English's lawyer's standards, but the core duties remained largely the same.

II. STANDARDS OF CONDUCT FOR LAWYERS IN COLONIAL AND POST-REVOLUTIONARY AMERICA

The early development of legal ethics standards in America resembles, but does not perfectly mirror, that in England. American lawyers who were trained under the English system, in the Inns of Court or otherwise, most certainly carried over the English notions of proper lawyer conduct.¹⁹⁷ A few colonies expressly adopted English statutes, common law and oaths.¹⁹⁸ Yet, American lawyers and the colonial reaction to them were unique in many ways. The distinctions in the English bar never took hold in America.¹⁹⁹ Moreover, many so-called lawyers working in the American colonies were not trained in the law, and lawyers as a class, whether skilled or not, were viewed with distrust by many colonists.²⁰⁰ As a result, some colonies, especially during the early period, attempted to prohibit professional (fee-paid) lawyers outright²⁰¹ or at least limit

197. See 1 CHROUST, *supra* note 12, at 33 (reporting that 236 American-born lawyers trained in the Inns of Court before 1815) & 36 (stating that the training of American lawyers at Inns of Court “established a tradition of professional excellence and high professional accomplishment” and “raised considerably the standards within the American profession itself”); WARREN, *supra* note 18, at 188 (reporting that a “far greater number [of colonial lawyers] than is generally known, received their legal education in London in the Inns of Court; and the influence, on the American Bar, of these English-bred lawyers, especially in the more southerly colonies, was most potent”).

198. See *infra* note 224.

199. See LAWRENCE M. FRIEDMAN, *A HISTORY OF THE AMERICAN LAW* 275-76 (1973) (discussing failed attempts in America to establish a graduated bar and the formation in a few colonies of an order of serjeants).

200. For a discussion of colonial lawyers and hostility toward them, see 1 Chroust, *supra* note 12, at 26-37; FRIEDMAN, *supra* note 199, at 81-90; WARREN, *supra* note 18, Introductory (“Law Without Lawyers”) & ch. 10 (“Prejudices Against Law and Lawyers”); David R. Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, 29-33 reprinted in *ETHICS AND THE LEGAL PROFESSION* (Michael Davis and Frederick Elliston, editors) (1986); Gerald W. Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, 14 *AM. J. LEGAL HISTORY* 283 (1970). See generally JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS*, Ch. 12 (“The Character of the Lawyer in United States Society”) (discussing evolving roles of lawyers and individual lawyers from the colonial era to the early twentieth century).

201. For example, the Connecticut General Court ordered in 1667 that any person who “shall take that boldness to himself as to plead or speak” on the behalf of others, charged with delinquency, would be fined or sentenced to the stocks. LOOMIS & CALHOUN, *THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT*, 182-83; WARREN, *supra* note 18, at 130; see also FRIEDMAN, *supra* note 199, at 81 (reporting that the colony of Connecticut initially outlawed lawyers). The 1641 Massachusetts Body of Liberties permitted non-parties to assist litigants in court proceedings, but it forbade the outsiders from taking any fee. Benton, *supra* note 9, at 56 (quoting Body of Liberties, Liberty No. 26); see also 1 CHROUST, *supra* note 12, at 213 (noting that in 1686 and 1690, the Pennsylvania Provincial Council attempted without success to pass a bill preventing a person from pleading for a fee); WARREN, *supra* note 18, at 106 (same).

their numbers.²⁰² Virginia was perhaps the most extreme: for over a century, it fluctuated between banning lawyers outright and allowing them only under severe restrictions.²⁰³ Yet, some colonies saw lawyers as a scarce commodity that needed to be rationed.²⁰⁴ By the early eighteenth century, all colonies permitted fee-paid lawyers, but their grudging acceptance of lawyers resulted in sporadic regulation in a variety of forms.

A. FORMS OF EARLY AMERICAN REGULATION OF LAWYER CONDUCT

The forms of lawyer regulation in colonial and early post-revolutionary America did not differ markedly from those in England. The colonies and early states used oaths, statutes, judicial oversight, and procedural rules to govern attorney behavior. The difference from England was in the pervasiveness and continuity of such regulation. To be sure, articulation of standards in England varied over time, but the variation in early America was far greater. The American regulation fluctuated within a single colony and differed from colony to colony.

202. In 1730, Connecticut, complaining of too many attorneys, causing "quarrels and lawsuits" to multiply, passed a statute allowing only eleven attorneys to practice in the colony. WARREN, *supra* note 18, at 131. In 1674, a Maryland "Act to Reform the Attorneys . . . and to Avoid Unnecessary Suits" limited both the number of attorneys who could practice and their fee. *Id.* at 53; *see also* 1 CHROUST, *supra* note 12, at 250; John E. Douglass, *Between Pettifoggers and Professionals: Pleaders and Practitioners and the Beginnings of the Legal System in Colonial Maryland 1634-1731*, 39 AM. J. LEGAL HIST. 359, 366-79 (1995).

203. Historians report that the Virginia elite distrusted lawyers and made repeated efforts to expel or otherwise severely limit lawyers. These efforts either proved unworkable or were subject to royal nullification. Papke, *supra* note 200, at 30. *See also* 1 CHROUST, *supra* note 12, at 276-77 (attributing the "constant and energetic efforts of the early Virginia legislature to interfere with, and even prevent, the emerging and growth of a class of professional lawyers" to the "jealousy of the Virginia planters and merchants"); WARREN *supra* note 18, at 39 & 41 (explaining the "prejudice" against lawyers in Virginia and noting that the "problems of how to control these attorneys appears to have perplexed Virginia more than any other colony"). For example, a 1642 Virginia act permitted fee-paid lawyers, but it restricted the courts in which a single attorney could plead, punished lawyers who refused cases and limited fees to an amount that Professor Chroust describes as "ridiculously small." 1 CHROUST, *supra* note 12, at 269 BENTON, *supra* note 9, at 102-103 (quoting 1642 statute). Just three years later, Virginia repealed the 1642 licensing act and outlawed all fee-paid ("mercenary") attorneys who sought only "their own profit and inordinate lucre." BENTON, *supra* note 9, at 103 (quoting Laws of Va., Nov. 1645, Act VII); *see also* WARREN, *supra* note 18, at 41; 1 CHROUST, *supra* note 12, at 269, n.135. This back-and-forth process repeated itself through the end of the seventeenth century.

204. In 1708, Connecticut limited litigants in smaller cases (those not involving land and demanding less than ten pounds) to one attorney each and in larger cases, limited litigants to two attorney each. 2 CHROUST, *supra* note 12, at 241 (describing 1708 act, as modified in 1750 and 1784). In 1718, the Rhode Island colony limited the number of lawyers in a case to two. WARREN, *supra* note 18, at 142. New York in 1695 limited each side in litigation to no more than two lawyers and empowered courts to order any lawyers in excess of two to plead for the other side. BENTON *supra* note 9, at 78. In Massachusetts, a 1715 statute provided that "no person shall entertain more than two of the sworn allowed attorneys at law, that the adverse party may have liberty to retain others of them to assist him, upon his tender of the established fee, which they may not refuse." WARREN *supra* note 18, at 78; Gawalt, *supra* note 200, at 284 (discussing scarcity of lawyers in Massachusetts and 1715 statute). *See also infra* note 218 (reporting 1786 North Carolina law limiting each litigant to one lawyer); *infra* note 219 (reporting 1792 Virginia law limiting each litigant to two lawyers).

1. Ethics Oaths

A number of colonies used oaths to regulate lawyer behavior. The oath was the most expansive single listing of ethical standards for early American lawyers. Historians credit the oath as essential to the professionalization of the colonial bar.²⁰⁵ The most common form of oath was the “do no falsehood” oath applicable to English attorneys.²⁰⁶ Oath practice was not uniform in the colonies. Some colonies had unique substantive oaths,²⁰⁷ while a few others imposed only a simple oath requiring lawyers to swear allegiance and to promise to truly and honestly demean themselves.²⁰⁸ The use of detailed ethics oaths seemingly fell out of fashion as the new nation formed. After the revolution, a few states continued to require the “do no falsehood” oath,²⁰⁹ but many moved to (or

205. Warren credits the 1701 Massachusetts statutory imposition of the “do no falsehood” oath as dignifying the practice of law “as a regular profession.” WARREN, *supra* note 18, at 77-78. See also Douglass, *supra* note 202, at 366 (attributing the 1666 Maryland oath as “an important factor in effecting the transformation of pleaders to practitioners”).

206. At least six colonies formally adopted the “do no falsehood” oath. See generally WARREN, *supra* note 18, at 26 (noting that the “do no falsehood” oath was the oath “on which most of the forms of oaths prescribed later in the American colonies were founded”). In Massachusetts, a 1701 act mandated the following “do no falsehood” oath:

You shall do no falsehood, nor consent to any to be done in the court, and if you know of any to be done you shall give knowledge thereof to the Justices of the Court, or some of them, that it may be reformed. You shall not wittingly and willingly promote, sue or procure to be sued any false or unlawful suit, nor give aid or consent to the same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts as to your clients. So help you God.

HORRIS R. BAILEY, ATTORNEYS AND THEIR ADMISSION TO THE BAR IN MASSACHUSETTS 16 (1907) (excerpting 1701 Act); BENTON, *supra* note 9, at 60 (same). New Hampshire adopted the oath in the same year. 1 CHROUST, *supra* note 12, at 129-30; BENTON, *supra* note 9, at 59-60. In 1704, Delaware passed an act that, in order to prevent “abuses and irregularities,” required attorneys to be qualified for admission and take the “do no falsehood” oath. 1 CHROUST, *supra* note 12, at 233-34; BENTON, *supra* note 9, at 44-45. In 1708, Connecticut required the “do no falsehood” oath. BENTON, *supra* note 9, at 42; WARREN, *supra* note 18, at 130. A 1732 Virginia act “to prevent frivolous and vexatious suits,” “[f]or relief of his majesty’s good subjects, against causeless and unjust suits; and for the better enabling them to recover their just rights,” required the “do no falsehood” oath and provided for suspension or disbarment of any attorney who acted contrary to the duties of the oath. BENTON, *supra* note 9, at 108; 1 CHROUST, *supra* note 12, at 273-74. Maryland used the oath in its early colonial period but later shortened it. See *Lawyers in Colonial Maryland*, 17 AM. J. LEGAL HISTORY 145, 160 (1973).

207. A 1705 Rhode Island law mandated an oath “not to plead for favour nor affection for any person, but ye merit of the case according to law.” BENTON, *supra* note 9, at 94-95. In 1721, the Pennsylvania governor mandated an oath that “[t]hou shalt behave thyself in the Office of Attorney within the Court, according to the best of thy Learning and Ability, and with all good Fidelity, as well to the Court as to the Client: Thou shalt use no falsehood, nor delay any person’s cause for Lucre or Malice.” *Id.* at 92.

208. Maryland, for example, likely began with use of a “do no falsehood” oath. See *supra* note 206. See generally Douglass, *supra* note 202 (discussing early colonial Maryland oaths). In 1715, Maryland passed an “Act for rectifying the ill practices of attornies,” which provided a shortened oath that was primarily one of allegiance. BENTON, *supra* note 9, at 53-54 (reprinting 1715 Act); 1 CHROUST, *supra* note 12, at 252-54 (same); WARREN, *supra* note 18, at 53 (summarizing).

209. Connecticut used the “do no falsehood oath” until at least 1875. See Rev. Gen Statutes Conn., Title 21, Ch. II § 1 (1875) (mandating “do no falsehood” oath). Delaware

continued) a simple oath.²¹⁰

2. Regulation of Admission and Judicial Oversight of Lawyers

Most colonies and early states had statutes, court rules, and in some cases bar association rules that addressed admission of lawyers.²¹¹ To the extent that such regulation addressed admission only, it had marginal relevance to actual lawyer conduct. To be sure, the aim of admission regulation was to impact attorney behavior, but it did so by requiring study and examination or moral character at the time of admission.²¹²

Some admission regulations, however, went beyond mere admission standards and expressly addressed standards for practice. A few colonial statutes directed courts to disbar or otherwise discipline attorneys for misconduct.²¹³ These provisions became more prevalent after the revolution when new states adopted comprehensive statutes relating to their judicial system. Georgia,²¹⁴ Massachusetts,²¹⁵ New

used the oath until at least the late nineteenth century. BENTON, *supra* note 9, at 45-47. New Hampshire used the oath into the twentieth century. *Id.* at 70-73. A modified version continued as the official oath in Pennsylvania until at least 1920. *Id.* at 93.

210. In 1777, North Carolina required that the lawyer swear to "truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability." 2 CHROUST, *supra* note 12 at 166, n.193; BENTON, *supra* note 9, at 88-89. In 1786, Virginia moved to a short oath. 2 CHROUST, *supra* note 12, at 261, n.172. In 1837, Rhode Island provided for a short oath. BENTON, *supra* note 9, at 96. See generally Goodman, *supra* note 23, at 409 (reporting "the tendency of the 19th century bar . . . to shorten and dilute the early English version of the oath," apparently because it was "outmoded" and characterizing the new oath as "so shortened as to eliminate the most of its meaning"). See also *infra* notes 214-220 (reporting states that adopted comprehensive lawyer statutes, many of which provided for short oaths).

211. Admission standards were quite variable during the colonial and post-revolutionary period. Some colonies and states set virtually no standards for admission while others at least attempted to regulate admission. There is a reasonable amount of scholarship on early American admission regulations, particularly the relaxation of admission standards in the early nineteenth century. Professors Chroust and Warren dedicate much of their works to discussion of admission standards. See generally CHROUST, *supra* note 12; WARREN, *supra* note 18. Horris Bailey devoted an entire work to admission of lawyers in early Massachusetts. See generally BAILEY, *supra* note 206.

212. For example, the North Carolina colony experimented with different admission and licensing schemes, in part to control attorney "mismanagement of causes either through ignorance or neglect." 1 CHROUST, *supra* note 12, at 319-20 (describing 1753 statute concerning admission and 1755 legislative complaint about the "growing number of attorneys. . . . And their mismanagement of Causes either through Ignorance or Neglect").

213. In 1665 New York, for example, the Duke's Laws established a court system and provided for punishment of "common barrators" if found "vexing others with unjust, frequent and endless law suits." *Id.* at 154. In 1722, Pennsylvania's first law governing admission of attorneys, provided for the English penalties and suspensions for lawyers who "misbehaved." *Id.* at 222; see also BENTON, *supra* note 9, at 91-93.

214. In 1789, Georgia provided for judicial control of admission and discipline of attorneys, and also provided a short form of oath for attorneys to "uprightly demean" themselves "to the best of the [their] knowledge and ability." BENTON, *supra* note 9, at 49.

215. Massachusetts' 1836 statute, among other things, provided that lawyers had to be at least 21 years old, of good moral character and otherwise qualified through study or examination. Bailey, *supra* note 206, at 57. The act mandated a simple oath and provided generally for a lawyer's removal by the courts "for deceit, malpractice or other gross misconduct." *Id.* at 63. In 1860, Massachusetts re-instituted the longer "do no falsehood" oath. *Id.* at 61-62.

York,²¹⁶ New Jersey,²¹⁷ North Carolina,²¹⁸ and Virginia²¹⁹ adopted judicial statutes that addressed lawyer admission and practice. The statutes varied from state to state, but they usually touched on lawyer conduct standards by regulating the oath of office (usually a short oath) and providing for judicial disbarment of lawyers in cases of deceit or malpractice. A few, such as the New York statute, addressed additional matters such as fees and willful delay of suits.²²⁰

Unlike the English experience under the 1275 First Statute of Westminster,²²¹ the deceit and misconduct prohibitions of the American statutes did not seem to spur judicial development of more detailed standards of conduct for lawyers. It appears that American courts during the colonial and post-revolutionary period generally did not discipline attorneys to the degree necessary to develop uniform standards of conduct.²²² Indeed, scholars have reported that the early American courts rarely exercised their power to discipline lawyers at all, regardless of whether that power came from their inherent power or an authorizing statute.²²³ Nor

216. New York's 1787 statute mandated a short form of oath, provided for fines and imprisonment of attorneys guilty of "any manner of deceit, collusion in any court," imposed civil liability on attorneys who willfully delayed suits for their own gain, established client billing schedules and procedures and provided for disbarment of attorneys who let others sue or defend in their name. BENTON, *supra* note 9, at 79-84; 2 CHROUST, *supra* note 12, at 247-49.

217. In 1799, New Jersey passed an "Act to Regulate the Practice of the Courts of Law." The Act provided a fine for excessive fees, disbarment of lawyers guilty of "malpractice," and civil damages for "neglect" and mismanagement. 2 CHROUST, *supra* note 12, at 252-53; BENTON, *supra* note 9, at 74-75. The New Jersey Supreme Court, acting pursuant to the 1799 act, required attorneys to take both an oath of allegiance and a short lawyer's oath. *Id.*; 2 CHROUST, *supra* note 12, at 254 n.132. This scheme continued in New Jersey until at least the early twentieth century. BENTON, *supra* note 9, at 76-77 (reprinting law and oath as of 1909).

218. A 1786 North Carolina Act, which established the court system for the new state, briefly addressed lawyer conduct by limiting fees and allowing only one attorney for each litigant. BENTON, *supra* note 9, at 89-90.

219. Virginia's 1792 act provided for judicial discipline over attorneys guilty of "malpractice," set fee schedules, permitted only two lawyers on each side, and provided penalties for attorneys whose suits were dismissed for their non-attendance. 2 CHROUST, *supra* note 12, at 263-65. It also continued a short oath, which was in use in Virginia until at least the early twentieth century. BENTON, *supra* note 9, at 110.

220. See *supra* note 216 (discussing 1787 New York statute).

221. See *supra* notes 77-81 (discussing English cases interpreting Chapter 29 "deceit" prohibition of 1275 statute).

222. This is an area in need of further research. There is some suggestion of judicial attempts to set standards of conduct. Professor Douglass reports that during the late seventeenth century Maryland courts established rules of conduct and disciplined lawyers, but his examples of rules of conduct primarily concern court procedures. Douglass, *supra* note 202, at 367-68. He cites only two examples of disbarment, one of which was for a false plea. *Id.* Likewise, Professor Chroust reports that the New York Governor in 1727 appointed a "Committee to Hear Grievances in the Practice of Law," which was charged in part "with the enforcement of ethical standards among the legal profession," but Professor Chroust does not report what, if anything ever became of this committee. 1 CHROUST, *supra* note 12, at 173-74.

223. See Wolfram, *Toward a History I*, *supra* note 19, at 473 (noting that the English system of judicial control and discipline over lawyers carried over to the American colonies but that discipline in fact "seems to have been employed only rarely" and that this "relative disuse continued after the American revolution with little variation until well into the

can we assume that all colonies and early states imported the English standards of conduct. Some early American courts applied English law regarding lawyers,²²⁴ but others expressly rejected English law.²²⁵

3. *Fee Statutes*

A pervasive concern in colonial America was the fees of lawyers. Every colony—Connecticut,²²⁶ Delaware,²²⁷ Georgia,²²⁸ Maryland,²²⁹ Massachusetts,²³⁰ New Hampshire,²³¹ New Jersey,²³² New York,²³³ North Car-

later part of the twentieth century”); Papke, *supra* note 200, at 34 (noting that courts before the Civil War “only rarely initiated formal disciplinary proceedings”).

224. In 1721, Delaware colonial law provided that attorneys who “misbehave” would be subject to the same penalties as attorneys in Great Britain. BENTON, *supra* note 9, at 45. In 1731, Georgia formally adopted the 1729 English statute. See SCHELY, DIGEST OF THE ENGLISH STATUTES IN FORCE IN THE STATE OF GEORGIA 353-55 (1826); BENTON, *supra* note 9, at 48; WARREN, *supra* note 18, at 126. In 1702, North Carolina moved to control lawyers under the English statutes, particularly the 1275 statute and 1605 act. 1 CHROUST, *supra* note 12, at 316; BENTON, *supra* note 9, at 86-88. In 1712, South Carolina adopted selected English statutes as its own laws, including the 1402 act. 1 CHROUST, *supra* note 12, at 298-99; BENTON, *supra* note 9, at 97; WARREN *supra* note 18, at 119. Other colonies may have used English law governing lawyers, through more general adoption of English law. Maryland, for example, passed an act in 1662 declaring that when the laws of Maryland were silent on a subject, the law of England was to govern. WARREN, *supra* note 18, at 49. Finally, New Jersey “probably followed more closely the common law of England and English precedents than any other American colony;” New Jersey even had an order of sergeants. 1 CHROUST, *supra* note 12, at 193; WARREN, *supra* note 18, at 113.

225. See 1 CHROUST, *supra* note 131, at 11-12 (generally discussing colonial attitudes toward English common law) & 17 (noting that each colony gradually developed its own unique common law).

226. Connecticut set a table of fees as early as 1750, and in 1787, Connecticut restate the fee in the new American currency at \$1.34 for a general retainer in the Superior Court and \$.67 in the County Court. 2 CHROUST, *supra* note 12, at 242 n.73.

227. In 1793, the new state of Delaware passed detailed regulations that specified fees for a variety of lawyer services, including one penny per line for “drawing the general issue.” *Id.* at 256 (setting out 1793 Delaware fee schedule).

228. 1 CHROUST, *supra* note 12, at 327 (describing Georgia fee regulation); 2 CHROUST, *supra* note 12, at 273 (describing 1784 fee service schedule).

229. Maryland limited fees as early as 1674, see *supra* note 202, and in 1714, Maryland limited fees according to the size of the claim and required lawyers to accept cases if a prospective client offered the prescribed fee. BENTON, *supra* note 9, at 52; WARREN, *supra* note 18, at 53.

230. In 1686, Massachusetts permitted lawyers to take fees, but these fees had to conform to a statutory schedule. WARREN, *supra* note 18, at 72. A 1701 law set the lawyer fee at ten or twelve shillings, depending on the court. BAILEY, *supra* note 206, at 16.

231. A 1714 New Hampshire act limited fees according to the court in which the lawyer practiced. BENTON, *supra* note 9, at 70.

232. In 1750, the New Jersey legislature regulated both attorney admission and fees. 1 CHROUST, *supra* note 12, at 199. Warren reports this regulation as passing in 1740. WARREN, *supra* note 18, at 112.

233. 1 CHROUST, *supra* note 12, at 159-60 (describing New York colonial fee regulation).

olina,²³⁴ Pennsylvania,²³⁵ Rhode Island,²³⁶ South Carolina,²³⁷ and Virginia²³⁸—had some form of regulation addressing attorneys' fees.²³⁹ The colonial fee statutes addressed both the fee that a lawyer could charge his own client and the fee that a losing adversary must pay as part of the judgment.²⁴⁰ Professor Leubsdorf attributes the fee statutes to both the anti-lawyer sentiment and the regulatory mood of the era.²⁴¹ He also reports that fee regulation relaxed considerably in the early nineteenth century due to increasing recognition of the independence of contract between attorney and client and development of the "American rule" under which parties paid their own attorneys' fees.²⁴²

4. *Litigation Rules and Procedural Statutes.*

The colonies, early states and the new federal government had court rules and procedural statutes that addressed lawyer behavior in litigation. Some were unique, such as the 1659 Maryland decorum that lawyers in a case speak to one point before addressing the next "without disturbing each other."²⁴³ Other rules were more common, such as the practice in equity that a lawyer must sign and attest to bills.²⁴⁴ Even the new federal Congress reacted to reported litigation abuses by lawyers, when, in 1813, it passed the "vexatious lawyer" statute imposing costs on any attorney

234. In the eighteenth century, the North Carolina colony enacted several statutes addressing lawyers' fees. *Id.* at 317-19 (describing and quoting 1715, 1743 and 1770 statutes).

235. In 1710, Pennsylvania permitted attorneys under a maximum fee schedule. *Id.* at 218. Pennsylvania's fee statutes had a turbulent history, with several in the early eighteenth century being passed only to be disallowed by the Queen in Council. *Id.* at 219. Finally, in 1752, a fee schedule was allowed which set specific rates for particular services. *Id.*

236. At least two Rhode Island laws, passed in 1728 and 1766, regulated the fees of attorneys. *Id.* at 139-40.

237. *See id.* at 298 (reporting fee schedule under 1694 South Carolina act).

238. After attempting to outlaw fee-paid attorneys, *see supra* note 203, Virginia became troubled by lay lawyers—"ignorant men who will pretend to assist their friend in his business" before the courts—and in 1680 allowed professional lawyers but only at the fee set by statute. 1 CHROUST, *supra* note 12, at 271-72; BENTON, *supra* note 9, at 106-07; WARREN, *supra* note 18, at 42.

239. *See* Leubsdorf, *Attorney Fee Recovery*, *supra* note 15, at 11 n.8 (collecting colonial fee statutes).

240. *Id.* at 10 ("During much of the eighteenth century, virtually all the colonies tried to regulate attorney fees by statute. To be effective, such legislation had to prescribe both the fees a lawyer could charge his client and those that could be recovered from a defeated adversary."); *see also id.* at 12-13 (comparing colonial fee regulation to contemporaneous English practice).

241. *Id.* at 11.

242. *See generally id.* at 9 (stating that in "the first half of the 19th century, lawyers freed themselves from fee regulation and gained the right to charge what the market would bear"); *see also id.* at 13-17 (discussing disappearance of fee regulation and emergence of the "American rule"). *See also* 1 CHROUST, *supra* note 12, at 232-77 (discussing post-revolution fee regulation).

243. WARREN, *supra* note 18, at 52 (quoting a 1659 statute); *see also* 1 CHROUST, *supra* note 12, at 247 n.37 (discussing a similar 1657 decree).

244. *See supra* notes 101-103 (discussing English chancery court signature requirement). Justice Story, when he formulated the first set of federal equity rules in 1842, imposed the standard that a lawyer must attest that there is "good ground for the suit." FED. EQUITY R.P., Rule 24, 42 U.S. (1 How.) xli-lxx (1842).

who "multiplied the proceedings in any cause before the court . . . so as to increase costs unreasonably and vexatiously."²⁴⁵ For the most part, however, procedural rules and statutes were aimed at the litigation conduct of both litigant and counsel rather than the attorney alone. Indeed, most litigation penalties, such as imposition of costs or striking of pleadings, attached only to parties.²⁴⁶

This procedural governance of attorney behavior in colonial America apparently did not extend to recognition of confidentiality through the attorney-client privilege. The status of the privilege in England at the time of American colonization was somewhat conflicted,²⁴⁷ and the privilege took even longer to gain hold in America. Professor Hazard reports that "[t]here appear to be no American cases on the attorney-client privilege until the 1820s."²⁴⁸

5. Bar Association Rules

A very few colonies had bar associations that addressed matters touching on lawyer conduct.²⁴⁹ For the most part, bar associations themselves were rare and their rules related only marginally to substantive practice standards.²⁵⁰ For example, New Hampshire lawyers formed a bar association soon after the revolution and issued rules governing lawyers.²⁵¹ Most of the New Hampshire bar rules regarded admission and supervision of students of law.²⁵² Only a few set forth standards of conduct, such as a ban on assisting others in the unauthorized practice of law and a ban on champerty and other financial incentives to suits.²⁵³

Some early bar association rules reflected a broader range of substantive concerns. In 1745, members of the Rhode Island bar met and signed a compact regulating practice and fees.²⁵⁴ These rules are interesting in that they show a concern by the bar to protect lawyers, or in Professor Warren's view, they show "the solidarity of the 'fraternity.'"²⁵⁵ The

245. Act of July 22, 1813, 3 Sta. 21. A slightly modified version of this statute is still in effect. See 28 U.S.C. § 1927. See *infra* note 518 (discussing modern statute).

246. See Andrews, *Motive Restrictions*, *supra* note 100, at 695-700 (discussing early American litigation rules and penalties).

247. See *supra* notes 146-150.

248. Hazard, *Attorney-Client Privilege*, *supra* note 13, at 1087.

249. See generally 2 CHROUST, *supra* note 12, Ch III (discussing colonial and post-revolutionary bar associations).

250. There are suggestions of additional substantive colonial bar association standards. For example, Professor Chroust and others report the formation of a bar association in New York, from 1744 to 1770, which was aimed in part at "legal etiquette and professional ethics," but the records of the association no longer exist, and the few professional conduct actions that Professor Chroust lists concern admission to the bar. See 1 CHROUST, *supra* note 12, at 181-91.

251. See WARREN, *supra* note 18, at 138-39 (discussing early New Hampshire bar association).

252. General Regulations for the Gentlemen of the Bar in the State of New Hampshire (1805) (on file with author).

253. *Id.* (New Hampshire Bar Rules 16 and 19).

254. WARREN *supra* note 18, at 142-43; see also 1 CHROUST, *supra* note 12, at 141 (discussing 1745 compact); and see Friedman, *supra* note 199, at 87.

255. WARREN, *supra* note 18, at 142.

Rhode Island bar rules included minimum fee provisions, a prohibition against signing blank writs and “dispersing them about the colony,” and a bar against representation of clients being sued by other attorneys for their fees, unless three or more brethren determined the fee to be “unreasonable.”²⁵⁶ Likewise, in Massachusetts, where county bar associations formed after the revolution, the bar association rules again dealt primarily with admissions standards and procedures,²⁵⁷ but a few reached out to fraternal protection. One rule of the Suffolk County bar association banned solicitation of business,²⁵⁸ and a few other bar associations set minimum fee schedules.²⁵⁹

6. Training and Academic Discourse

As a whole, colonial lawyers were poorly educated and trained as compared to their English contemporaries.²⁶⁰ There were few law books of any sort²⁶¹ and no inns for training.²⁶² Nevertheless, colonial lawyers undoubtedly received some ethical education, whether through on-the-job training in law offices or courtrooms or through informal discourse. The content of such training is difficult for modern scholars to uncover, but records survive of at least one person’s lectures on legal ethics, the speeches of Cotton Mather. In a 1710 address—what Professor Chroust calls the first address on professional duties in North America²⁶³—Mather amplified the ethical duties of a lawyer beyond those stated in the oaths of office and early statutes. Mather focused on the duty of each lawyer to do justice in litigation, imploring each to “keep constantly a Court of Chancery in your own Breast” and to “abominate the use of all unfair Arts to Confound Evidence, to Browbeat Testimonies, to Suppress

256. WARREN, *supra* note 18, at 142–43 (quoting rules); FRIEDMAN, *supra* note 199, at 87 (same).

257. See BAILEY, *supra* note 206, at 20–24 & 33–46 (describing revolutionary era bar associations in Massachusetts and reprinting their rules); WARREN *supra* note 18, at 196–97.

258. WARREN, *supra* note 18, at 200 (“no gentleman of the Bar ought to go out of his office to put himself in the way of applications for drawing of writs nor to employ any other persons to do business for him out of his office.”).

259. PAPKE, *supra* note 200, at 32 (noting that the Essex County bar association set a minimum fee schedule in the late eighteenth century); see also Gawalt, *supra* note 200, at 306 (noting that minimum fee regulations were in reaction to earlier efforts by the legislature to set maximum fees).

260. See FRIEDMAN, *supra* note 199, at 81–88 (discussing the colonial legal profession generally and noting that training of colonial lawyers, if any, was limited to study in the English inns or serving as apprentice in a colonial law office); WARREN, *supra* note 18, at 83 (noting that “in reality, in order to master the profession a student in the Colonies had to acquire far more knowledge than a student at the Inns of Court in London.”).

261. See 1 CHROUST, *supra* note 12, at 18–19 (noting the scarcity of legal texts in colonial America) & 21 (noting that colonial cases were generally not reported).

262. This is a bit of an overstatement, for there were a very few early clubs and bar associations that aimed in part to train lawyers. See THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS*, 100 (1985 ed.) (discussing the “Moot” in New York City in 1770s that trained lawyers and “occasionally expressed itself on standards of practice”); see also *supra* Part II(B)(5) (discussing colonial bar associations).

263. 1 CHROUST, *supra* note 12, at xi.

what may give Light in the Case.”²⁶⁴ He similarly urged lawyers to think of their broader reputation and duty to society and to refute the “old Complaint, That a Good Lawyer seldom is a Good Neighbor” “by making your Skill in the Law a Blessing to your Neighborhood.”²⁶⁵ In another address, Mather instructed lawyers regarding their duty to serve the poor: “what a noble thing would it be for you to find out oppressed widows and orphans; and as such can appear only ‘in forma pauperis;’ and are object, in whose oppression ‘might overcome right,’ generously plead their cause.”²⁶⁶

B. OVERVIEW OF THE SUBSTANTIVE STANDARDS OF CONDUCT IN COLONIAL AND EARLY AMERICA

The foregoing outline of regulation and standards must be taken in context. On the one hand, the pervasiveness of standards should not be overstated. Not every colony had each type of standard or regulation, and law within a single colony did not remain static. Some colonies had essentially no standards or regulation of attorneys. On the other hand, the extent of standards should not be understated. Early American lawyers were not without ethical standards. The problem is in determining the standards, particularly in any given colony at any given time.

Only three of the traditional core duties can be fairly be characterized as pervasive in the formal, positive law of the colonial and post-revolutionary period: the duties of litigation fairness, competency and reasonable fees. Litigation candor and fairness obligations were expressed in the “do no falsehood” oath, the procedural rules and misconduct statutes. Likewise, the duty of competency was part of the “do no falsehood” oath, and competency can be inferred from the admission standards and statutory prohibitions against malpractice. The duty of reasonable fees was reflected in the fee statutes of every colony as well as selected admission statutes.

The duties of loyalty and confidentiality do not appear in any of the formal regulations. This does not mean that colonial lawyers did not have these duties. The duties were recognized in England—under the 1275 First Statute of Westminster, for example—and they very well were part of the received wisdom of the law of lawyering. In fact, a few colonies expressly adopted this English law. Moreover, the two duties arguably fell within the statutory deceit or malpractice provisions of the American statutes. Yet, there is some indication that the English standards of loyalty may not have carried over to colonial America. For example, a few colonial provisions addressing the scarcity of lawyers run counter to traditional notions of loyalty. In 1695, New York limited each side in litigation to no more than two lawyers and empowered courts to order any lawyers

264. *Id.* at xi - xii (citing COTTON MATHER, *BONIFACIUS* 28-39 (1910)).

265. *Id.*

266. See Maute, *Lawyers' Pro Bono Responsibilities*, *supra* note 112, at 100-01 (reprinting Mather, *ESSAYS TO DO GOOD*).

in excess of two to plead for the other side.²⁶⁷

Similarly, there are few references in the colonial era to a lawyer's duty to serve the poor. As with the other duties, the English lawyer's tradition of service to the poor may have carried over to early American lawyers. In addition, there is some evidence of American colonies continuing the English tradition of *in forma pauperis* procedures,²⁶⁸ and Cotton Mather implored lawyers that they had a duty to serve the poor.²⁶⁹ Thus, although these duties are not expressly stated, they may have been part of an informal understanding of proper conduct for early American lawyers.

Interestingly, although some core traditional duties were virtually overlooked in formal standards, there is a hint, in the early local bar association rules, of more modern business concerns of lawyers. A few early bar association rules addressed concerns about solicitation of clients, fee competition, and interference with another's lawyer's business. These rules were too isolated to signify a trend, but they did foreshadow the business concerns of the codes promulgated by their successor bar associations almost a century later.

In sum, it is difficult to characterize the substantive standards of legal conduct in the United States before the mid-nineteenth century. Many regulations had the effect of setting some standards of conduct, but the regulation was sporadic, leaving gaps in the substantive standards. We do not know the degree to which "received wisdom" and informal understanding filled the gaps. In any event, it is safe to say that the nineteenth century began with relatively few formal dictates or guidelines as to the professional behavior of American lawyers.

III. STANDARDS OF CONDUCT FOR LAWYERS IN NINETEENTH CENTURY AMERICA

The nineteenth century has been termed the "dark ages" of legal ethics in the United States.²⁷⁰ As the preceding discussion suggests, this label might have been accurate in terms of formal standards at the beginning of the century, but by mid-century, American legal reformers were filling the void in two ways. First, David Dudley Field, the drafter of the highly influential New York "Field Code," introduced a new set of uniform standards of conduct for lawyers. This concise statement of eight statutory duties became law in several states in the second half of the nineteenth century. At the same time, legal educators, such as David Hoffman and George Sharswood, and many other lawyers were working to flesh out the cryptic outline of a lawyer's duties. These men lectured and wrote

267. See *supra* note 204 (reporting 1695 New York law). Massachusetts seemingly had a similar provision. *Id.*

268. John M. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 381 (1923).

269. See *supra* note 266.

270. I take this term from a 1975 unpublished paper by a Harvard law student. See William B. Moore, *Dark Ages or Enlightenment? A Survey of Legal Ethics In Theory and Practice in the United States Between the Years 1825 and 1905* (1975) [hereinafter *Dark Ages*] (on file with author and at Harvard Law School law library).

about legal ethics in unprecedented detail and thus brought a new level of understanding to a lawyer's duties.

Before addressing the work of the nineteenth century reformers and educators, I must note that a number of mid-nineteenth century laws and statutes, other than the Field Code, touched upon lawyer behavior. A few forms of colonial regulations—the “do no falsehood” oath and the deceit prohibitions, for example—persisted in some states.²⁷¹ Procedural law continued to directly, or indirectly, limit an attorney's litigation behavior.²⁷² The developing law of agency recognized basic duties of competence, loyalty and safeguarding of client property.²⁷³ Evidence law was beginning to more firmly recognize the attorney-client privilege and its underlying theory of confidentiality.²⁷⁴ Thus, all of the core duties, with the likely exception of service to the poor, had some basis in formal law. Yet, as in the colonial and early post-revolutionary periods, these standards were isolated and did not provide a comprehensive statement of a lawyer's duties. The reformers, by contrast, were expansive and direct in their discussion of a lawyer's duties, and they thereby began a new era in American legal ethics.

A. THE FIELD CODE STATUTORY STATEMENT OF A LAWYER'S DUTIES

David Dudley Field²⁷⁵ is famous for the contributions that his “Field Code” made in reforming civil procedure.²⁷⁶ The Field Code went beyond mere matters of pleading and addressed a variety of issues, including standards for lawyer admission.²⁷⁷ In particular, Section 511 of the

271. See *supra* notes 209 (oaths) and 215-21 (general lawyer statutes including deceit or other misconduct prohibitions).

272. See *supra* notes 244 (equity practice rules) and 246 (federal vexatious lawyer statute).

273. See JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY, §§ 182-88 (Little, Brown 1839) (agent's duty of ordinary skill and diligence) [hereinafter STORY, LAW OF AGENCY]; *id.* §§ 205-08 (agent's duty to safely handle property and money of principal); *id.* §§ 210-14 (agent's duty of loyalty and bar against self-dealing).

274. See generally HAZARD, *Attorney-Client Privilege*, *supra* note 13 (discussing history of privilege and its emergence in American cases in the 1820s).

275. See generally DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW (England Publishing, Inc., 1986) (discussing Field's life and work); see also SHAFFER, *supra* note 262, ch. 5 (“Public and Private Lives: The Field-Bowles Debate”) (discussing Field's law practice and the public debate that it prompted).

276. The exact definition of the “Field Code” is elusive. In 1847, Field convinced the New York legislature to appoint him as one of three commissioners to reform legal procedures. Field was the primary drafter of the new code of civil procedure, presented to the legislature in 1848. The commission presented subsequent reports with amendments and the legislature published the code in 1850. The 1850 code also included a code of criminal procedure, and years later, the legislature added a penal code. It is principally the code of civil procedure that is commonly known as the “Field Code,” but even the code of civil procedure was not static. It underwent revisions by both Field's commission and the legislature. Most authorities cite to either the original 1848 proposed code or the 1850 published version, as the “Field Code.” I use the 1850 version. The Code of Civil Procedure of the State of New York: 1850 (Vol. 1) (The LawBook Exchange Limited) [hereinafter Field Code].

277. *Id.* §§ 506-510 (admission of attorneys).

1850 Field Code listed eight duties of a lawyer.²⁷⁸ Field modeled his list directly on the 1816 Swiss oath.²⁷⁹ Like the Swiss oath, the Field Code primarily stated litigation duties, and in this regard, the Field Code was specific: duties to respect the courts, to not mislead the courts, to do justice in litigation, to abstain from offensive personality, to not unduly prejudice parties or witnesses, to not incite passion or greed in litigation and to take cases on behalf of the poor and oppressed.²⁸⁰ Also important, the Field Code included the duty of confidentiality, which was not part of the Swiss oath.²⁸¹

Field's statement of duties was a significant step forward in American legal ethics. The Field Code set forth standards at a time when very few states had any formal dictates on lawyer behavior. The Field Code also made the standards a statutory obligation and provided for disbarment or suspension of a lawyer for the "wilful violation" of any of the duties.²⁸² Moreover, the Field Code was widely adopted, particularly by the west-

278. Section 511 stated the following duties of a lawyer:

1. To support the constitution and laws of the United States and of this state;
2. To maintain the respect due to the courts of justice and judicial officers;
3. To counsel or maintain such actions, proceedings, or defenses, only, as appear to him legal and just, except the defense of a person charged with a public offence;
4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;
5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;
6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;
7. Not to encourage either the commencement or the continuance of an action or proceeding, from any motive of passion or interest;
8. Never to reject, for any considerations personal to myself, the cause of the defenseless or oppressed.

Id. § 511, at 204-09.

279. The Swiss oath "so justly [expresses] the general duties of lawyers, that we cannot do better than take almost the very terms of it." *Id.* at 205 (official commentary to Field Code § 511).

280. *Id.* In addition, Field fleshed out the litigation duties in lengthy commentary to Section 511. A lawyer did not have the duty to employ every means for his client. Field Code, *infra* note 316, at 207-08 ("there are duties to society, to every member of its, as well as to the one who retained him."). A lawyer could defend a guilty criminal client. *Id.* at 209 ("We by no means assert, that an advocate may not take upon himself the defense of a man whom he believes to be guilty."). Likewise, a lawyer could present technical defenses in civil cases. *Id.* at 209 ("He may also in civil cases present the defenses recognized and provided by law, although he may himself disapprove of the principle and policy of the law."). The commentary was itself unusual in that the 1850 Field Code did not have commentary for most of its provisions.

281. *See supra* note 194 (reprinting 1816 Swiss oath).

282. Field Code, *supra* note 276, § 525, at 215-216 (providing for disbarment or suspension for a variety of offenses including conviction of a felony or misdemeanor involving moral turpitude, knowing signature of a frivolous pleading, wilful disobedience of a court order and "wilful violation of any of the provisions of section 511"). Whether punishment was actually extended for violation of one of the eight broadly worded Field Code duties is a separate question.

ern territories and new states.²⁸³ By the turn of the twentieth century, at least seventeen states had adopted some form of the Field Code's statement of a lawyer's duties.²⁸⁴

Despite these advances, the Field Code statement of substantive standards was limited. To be sure, the Field Code spoke in relative detail as to a lawyer's ethical obligations in litigation, and it expressed duties of confidentiality and service to the poor. But, it omitted key aspects of a lawyer's duties. The Field Code was silent as to competence, fees and loyalty. These and other duties were fleshed out by other nineteenth century works.

B. THE ACADEMIC WORKS OF DAVID HOFFMAN AND GEORGE SHARSWOOD

Two professors, David Hoffman and George Sharswood, were instrumental in using legal education to develop and refine the standards of conduct for lawyers in the mid-nineteenth century. David Hoffman was a professor of law at the University of Maryland²⁸⁵ who developed an innovative and ambitious plan for legal education, entitled *Course of Legal Study*.²⁸⁶ In 1836, Hoffman appended to the second edition of his *Course*

283. Not every state that adopted the Field Code also adopted the statement of a lawyer's duties. Alaska, for example, adopted the Field Code in 1900, but adopted only a simple oath of office for lawyers and did not adopt a statement of the lawyer's duties. See *Laws of Alaska*, Ch 75, Section 735 (1900). Interestingly, New York itself quickly abandoned (or never adopted) the detailed statement of a lawyer's duties. See WOLFRAM, *TOWARD A HISTORY I*, *supra* note 19, at 485 (stating that New York never adopted the lawyer duty provision of the 1850 code).

284. States typically adopted the standards as a statutory statement of duties, coupled with both a simple oath by which the lawyer promised to abide by the duties and a statutory provision for disbarment upon violation of the duties. Iowa and Minnesota both adopted statement of duties in 1851. IOWA CODE § 1614 (1851) (duties); Rev. Stat. Territory of Minn., Ch. 93, § 7 (duties). In 1852, Alabama and Indiana adopted the duties (with minor variations). ALA CODE § 5738 (1882) Title 9, ch. 10 § 738 (1852); Ind. Rev. Stat. XLV, § 771 (1852) (duties). Nebraska did so in 1857. *Laws of the Territory of Nebraska*, ch V, § 5 (1857). Oregon adopted the duties in 1862. *Laws of Oregon, 1843-1872*, Title II, § 1006 (Semple 1874)). Idaho adopted the duties in 1880. Idaho Gen. Law. § 120 (1880-81). The Oklahoma territory did so in 1890. *Statutes of Oklahoma*, Ch. 7 § 4 (1890). In addition, the ABA reported in 1907 that several other states – California, Georgia, Kentucky, Mississippi, Utah, and Wisconsin – had adopted a similar form of statement of duties. ABA Memorandum For Use of ABA Committee to Draft Canons of Professional Ethics, at 112 (March 23, 1908). See *infra* notes 407-411 (discussing ABA study of state ethics codes). Washington converted the standards back to an oath, where the lawyer recited each of the listed duties. See 31 ABA REPORTS, *supra* note 2, at 714-15 (quoting Washington oath). The Dakota territories used both the Field Code statutory statement of duties and the "do no falsehood" oath. Revised Codes of the Territory of Dakota, Chapter 18, 1 (oath) and § 4 (duties). The Louisiana Bar Association, in 1899, adopted the duties as its "Code of Ethics." 31 ABA REPORTS, *supra* note 2, at 714.

285. See generally Maxwell Bloomfield, *David Hoffman and the Shaping of A Republican Legal Culture*, 38 MD. L. REV. 673 (1979) (surveying the life and work of David Hoffman). See also Stephen E. Kalish, *David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54 (1982) (discussing Hoffman's ethical resolutions); Thomas L. Shaffer, *David Hoffman's Law School Lectures*, 32 J. LEGAL EDUC. 127 (1982) (discussing Hoffman's law lectures).

286. The most commonly cited version is the two-volume enlarged Second Edition, which he published in 1836. DAVID HOFFMAN, *COURSE OF LEGAL STUDY* (2d ed. 1836).

of *Legal Study*, a list of fifty “Resolutions In Regard to Professional Department.”²⁸⁷ Hoffman’s purpose in publishing the resolutions was to fortify the student, who although “a young man of the soundest morals, and of the most urbane, and honorable department,” will be in need of a “guide” when he is “fully engaged in all the perils, and honors, and emoluments of an arduous profession.”²⁸⁸

Hoffman’s fifty principles were stated in the form of resolutions that Hoffman urged lawyers to repeat twice per year.²⁸⁹ They covered a broad range of issues. Hoffman’s resolutions addressed five of the six core duties of lawyers: litigation fairness,²⁹⁰ competence,²⁹¹ loyalty,²⁹² reasonable fees,²⁹³ and service of the poor.²⁹⁴ As to fees, Hoffman not only addressed general fee practices and standards, but he also explored contingent fees in relative detail.²⁹⁵ The litigation duties were particularly detailed. At least a dozen of Hoffman’s resolutions addressed litigation behavior.²⁹⁶ Yet, despite this detailed discussion on fees and litigation, Hoffman did not mention the duty of confidentiality.²⁹⁷

287. *Id.* at 752-75 (Resolutions). Hoffman introduces the Resolutions with both a broader discussion of professional department, *id.* at 720-44, and a particular explanation of the resolutions. *Id.* at 744-51. See also 31 ABA REPORTS, *supra* note 2, App. H, at 717-35 (reprinting Hoffman’s fifty resolutions); and see DRINKER, *supra* note 5, App. E (same).

288. *Hoffman*, *supra* note 286 at 751.

289. *Id.* at 775 (Resolution 50).

290. A significant number of Hoffman’s resolutions addressed the lawyer’s litigation behavior. See *id.* at 752-53 (Resolutions 3, 6: resolving to respect judges and court officials); *id.* at 766 (Resolution 34: resolving to not be critical of judges after losing a case); *id.* at 754 (Resolution 10: resolving not to bring “frivolous and vexatious defenses”); *id.* (Resolution 11: resolving to advise a client to “abandon” claims and defenses that “ought not” be sustained); *id.* at 755 (Resolution 15: addressing lawyer’s duties with regard to criminal clients); *id.* at 758-59 (Resolution 19: resolving to abide by client’s decision to settle case); *id.* at 776 (Resolution 35: resolving not to “be voluntarily called as a witness in any cause in which I am counsel”); *id.* at 769-70 (Resolution 41: promising to give accurate and true readings of documents in court); *id.* at 770 (Resolution 42: resolving to be fair in examination of witnesses); see also *infra* notes 322-323 (discussing Hoffman’s views as to whether a lawyer should bring defenses such as statute of limitation and infancy).

291. This duty included the lawyer’s duty to consult with other lawyers and continue study. *Id.* (Resolution 20: resolving to advise a client to consult other lawyers when “I [do] not understand my client’s cause, after due means to comprehend it”); *id.* at 766 (Resolution 34: resolving to acknowledge that “[l]aw is a deep science” and to be “ever willing to be further instructed”).

292. *Id.* at 753 (Resolution 8: resolving that if “I have ever had any connection with a cause, I will never permit myself . . . to be engaged on the side of my former antagonist”).

293. *Id.* at 762 (Resolution 27: resolving to charge “what my judgment and conscience inform me is my due”); *id.* at 763 (Resolution 29: resolving to return unearned retainers); *id.* at 774 (Resolution 49: noting that “[a]varice is one of the most dangerous and disgusting vices” and resolving “never to receive from any one, a compensation, not justly and honourably my due”).

294. *Id.* at 758 (Resolution 18: resolving to “never close my ear or heart, because my client’s means are low” and to “[t]hose who have none . . . they shall receive a due portion of my services, cheerfully given”).

295. *Id.* at 760-62 (Resolution 24: cautioning against investing in a client’s cause but allowing contingent fees).

296. See *supra* note 290 and *infra* notes 322-323.

297. The duty of confidentiality might be seen as a part of loyalty, but Hoffman’s Resolution 8, which addressed conflicts of interest, did not refer to confidentiality. See *supra* note 292.

In addition to the five core duties, Hoffman discussed a number of other concepts. He reminded lawyers to love the practice of law,²⁹⁸ and, true to their name, many of his resolutions instructed lawyers on matters of deportment, such as his admonitions to "be always courteous"²⁹⁹ and to have a confident bearing.³⁰⁰ Hoffman addressed a number of client relations issues, such as prompt and candid communications,³⁰¹ proper handling of client money,³⁰² and return of client papers.³⁰³ Finally, Hoffman included a number of resolutions regarding proper relations with other lawyers. Some resolutions stated gentlemanly notions,³⁰⁴ but others, such as the resolution to not underbid another lawyer's fees,³⁰⁵ reflected trade protectionism concerns.

In 1854, George Sharswood, a Professor at the University of Pennsylvania, followed Hoffman's example with *An Essay on Professional Ethics*.³⁰⁶ Sharswood's essay, like Hoffman's list of resolutions, was an academic work that included many concepts of proper gentlemanly behavior. Sharswood peppered his essay with tips on courtesy and deportment,³⁰⁷ discussed client relations in detail,³⁰⁸ and emphasized fair dealings with other lawyers.³⁰⁹ Sharswood also addressed the core duties

298. HOFFMAN, *supra* note 286, at 773 (Resolution 48: resolving to cultivate a "passion for my profession" or "abandon it").

299. *Id.* at 752 (Resolution 5).

300. *Id.* at 772 (Resolution 46: resolving to avoid "morbid timidity" and act with "self-possession," "calmness," and "steady assurance").

301. *Id.* at 764 (Resolution 31: resolving that "[a]ll [my] opinions for clients. . . shall be my opinions, deliberately and sincerely given, and never *venal and flattering offerings to their wishes*"); *id.* at 767 (Resolution 36: resolving that "[e]very letter or note that is addressed to me, shall receive a suitable response, and in proper time.").

302. *Id.* at 762 (Resolution 25: resolving to promptly retain a client's fund); *id.* (Resolution 26: resolving to keep the client's funds "*distinctly as his*").

303. *Id.* at 763 (Resolution 30: resolving that client papers will be "carefully arranged by me, and handed over to him").

304. *Id.* at 757 (Resolution 17: resolving to have regard for "junior brethren"); *see also id.* (Resolution 37: resolving not to envy other lawyers); *id.* at 768 (Resolution 38: resolving to forgive, rather than to seek revenge, against other lawyers who abused the lawyer in his youth).

305. *Id.* at 763 (Resolution 28: resolving to "regard as eminently dishonorable all *underbidding* of my professional brethren"); *see also id.* at 753 (Resolution 7: resolving not to take clients from other lawyers).

306. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS*, (5th ed. 1907) [hereinafter SHARSWOOD]; *see also* ABA REPORTS, *supra* note 2 (special reprinting of Sharswood essay). Sharswood was a law professor at the University of Pennsylvania. For a discussion of George Sharswood's work and life, see the "Memorial" dedicated to Sharswood in the fifth edition of his essay, *supra* (pages not numbered).

307. *See id. supra* note 306, at 64 (urging that the lawyer should "carefully aim to repress everything like excitability or irritability"); *id.* at 76 (stating that a good reputation can only be achieved "by real learning, by the strictest integrity and honor, by a courteous demeanor, and by attention, accuracy and punctuality in the transactions of business").

308. *See id.* at 110 (noting that a lawyer should disclose all possible conflicts); *id.* at 167 (stating that truth to all, including client, should be "the polar star of the lawyer").

309. *See id.* at 72-76 (discussing a lawyer's obligation of "fidelity to the profession" and urging that lawyer be particularly mindful of his professional reputation, especially in keeping his word).

of lawyers, including litigation fairness,³¹⁰ competence,³¹¹ loyalty,³¹² reasonable fees,³¹³ and service to the poor,³¹⁴ and unlike Hoffman, Sharswood addressed confidentiality, albeit fleetingly.³¹⁵ Like Hoffman, Sharswood focused on litigation behavior and devoted a substantial portion of his essay to the lawyer's litigation duties, ranging from respect for the courts³¹⁶ to specific litigation actions.³¹⁷

Hoffman and Sharswood are now the focus of modern scholarly attention and debate. Most academic observers describe their works as momentous in the field of American legal ethics.³¹⁸ Many claim that Hoffman and Sharswood represent a bygone tradition of lawyers who had a high calling and sought justice over everything else.³¹⁹ Yet, some

310. See *infra* notes 324-325.

311. See *id.* at 76 (discussing negligence concerns); *id.* at 125-28 (discussing the need for a lawyer's continuing study).

312. Sharswood broadly discussed "fidelity" to the client and raised a number of issues under this general duty. See *id.* at 76-125. Sharswood's litany of duties, beginning with "[e]ntire devotion to the interest of the client" is the most quoted portion of the entire essay. *Id.* at 78. Although much of this discussion concerned the relative duties to court and client in the litigation context, see *supra* notes 308-11, some addressed more traditional conflicts of interest concerns. See *id.* 109-10 (urging a lawyer to disclose "every circumstance of his own connection with the parties or prior relation to the controversy, which can or may influence his determination in the selection of him for the office" because a client has the right to presume that the lawyer "has no interest which may betray his judgment or endanger his fidelity").

313. See generally *id.* at 136-66 (addressing fees). Among other things, Sharswood noted that unlike English barristers, an American lawyer could sue for fees, *id.* at 136, that fees must be reasonable, *id.* at 153, and that contingent fees, though legal, are "dangerous." *Id.* at 153-66.

314. *Id.* at 151 (stating that there "are many cases, in which it will be his duty . . . to work for nothing" and that the time should never come "when a poor man with an honest cause, though without a fee, cannot obtain the services of honourable counsel, in the prosecution or defence of his rights").

315. SHARSWOOD, *supra* note 306, at 107 (stating that "the law seals [a lawyer's] lips as to what has thus been communicated to him in confidence by his client.").

316. *Id.* at 62-63 (stating that lawyers should treat judges and court officers with respect).

317. See *id.* at 77-109 (discussing a lawyer's duties when the demands of his client in litigation conflict with the lawyer's "own sense of what is just and right"); see also *infra* notes 322-326 (comparing Hoffman's and Sharswood's positions on litigation duties).

318. E.g., HURST, *supra* note 200, at 329 (stating that Sharswood "authoritatively spoke the articulate conscience of the profession in the nineteenth and early twentieth centuries"); Thomas L. Shaffer, *Towering Figures, Enigmas, And Responsive Communities in American Legal Ethics*, 51 ME. L. REV. 229, 230 (1999) (stating that "Hoffman invented American legal ethics"); Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look as the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 10 (1999) (describing Hoffman and Sharswood as "the authors of the two most important early-nineteenth century American treatises on legal ethics"); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 (1992) (arguing that Sharswood's essay "was the original source of most legal ethics codes"); Walter P. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1064 (July 1978) (stating that Hoffman "has the undisputed title to the first formulation of a code of professional ethics" in the United States).

319. See Pearce, *supra* note 318, at 241 (arguing that "Sharswood believed that a lawyer's principal obligation was the republican pursuit of the community's common good even where it conflicts with either her client's or her own interests"); Carle, *supra* note 318, at 10-13 (discussing the "religious jurisprudence" of both Hoffman and Sharswood and concluding that Sharswood "reached much the same conclusion as Hoffman" that lawyers

scholars dispute whether Sharswood shared this ideal with Hoffman,³²⁰ and others question whether this ideal reflected the reality of nineteenth century law practice.³²¹

This debate and discussion focus primarily on Hoffman's and Sharswood's positions as to the lawyer's role and responsibility in litigation when the lawyer's own morals differ from those of the client. Hoffman instructed young lawyers to resolve that "[m]y client's conscience, and my own, are distinct entities,"³²² and that as a result, a lawyer must sometimes override his client's wishes. Among other things, Hoffman admonished lawyers to intercede and not present technical defenses such as the statute of limitation or infancy, if his client actually owed the debt.³²³ Sharswood presented a somewhat different view. He did not join with Hoffman in saying that the lawyer should refrain from presenting good defenses, but Sharswood did not relieve the lawyer of all responsibility for his client's actions and causes. Sharswood made a distinction between civil plaintiffs and defendants, and argued that counsel was "duty bound" to refuse a plaintiff whose demand offends the lawyer's "sense of what is just and right."³²⁴ Even as to civil defendants, Sharswood argued that the lawyer "ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposing party, by sharp practice, or special pleading."³²⁵

I offer a slightly different perspective on the modern scholarly debate. Hoffman's and Sharswood's discussion of these litigation issues—indeed their entire works—can be seen as a step in the ongoing evolution of legal ethics standards, from the cryptic statements of duty in the medieval oaths to detailed modern standards of conduct. The medieval oaths stated a number of litigation fairness duties, including a duty not to bring unjust causes.³²⁶ Commentators, such as *The Mirror*,³²⁷ Lord

"could and should exert their sense of justice in individual cases to steer the legal system toward just results").

320. See Bloomfield, *supra* note 285, at 687 (noting that Sharswood was familiar with Hoffman's work and "agreed with many of their specific recommendations" but arguing that "the two men were poles apart" on fundamental issues such as professional accountability); see also James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2427-29 (2003) (arguing that Sharswood's view was "much more nuanced than Hoffman's" but that it "approximates Hoffman's less discriminating moralism"); M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: the "Other Tradition"*, 47 U. KAN. L. REV. 793, 803-07 (1999) (comparing Sharswood to Hoffman and concluding that Sharswood took a "middle path" and was "unwilling to accept the extreme moralistic view of Hoffman").

321. Norman W. Spaulding, *The Myth of Civil Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003) (arguing that to the extent that Hoffman urged a moralistic role for lawyers, that view did not reflect the actual practice of mid-nineteenth century lawyers and was not shared by Sharswood).

322. HOFFMAN, *supra* note 287, at 755 (Resolution 14).

323. *Id.* at 754 (Resolution 12: statute of limitations); *id.* (Resolution 13: infancy).

324. SHARWOOD, *supra* note 306, at 96.

325. *Id.* at 99.

326. See *supra* note 61 (1273 Court of Arches oath) and note 186 (1274 French oath).

327. See *supra* note 74 (quoting *The Mirror*).

Whitlocke³²⁸ and Cotton Mather,³²⁹ expounded on the meaning of this and other litigation duties. Hoffman and Sharswood essentially did the same thing. They added another level of detail to the discussion and disagreed somewhat on the practical application of the duties, but they were discussing the same basic litigation duties. In fact, Sharswood's essay often referred to historical duties of lawyers, and he directly tied much of his discussion of a lawyer's litigation duties to the elements of the "do no falsehood" oath.³³⁰

This is not to say that Hoffman's and Sharswood's works were insignificant. To the contrary, they added valuable insights to the understanding of a lawyer's duties, and they did so at a time when American lawyers had very little guidance. They helped launch a debate as to what the duty to do justice meant, a debate that would continue into the twenty-first century and one that eventually would change the duty itself.³³¹ Hoffman and Sharswood also added new perspectives on law office management, deportment, client relations and relations within the profession.³³² In other words, they were instrumental in moving discussions of legal ethics toward the modern era.

C. OTHER NINETEENTH CENTURY DISCUSSIONS OF LEGAL ETHICS

Hoffman and Sharswood were not the only lawyers in the nineteenth century to add new detail to the lawyer's basic duties. Lawyers got such ethical guidance from many sources, including law school lectures, journal articles and even eulogies of prominent lawyers.³³³ Modern scholars are beginning to collect these works,³³⁴ and I highlight a few here. First, as the Hoffman and Sharswood works suggest, a primary source of ethical instruction was law school lectures.³³⁵ In 1871, William Allen Butler gave

328. See *supra* note 81-89 (quoting Lord Whitlocke).

329. See *supra* notes 264-266 (quoting Cotton Mather); see also PAPER, *supra* note 200, at 35 (discussing Cotton Mather's speech and comparing it to Sharswood).

330. See SHARSWOOD, *supra* note 306, at 56-64, 115, 167. Sharswood characterized the "do no falsehood" oath as a "comprehensive summary of [a lawyer's] duties as a practitioner." *Id.* at 57.

331. See *infra* notes 422 and 520-525 (discussing continuing debate and change in duty).

332. Yet Hoffman and Sharswood were not the first to discuss even gentlemanly deportment. The ecclesiastical courts expressed concern about deportment, see *supra* note 66, and the speeches and training in the English Inns likely included matters of professional deportment. See generally *supra* notes 109-123 (discussing Lord Whitlocke's and other speeches).

333. Eulogies usually spoke in especially high-minded terms, but they at least reflected ethical aspirations of the era. Hoeflich, *supra* note 320, at 808-12 (summarizing nineteenth century eulogies). For example, Professor Hoeflich reports an 1848 memorial, eulogizing John Pickering as a lawyer who was "courteous," plain-speaking, well-prepared and who did not use law as a "cunning weapon." *Id.* at 810-11.

334. For works that collect and report on original nineteenth century discourses on legal ethics, see Spaulding, *supra* note 321; Hoeflich, *supra* note 320; Moore, Dark Ages, *supra* note 270; and Brian C. Shaw, A Survey of Legal Ethics in the Nineteenth Century (1980) (unpublished student paper on file with author and at Harvard Law School library).

335. Indeed, a number of law schools, such as the University of Alabama School of Law, are recognizing the significance of their early lectures and are republishing them for modern audiences. See Wade Keyes Introductory Lecture to the Montgomery School of

a lecture to the law school at the University of the City of New York³³⁶ in which his aim was "to state with some precision the true principles which apply to the professional conduct and responsibility of the Bar."³³⁷ Butler explained a variety of standards of conduct, including the lawyer's duties to seek justice and fairness in litigation,³³⁸ maintain the confidences of the client,³³⁹ deal reasonably and candidly with client,³⁴⁰ and serve the poor.³⁴¹ Similarly, Professor Rene Holaind lectured on legal ethics at Georgetown University in the late nineteenth century, and in 1899, he published his lectures along with a list of twenty-eight "Rules for the Guidance of A Lawyer's Professional Conduct"³⁴² that covered a full spectrum of a lawyer's conduct.³⁴³

In addition, lawyers wrote directly for the practicing bar in law journals, newspapers and books. In 1871, for example, Judge Isaac Redfield published two ethics essays in the *American Law Register*, the first concerning the lawyer's obligations with respect to clients and causes³⁴⁴ and the second addressing fees.³⁴⁵ In an 1882 article in the *Kentucky Law Journal*, W.F. Bullock discussed the "rules of professional conduct" for lawyers,³⁴⁶ which, as he described, included many responsibilities of a lawyer in litigation as well as other duties that were "not limited to the forum."³⁴⁷ In 1896, Samuel Wandell published a book entitled "You Should Not,"³⁴⁸ described by Wandell as a "code of 'danger signals' for the members of the legal profession, who, in the busy race for success at

Law: Legal Education in mid-Nineteenth Century Alabama, (Occasional Publications of the Bounds Law Library, No. 2, University of Alabama School of Law, 2001) (reprinting 1860 lecture addressing, among other things, ethical and professional ideals of lawyers).

336. WILLIAM A. BUTLER, *LAWYER AND CLIENT: THEIR RELATION, RIGHTS AND DUTIES* (1871).

337. *Id.* at 3-4.

338. *E.g., id.* at 23 (stating that a lawyer "must dissuade his client from commencing suit whenever it is clearly unnecessary" and that "[t]he instructions of a client are no excuse for defences for delay or for snap judgments, any more than for false or sham pleas."); *id.* at 28 (stating that a lawyer may present the defense of statute of limitation); *id.* at 34 ("[I]t is necessary and essential that both sides and every view should be presented.").

339. *E.g., id.* at 66 ("[T]he "inviolable secrecy, of which, to the credit of our profession, we rarely hear a breach.").

340. *Id.* (requiring "frankness in regard to everything which happens affecting the client's interests in his lawyer's hands, and of prompt . . . reckoning for every dollar of money which belongs to him").

341. *Id.* ("undertaking the cause of the poor man, without any hope of reward, and of protecting the oppressed from harsh extractions").

342. RENE I. HOLAIND, *NATURAL LAW AND LEGAL PRACTICE* 315-38 (Twelfth Lecture, "Legal Ethics") & App. 339-44 (Rules).

343. *See id.* at 339-44 (rules addressing conflicts of interest (Rule 6), litigation candor (Rule 8), service to the poor (Rule 13), fees (Rules 14 and 17) and contacts with represented parties (Rule 25)).

344. Isaac F. Redfield, *The Proper Limits of Professional Responsibility and Duty*, 10 AM. L. REG. 281 (May 1871).

345. Isaac Redfield, *The Responsibilities and Duties of the Legal Profession*, 10 AM. L. REG. 545 (Sept. 1871).

346. W.F. Bullock, *Professional Ethics*, 1 KY. L.J. 587, 588 (1882).

347. *Id.* at 591.

348. SAMUEL H. WANDELL, *YOU SHOULD NOT: A BOOK FOR LAWYERS, OLD AND YOUNG, CONTAINING THE ELEMENTS OF LEGAL ETHICS* (1896).

the Bar, have too little time for the study of ethics.”³⁴⁹ Wandell detailed scores of principles, similar in format to Hoffman, which included personal appearance, litigation conduct, and fees.³⁵⁰

The lawyer’s oath was a common theme in the nineteenth century works. Like Sharswood, many commentators used the lawyer’s oath as a springboard for discussing legal ethics.³⁵¹ Justice Story, in an 1839 treatise on agency law, briefly noted the oaths of early Roman advocates and remarked that the ancient oaths were “well worthy” for “consideration of Christian lawyers in our day.”³⁵² Although Justice Story did not discuss the duties of lawyers in detail, he endorsed their “two essential maxims” to “never defend a cause which is unjust” and “not to defend just causes but by the ways of justice and truth.”³⁵³ In 1867, D. Bethune Duffield gave a lecture to the graduating law class at the University of Michigan entitled “The Lawyer’s Oath,”³⁵⁴ in which he discussed the meaning of each clause of the 1816 Swiss lawyer oath³⁵⁵ with a particular emphasis on the lawyer’s duty to serve the poor.³⁵⁶ In 1887, Judge Joseph Cox, speaking to the State Bar Association of Ohio, discussed the history of the lawyer’s oath and the meaning of the short version of the oath then in use in Ohio.³⁵⁷ The oath, according to Judge Cox, included several duties, such as the lawyer’s obligation to uphold the law,³⁵⁸ his multiple duties to his client,³⁵⁹ his litigation duties,³⁶⁰ and his obligations to fellow lawyers.³⁶¹

Thus, although Hoffman and Sharswood were significant spokespersons in the emerging field of legal ethics, they were not alone in their efforts. By the end of the nineteenth century, lawyers had considerably more sources for ethical guidance than their predecessors did at the beginning of the century. Lawyers had a statutory statement of some of

349. *Id.* at “Preface.”

350. *See generally id.*

351. *See* Hoeflich, *supra* note 320, at 798 (stating that use of the oath in nineteenth century discourse was “very significant” because oaths were “taken quite seriously” and converted lawyers from private citizens to public officials).

352. STORY, *LAW OF AGENCY*, *supra* note 273, at 26 n.1.

353. *Id.* (quoting 2 Jean Domat, *PUBLIC LAW*, B.2, tit 6 § 2).

354. D. Bethune Duffield, *The Lawyer’s Oath: An Address Delivered Before the Class of 1867, of the Law Department of the University of Michigan* (1867).

355. *Id.*; *see supra* note 194 (setting forth 1816 Swiss oath).

356. Duffield traced the history of the lawyer’s duty to serve the poor, Duffield, *supra* note 354, at 15-16, gave examples of the good work that lawyers could do for “tearful widows” and other poor persons, *id.* at 16-18, and pronounced that “all the better impulses of [the lawyer’s] nature, acting in harmony with the obligations of his oath” will inspire the lawyer to “deeds of charity, worthy of his high calling.” *Id.* at 18.

357. Cox, *supra* note 54.

358. *Id.* at 49 (stating that by taking an oath, the lawyer elevates his duty from that of a mere citizen, which is bound by law, to an obligation to both obey and support the laws).

359. *E.g., id.* at 50 (noting duties to set apart client funds from his own and give clear, faithful, informed and honest advice).

360. *Id.* at 50 (“[T]he lawyer should by all practicable means discourage litigation, and especially those petty, vexatious ones for small causes and amounts.”); *id.* at 51 (discussing proper limits on cross-examination and criminal defense).

361. *Id.* at 51 (“The lawyer owes the duty of fidelity, honesty and courtesy to his brother members of the Bar.”).

their core duties in several states, and they had detailed guidelines and suggestions from scores of educators, judges and lawyers. Although these steps represented a significant advancement in legal ethics, there was more work to be done to move legal ethics into the modern era. The Field Code statutory statements of duty, like the old oaths, were cryptic statements.³⁶² The nineteenth century lectures and other public discourses provided detail, but they usually reflected the view of only the author and carried little, if any, legal weight.³⁶³ The time was ripe for the new era of the bar association codes that would eventually bring both crucial detail and legal effect to the standards of conduct.

IV. THE MODERN ERA OF LEGAL ETHICS STANDARDS IN THE UNITED STATES

Toward the end of the nineteenth century, a new form of ethical standards began to guide lawyers in their practice—the bar association code of legal ethics. The bar codes were detailed ethical standards formulated by lawyers for lawyers. They in essence blended the two primary sources of ethical guidance from the nineteenth century. Like the academic discourses, the bar association codes gave detail to the statutory statements of duty and the oaths of office, but unlike the academic lectures, the bar association codes retained some of the official imprimatur of the statutes and oaths. Indeed, the bar association codes became so popular that states adopted them as binding rules of law.

Crucial to the development of the new codes was the re-emergence of bar associations themselves. Local bar associations formed sporadically during the colonial period, but they disbanded by the early nineteenth century.³⁶⁴ As I discuss above, some of these early associations promulgated rules, but very few addressed substantive standards of conduct for practicing lawyers.³⁶⁵ In the late nineteenth century, bar associations be-

362. WOLFRAM, *supra* note 19, at 485 (describing the Field Code statement of duties as “nothing more than a perfunctory and non-specific list of lawyer duties”); HURST, *supra* note 200, at 329 (stating that in the nineteenth century the “stated ethical principles lacked breadth and penetration”).

363. See Shaffer, *supra* note 318, at 233-34 (noting that Hoffman and Sharswood “had been content with disapproval, with snubbing the bad actor, and addressing gentlemen instead”); James E. Moliterno, *Lawyer Creeds and Moral Seismology*, 32 WAKE FOREST L. REV. 781, 787 (1997) (noting that the works of Hoffman and Sharswood “‘governed’ the legal ethical culture in the loosest sense” in that they adopted an aspirational approach); N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 926 (1995-96) (stating that “[e]arly standards were exactly that, exhortations with no specific consequences for violations.”); Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Professor*, 61 TEMP. L. REV. 1323, 1324-25 (1988) (describing Hoffman’s and Sharswood’s lectures as “informal words” to educate and assist students and new lawyers).

364. See generally Phillip J. Wickser, *Bar Associations*, 15 CORNELL L. Q. 390 (1930) (discussing the history of bar associations from colonial era to early twentieth century); HURST, *supra* note 200, at 285-94 (discussing disappearance and re-emergence of bar associations).

365. See *supra* Part II(A)(5) (discussing early bar association rules).

gan to form again,³⁶⁶ picking up where their colonial predecessors had left off. Many of the new bar associations, most notably the Alabama State Bar Association and the American Bar Association, took on the task of drafting substantive standards of conduct for their members.³⁶⁷

In 1887, Alabama became the first state with a comprehensive bar association code of ethics. The 1887 Alabama Code of Ethics was the model for several states' codes, and it was the foundation for the American Bar Association's 1908 Canons of Ethics. The ABA has since formulated three additional sets of model ethical standards for lawyers—the 1969 Model Code of Professional Responsibility, the 1983 Model Rules of Professional Conduct, and the Ethics 2000 overhaul of the Model Rules. Although the ABA's works are merely models and are not themselves binding on any lawyer, most states have adopted the ABA models, with local variation, as rules of law. Today, lawyers in every state have a set of detailed standards, usually in the form of court rules but also in wide array of statutes, judicial decisions, court rules and oaths, that govern their behavior.

A. THE 1887 CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION

In 1882, Thomas Goode Jones³⁶⁸ proposed that the newly formed Alabama State Bar Association³⁶⁹ create a code of ethics.³⁷⁰ Jones argued that many cases of improper conduct by lawyers were “thoughtless rather than willful” and could be avoided if the lawyers had “within easy reach” a “short, concise Code of Legal Ethics, stamped with the approval of the Bar.”³⁷¹ Jones became the principal drafter of the new code, and the bar

366. Bar associations started on the local level but soon moved to statewide organization. The Bar of the City of New York formed in 1870, followed in 1876 by New York state bar association. Wickser, *supra* note 364, at 396. By the turn of the twentieth century, thirty-six states or territories and the District of Columbia had formed bar associations. *Id.*, App. I, at 417 (listing state bar associations by year of organization). The American Bar Association formed in 1878. *Id.* at 397. See generally John A. Matzko, “The Best Men of the Bar:” *The Founding of the American Bar Association*, reprinted in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, at 75-96 (Gerard W. Gawalt ed., 1984).

367. This was a trend generally among professional organizations. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, J. L. & SOC. INQUIRY 677, 691 (1989) (describing the “link” between professional associations and the making of ethical standards, stating that “promulgating an ethics code is often [the] first order of business” of new associations and noting that “young bar associations” accordingly “began to spin ethics treatises into codes” in the late nineteenth century).

368. Jones was a prominent Alabama lawyer and later Alabama Governor and federal judge. See generally Paul M. Pruitt Jr., *Personal Code of a Public Man*, reprinted in *GILDED AGE*, *supra* note 5, at 65-90; Jones, *Canons of Professional Ethics: Their Genesis and History*, 7 NOTRE DAME L. REV. 483 (1931) (article by Jones' son).

369. The Alabama State Bar Association formed in 1878. Wickser, *supra* note 364, at 417.

370. *Proceedings of the Fourth Annual Meeting of the Alabama State Bar Association*, at 20 (1883).

371. *GILDED AGE*, *supra* note 5, at 91; *Report of the Organization and of the First, Second and Third Annual Meeting of the Alabama Bar Association* (1882).

association adopted his code in 1887.³⁷²

The 1887 Alabama Code consisted of fifty-six rules, which covered five of the six core duties: litigation fairness,³⁷³ loyalty,³⁷⁴ reasonable fees,³⁷⁵ confidentiality,³⁷⁶ and service to the poor.³⁷⁷ The 1887 Alabama Code only indirectly addressed the remaining core duty of competence, by specifying good practices.³⁷⁸ The new code had many qualities of the earlier works of Field, Sharswood and Hoffman.³⁷⁹ It not only quoted Sharswood's essay and the Field Code,³⁸⁰ but it also was filled with gentlemanly admonitions in the style of Hoffman and Sharswood.³⁸¹

Only a few of the rules in the 1887 Alabama Code provisions went beyond the standards set forth by Field, Sharswood and Hoffman.³⁸² The "new" provisions included detail concerning the duty of confidential-

372. *Id.* at 93-109 (Report of the 10th Annual Meeting of the Alabama State Bar (1887) (debating and adopting code)).

373. *Id.* at 48 (Rule 5: demanding "utmost candor" in dealings with the court and outlining prohibited "deceits").

374. *Id.* at 51 (Rule 18: condemning dual role of advocate and witness); *id.* at 52 (Rule 23: instructing lawyer to not attack later an instrument he drafted for a former client); *id.* at 53 (Rule 25: discouraging representation of conflicting interests and allowing such representation only upon informed consent of client); *id.* at 55 (Rule 34: requiring full disclosure of potential conflicts).

375. The 1887 Alabama Code had six separate rules on fees, addressing, among other things, the need for clear understanding as to the fee, the factors in determining a reasonable fee and contingent fees. *Id.* at 57-58 (Rules 46 through 51).

376. *Id.* at 52 (Rules 21 and 22: addressing confidentiality with regard to current and former clients).

377. *Id.* at 59 (Rule 57: providing that a lawyer should not avoid appointment to represent indigent criminal defendants and "should always be a friend to the defenseless and oppressed").

378. *Id.* at 54-55 (Rule 32: cautioning lawyers against bold assurances to clients); *id.* at 55 (Rule 33: warning against procrastination and urging prompt preparation for trial, prompt responses to letters and keeping engagements); *id.* at 55 (Rule 35: telling lawyers to gain full knowledge of a client's cause before giving advice).

379. One of Jones' stated aims was to make accessible the "standard works of great eminence and authority upon legal ethics." *Id.* at 91; *Report of the Organization and of the First, Second and Third Annual Meetings of the Alabama State Bar Association* (1882).

380. *See id.* at 46 (Preamble: quoting Sharswood as to need for "high-toned morality" in the legal profession); *id.* at 11 (Rule 10: quoting Sharswood stating that an attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability"); *id.* at 46-47 (Preamble: quoting the Field Code, adopted by Alabama in 1852, and describing it as a "comprehensive summary of the [lawyer's] duties").

381. Rule 6 of the 1887 Alabama Code told lawyers to be punctual and apologize if they were late. *Id.* at 49. Rule 30 instructed lawyers to be courteous and cooperative with opposing counsel and to not act in a way that "would be repugnant to his own sense of honor and propriety," even if the client asked otherwise. *Id.* at 54.

382. *See Maute, supra* note 112, at 103-38 (comparing Hoffman, Sharswood and the 1887 Alabama Code to modern standards, with an emphasis on the duty to serve the poor); Allison Marston, *Guiding The Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998) (comparing Hoffman, Sharswood and the 1887 Alabama Code); Moliterno, *supra* note 363, at 787-95 (comparing Hoffman and Sharswood to both the 1887 Alabama Code and the 1908 ABA Canons); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 914 (1980) (comparing works of Hoffman, Sharswood, Field and Jones, with an emphasis on the duties of confidentiality and loyalty); Pearce, *supra* note 318 (arguing that the 1887 Alabama Code is largely a compilation of Sharswood's ideas).

ity,³⁸³ an instruction to report the wrongdoing of other lawyers,³⁸⁴ a duty to settle without litigation “if practicable,”³⁸⁵ a duty to refrain from trial publicity,³⁸⁶ and a condemnation of solicitation with modest allowance of general advertisements and business cards.³⁸⁷ Yet, even these propositions can be traced to earlier sources. The English “do no falsehood” oath had a provision for reporting wrongdoing by other lawyers.³⁸⁸ English serjeants, as early as the sixteenth century, were told to pursue settlement of claims.³⁸⁹ Advertising and solicitation were not concerns of the early medieval standards, but the Inns of Court trained barristers that it was ungentlemanly to advertise³⁹⁰ and at least one colonial bar association banned solicitation.³⁹¹

The most significant contribution of the 1887 Alabama Code was not its substantive content but instead the very nature of the code. The 1887 Alabama Code bore the stamp of approval of the entire Bar.³⁹² In drafting the code, Jones actively sought input and suggestions from other lawyers, and the Alabama State Bar Association distributed Jones’ proposed code for review by its entire membership.³⁹³ The membership endorsed the code in 1887, only after debating and suggesting changes to Jones’ proposed standards of conduct.³⁹⁴ The association added to the official imprimatur of the code by publishing it and sending a copy to every lawyer in the state.³⁹⁵ Thus, the 1887 Alabama Code was a set of guidelines made by and for practicing lawyers.

383. Rule 21 required client consent to divulge both communications and confidences and provided that the lawyer’s “obligation of secrecy” extended beyond the death of the client. GILDED AGE, *supra* note 5, at 52. Rule 22 explained that the duty “extends further than mere silence” and required the lawyer to decline subsequent related matters in which he might use the secrets against his client. *Id.*

384. Rule 11 of the 1887 Alabama Code stated: “Attorneys must fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession.” *Id.* at 50.

385. *Id.* at 55 (Rule 35).

386. *Id.* (Rule 17: barring trial publicity because such discussions “tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice”).

387. Rule 16 permitted modest advertising but it and Rule 20 condemned “self-laudation” as “wholly unprofessional” and solicitation as “indecent.” *Id.* at 51, 52 (Rules 16 and 20).

388. *See supra* note 139.

389. *See supra* note 111.

390. *See supra* note 129.

391. *See supra* note 258.

392. *See supra* note 371 (quoting Jones’ aim of creating a code of ethics “stamped with approval of the Bar”).

393. GILDED AGE, *supra* note 5, at 93 (*Report of the Proceedings of the 10th Annual Meeting of the Alabama State Bar Association* (1887)).

394. *See generally id.* (reporting the debate of the Association on individual provisions of the code). Among other things, the members debated whether the rules should include generally accepted practices or whether such rules trivialized the code. For example, one member argued that it should be understood that a lawyer should not call a judge “an ass” and that no rule was needed for this type of proposition. *Id.* at 99-101.

395. *Id.* at 109 (*Report of the Proceedings of the 10th Annual Meeting of the Alabama State Bar Association* (1887) (noting that half of Alabama’s 795 lawyers did not belong to the association and asking that the code be sent to all lawyers because the non-members “are our brethren” and “feel as deep an interest as we do in the Code”).

The Alabama State Bar Association seemingly contemplated enforcement of its new guidelines. One mission of the new association was to police lawyers,³⁹⁶ and Jones saw the new code as playing a central role in that mission.³⁹⁷ When the association considered the new code, its potential enforcement caused some bar members to raise vagueness and other concerns about the substance of particular rules.³⁹⁸ Although the association directed Jones' to study the issue of enforcement,³⁹⁹ apparently no action was taken.

Nevertheless, the 1887 Alabama Code arguably was enforceable to the extent that it either reflected the courts' view of proper conduct or elaborated on the meaning of the statutory duties. For example, Rule 5 of the 1887 Alabama Code elaborated upon the third Field Code duty to "not mislead judges." Rule 5 condemned several itemized deceits, such as "[k]nowingly citing as authority an overruled case, or treating a repealed statute as in existence"⁴⁰⁰ If a lawyer perpetrated one of the itemized deceits, he would be in violation of the statute. Yet this example does not entirely answer the question of enforcement of the 1887 Alabama Code because the new code also addressed conduct not covered by the Field Code, such as punctuality and advertising. It is unlikely that a court would have sanctioned a lawyer for matters such as advertising, even it viewed the behavior as improper, given the general reluctance of courts of this era to discipline lawyers.⁴⁰¹ In any event, enforcement, especially as to these other standards of conduct, was an open question under the 1887 Alabama Code, and as we shall see, enforcement issues persisted for the bar association codes that followed.

Regardless of its legal effect, the 1887 Alabama Code had immediate and widespread influence. Twenty years after the Alabama State Bar As-

396. See *Report of the Proceedings of the 5th Annual Meeting of the Alabama State Bar Association*, at 6-7 (1884) (on file with author) (arguing that the association "will gain popular support and rapid accessions from lawyers not members, when it gives some token that it is in earnest, and will act as well as advise in matters" and will act to "put down . . . evil practices" of lawyers); see also *id.* at 7 (suggesting that a committee in each judicial circuit monitor misconduct by lawyers and "take proper proceedings for the disbarment of the offending member, at the expense of the Association").

397. In his initial proposal asking for a code of ethics, Jones argued that "[j]udicial administration would be greatly advanced if there were some organized body of lawyers, armed with legal authority and duty to investigate and prosecute unworthy members." GILDED AGE, *supra* note 5, at 91 (*Report of the Proceedings of the First, Second and Third Annual Meetings of the Alabama State Bar Association* (1882)). He explained that "the Code would be ready witness for his condemnation, and carry with it the whole moral power of the profession." *Id.* at 92.

398. For example, some questioned whether the new code should address commonly understood standards of conduct, see *supra* note 394, while others argued that "it is important to call these rules to the attention of the younger members, and enforce them." GILDED AGE, *supra* note 5, at 101 (*Report of the Proceedings of the 10th Annual Meeting of the Alabama State Bar Association* (1887)).

399. *Id.* at 94 (suggesting that the bar association assign Jones' committee the task of considering enforcement, stating that "the most natural consequence [of adopting the new code] would be the means of enforcing it.").

400. *Id.* at 48 (Rule 5).

401. See *supra* notes 222-223 (discussing rarity of judicial discipline in the United States before the twentieth century).

sociation formally adopted its code of ethics, ten other states had adopted a similar code, and many other states were considering adopting such a code.⁴⁰² The work of the Alabama State Bar Association was so successful that it became the foundation for the American Bar Association's national standards of conduct.

B. THE AMERICAN BAR ASSOCIATION'S MODEL STANDARDS OF LEGAL ETHICS

In the early twentieth century, the American Bar Association took on the project that would become one of the ABA's key functions—formation of national model standards for attorney conduct. The ABA's first national model, the ABA 1908 Canons of Ethics, closely resembled the 1887 Alabama Code. Over the next century, the ABA supplemented and reformatted the national standards, eventually deciding upon a format of model rules. The core content of the ABA standards has remained largely the same throughout this process. The substantive change has come in providing added detail with regard to the core duties and in adding a few new provisions to address changes in practice. The principal advancement that the ABA brought to the field of legal ethics was conversion of ethical standards into workable and enforceable rules of law. Indeed, most states have adopted the ABA's Model Rules of Professional Conduct, or some variation on them, as binding rules of law.

1. *The ABA 1908 Canons of Ethics*

In 1905, the ABA's president, Henry St. George Tucker, suggested that the ABA explore "whether the ethics of our profession rise to the high standard which its position of influence in this country demands."⁴⁰³ The ABA took up the challenge. Concluding that a code of ethics would "crystallize abstract ethical principles"⁴⁰⁴ and promote uniform standards on the state level,⁴⁰⁵ the ABA appointed a committee to draft a code.⁴⁰⁶ The ABA committee decided to follow the example of the 1887 Alabama

402. In 1907, an ABA committee reported on the widespread adoption of the 1887 Alabama Code of Legal Ethics. See ABA REPORTS, *supra* note 2, at 685-713 (reporting the variations of the codes in Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, Wisconsin, and West Virginia). Later, in 1908, the ABA Committee reported that during the course of its work, Mississippi had adopted an identical code, and that at least nine other states and "doubtless a number of others" had formed committees to consider such a code. ABA Memorandum For Use of ABA's Committee To Draft Canons of Professional Ethics, at 5 (March 23, 1908) (commonly known as the "red book") [hereinafter REDBOOK]. See generally *infra* notes 406-413 (discussing ABA efforts to draft code and its "red book" compilation of research).

403. 28 ABA REPORTS, *supra* note 2, at 384 (Tucker address). See generally Altman, *supra* note 320 (studying in depth the drafting of the ABA Canons).

404. 29 ABA REPORTS, *supra* note 2, at 604 (committee report).

405. *Id.* at 603. The ABA also cited broader policy reasons for a code, including education of young lawyers, *id.*, furtherance of the ABA's mission to uphold the highest integrity of the bar, *id.* at 601-02, deterrence of the growing commercialization of the bar, *id.*, and setting standards for judicial discipline. *Id.* at 602-03.

406. 31 ABA REPORTS, *supra* note 2, at 61.

Code, which was both the prevailing model of legal ethics standards⁴⁰⁷ and “a form which may be safely adopted.”⁴⁰⁸ The committee prepared a draft structured around the 1887 Alabama Code, with commentary and reports of state variations.⁴⁰⁹ The ABA sent these materials, along with a special printing of Sharswood’s essay, to the entire ABA membership and to each state bar association, soliciting comments.⁴¹⁰ After receiving more than 1000 letters of comment,⁴¹¹ the committee transformed the Alabama code into a new form called “Canons of Ethics.”⁴¹² In 1908, the ABA formally adopted the canons, with limited debate and only one change.⁴¹³ At the same time, the ABA also adopted a model oath of office, based on the Field Code.⁴¹⁴

As its drafting history would suggest, the ABA Canons closely resembled the 1887 Alabama Code.⁴¹⁵ The ABA took a somewhat stronger position against lawyer advertising and contingent fees⁴¹⁶ and added a

407. 30 ABA REPORTS, *supra* note 2, at 61-64; *see also id.* at 676-736 (*Report of the Committee on Code of Professional Ethics*, surveying state variations on 1887 Alabama Code and other statements of legal ethics standards).

408. 28 ABA REPORTS, *supra* note 2, at 62 (noting that it is “safer to follow a good precedent if one has been made than to establish a new one”).

409. 30 ABA REPORTS, *supra* note 2, at 676-736. The report also appended other legal ethics standards. *Id.* at 714-36 (appending the Louisiana State Bar Association Code, the Washington state oath, the 1816 Swiss oath, Dr. Samuel Johnson’s 1765 lawyer’s prayer, 1683 regulations from Denmark, Hoffman’s Resolutions, and an undated German oath).

410. *Id.* at 63-64.

411. 33 ABA REPORTS, *supra* note 2, at 570-71. The committee’s collection of these comments, now known as the “redbook,” reflected a wide range of views, some simply approving or rejecting particular rules and others suggesting alternative language or rules. REDBOOK, *supra* note 402.

412. *See generally* 33 ABA REPORTS, *supra* note 2, at 567-86 (Final report of the Committee on Code of Professional Ethics).

413. 33 ABA REPORTS, *supra* note 2, at 55-86 (debate on the Final Report and proposed canons). The change softened the warning as to contingent fees in Canon 13. *Id.* at 579; *see also id.* at 61-80 (debate on Canon 13).

414. The ABA used the Washington state oath, as its model, and the Washington oath was a modified version of the Field Code statement of duties. *Id.* at 85 (adopting oath); *id.* at 584-85 (proposing form of oath used by Washington state); *see supra* note 284 (noting Washington’s adoption of Field Code as a form of oath.). The oath, as adopted by the ABA, was slightly different from the Field Code. The ABA oath did not include the sixth Field Code duty (to not encourage suits “from any motive of passion or interest”) and added a moderate conflicts provision to the duty of confidentiality (swearing to not take compensation in a matter without client approval). 33 ABA REPORTS, *supra* note 2, at 585; *see also infra* notes 523-525 (discussing 1977 amendment of ABA model oath, deleting duty to not bring unjust causes).

415. The ABA Canons took the same format and had largely the same content as the 1887 Alabama Code. The ABA version combined and condensed many rules of the 1887 Alabama Code into a single canon, resulting in only thirty-two Canons, as opposed to fifty-six rules in the 1887 Alabama Code. For example, ABA Canon 12, regarding fees, was a near verbatim restatement of three separate rules concerning fees from the 1887 Alabama Code. *See* GILDED AGE, *supra* note 5, at 128-29 (comparison chart of Alabama Rules 48, 49, 50 and Canon 12).

416. Rule 16 of the 1887 Alabama Code had permitted general advertisements but condemned solicitation, while ABA Canon 27 permitted only business cards. *Id.* at 119 (comparison chart). The 1887 Alabama Code permitted contingent fees but warned that they lead to many abuses, and the ABA Canons permitted contingent fees only “where sanctioned by law” and “under the supervision of the Court.” *Id.* at 130 (comparison chart).

few new substantive provisions, such as merit selection of judges.⁴¹⁷ Significantly, the ABA Canons omitted a few standards that had been part of the 1887 Alabama Code. The ABA Canons, for instance, did not address a lawyer's duty of confidentiality other than to mention confidentiality generally with regard to conflicts of interest.⁴¹⁸ Nor did they require prompt communications with clients, tell lawyers to discuss and resolve fee arrangements with clients in advance,⁴¹⁹ or particularize the prohibition on attorney conflicts of interests as the 1887 Alabama Code had done.⁴²⁰ Nevertheless, the ABA Canons addressed all six of the core duties, even though its treatment of confidentiality and loyalty were in less depth than the 1887 Alabama Code.

As with the nineteenth century works, modern scholars have debated the significance of the ABA Canons. Many criticize the ABA Canons as reflecting the narrow views and needs of the elite of the bar.⁴²¹ Some scholars continue the debate concerning a lawyer's duty to do justice.⁴²² Some also criticize the ABA Canons as being largely irrelevant and unenforceable statements of vague principles.⁴²³ Other observers, however, credit the ABA Canons for making unprecedented and distinctive contri-

417. 33 ABA REPORTS, *supra* note 2, at 576 (Canon 2: stating the duty of the bar "to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges" and urging lawyers to "protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench").

418. 28 ABA REPORTS, *supra* note 2, at 576-77 (Canon 6: "Adverse Influences and Conflicting Interests"). See also GILDED AGE, *supra* note 5, at 121 (comparing 1887 Alabama Code to ABA provisions addressing confidentiality).

419. Compare GILDED AGE, *supra* note 5, at 55 (1887 Alabama Code, Rule 33, requiring prompt communications), with *id.* at 57 (1887 Alabama Code, Rule 46, requiring advance agreements as to fees where possible).

420. Rule 23 of the 1887 Alabama Code barred an attorney from later attacking an instrument that he had drafted, and Rule 31 advised lawyers to give preference to older and existing clients over new clients. *Id.* at 52-53 & 54 (Rules 23 and 31).

421. See JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA, 40-53 (Oxford Univ. Press 1977) (arguing that the ABA Canons contributed to the stratification of the American legal profession and further empowered elite lawyers by restricting activities, such as advertising and contingent fees, that were instrumental to the survival of lower-rung lawyers). See also *id.* at 204-05 (reporting similar views of Karl Llewellyn in a series of articles and speeches in the 1930s); WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 54, n.24 & 55 n.28 (collecting criticism of ABA Canons as principles adapted for only a portion of the bar).

422. See Hurst, *supra* note 200, at 330 (stating that the ABA Canons "paid relatively brief, and very general, respects to the lawyer's obligation to maintain 'the law'" and "emphasized the lawyer's prime obligation to put his best advice and advocacy fearlessly and vigorously at the service of his client's interests"); Carle, *supra* note 318, at 1 (arguing that the ABA "adopted ineffectual compromise language in the Canons, leaving us with a legacy of concealed ambivalence on the question of lawyers' 'duty to do justice' in civil cases"); Altman, *supra* note 320, at 2440 (comparing the ABA Canons to the 1887 Alabama Code and arguing that the ABA Canons "express a more robust vision of conscientious lawyers that enlarges the authority of, and gives greater support to, the lawyer's moral autonomy in that relationship"); Pearce, *supra* note 318, at 267-72 (comparing the ABA Canons to Sharswood and concluding that the ABA Canons generally adopted Sharswood's "republican vision" as to the duty to do justice).

423. See WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 55 n.29 (collecting criticisms of ABA Canons as vague).

butions to American legal ethics.⁴²⁴

Again without entering the debate, I offer the perspective that the ABA Canons were yet another step in the evolution of standards of conduct for lawyers. The striking similarity between the ABA Canons and the 1887 Alabama Code suggests that the ABA Canons did not make a dramatic shift in either substance or form of existing standards of conduct. That was not a failure. Indeed, an aim of the ABA was to "crystallize" existing principles of legal ethics.⁴²⁵ The ABA also did more, moving the standards forward. The ABA critiqued the standards, updated them to some degree, and, more importantly, nationalized them. This widespread publication and application led to further debate and development of the standards.

A number of states adopted the ABA Canons either as guidelines or as rules of law,⁴²⁶ but the canons had mixed success.⁴²⁷ As early as 1924, some ABA members questioned the form and function of the canons,⁴²⁸ and thereafter members regularly raised concerns about the canons.⁴²⁹ An initial complaint was that the ABA Canons spoke to specific issues and did not give broad, fundamental principles of legal ethics.⁴³⁰ Interestingly, that concern soon transformed into a criticism that the ABA Canons were too general.⁴³¹ In a 1934 speech, Justice Harlan Fiske Stone

424. See Altman, *supra* note 320, at 2439 (describing the "distinctive contribution" of the ABA Canons: "a comprehensive and detailed vision of conscientious lawyering, supported by new and expanded prohibitions on commercial practices by lawyers and by a virtually unprecedented duty imposed on lawyers to actively regulate the conduct of lawyers and judges . . .").

425. See *supra* note 404.

426. Some courts used the ABA Canons merely as guidelines in disciplinary proceedings, while others adopted them as court rules or legislation. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 19, at 55-56 (collecting authorities); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 *GEO. J. LEGAL ETHICS* 911, 918 (1994) (reporting that twenty-two states had adopted the canons by 1910).

427. See HAZARD, *FUTURE OF LEGAL ETHICS*, *supra* note 13, at 1254 n.77 (collecting cases). Professor Hazard reports that "because the 1908 Canons were something different from legal rules, their status as a basis for disciplinary action was uncertain." *Id.* See also Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 *VAND. J. TRANSNAT'L L.* 1117, 1127 (1999) (stating that enforcement was "intermittent, haphazard, and often biased against solo and small firm practitioners").

428. See 49 *ABA REPORTS*, *supra* note 2, at 467 (recommending in 1924 that a committee consider supplementing the canons to address the "numerous questions of professional conduct to which none of the present Canons seem applicable").

429. See Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 *ARK. L. REV.* 1 (1970) (outlining ABA efforts to reconsider the ABA Canons).

430. *Id.* at 3 (report noting that "it might be more desirable to have the Canons consist of a statement of fundamental principles that should govern a lawyer's conduct rather than of definite rules as to specific items of conduct."). See also 58 *ABA REPORTS*, *supra* note 2, at 428-40 (1933 *Report of the Special Committee on Canons of Ethics*, recommending amendments to ABA Canons and raising the question whether the ABA should adopt a general statement of ethical principles).

431. See 60 *ABA REPORTS*, *supra* note 2, at 92-95 (1935 report suggesting that the ABA "face the fact that some of the more fundamental problems of the profession should be grappled with in a Code of Practice which will deal not with general principles but with specific abuses").

argued that in order for the legal profession to serve “as the guardian of the public interest,” it must appraise the changing conditions of the lawyer and society and the “appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our codes of ethics.”⁴³² The ABA Canons, in Justice Stone’s view, were “generalizations designed for an earlier era.”⁴³³

For several years, the ABA attempted to correct and update the canons through new canons, individual amendments and interpretative opinions. In 1928, the ABA amended one canon and added thirteen new canons.⁴³⁴ Some of these thirteen new canons addressed the business of law practice, such as firm names and specialties and sharing of fees.⁴³⁵ Others addressed fundamental elements of the lawyer-client relationship, such as confidentiality and termination of the relationship.⁴³⁶ Over the next thirty years, the ABA continued to amend many of the canons and added two more.⁴³⁷ In addition, the ABA issued hundreds of opinions (both formally and informally) as to the proper interpretation and application of the canons.⁴³⁸

2. *The 1969 ABA Model Code of Professional Responsibility*

By the middle of the twentieth century, there was growing consensus that the ABA Canons needed more meaningful revision.⁴³⁹ In 1964, the ABA President-elect Lewis Powell asked for the appointment of a committee to study the “adequacy and effectiveness” of the ABA Canons.⁴⁴⁰ The resulting committee concluded that the canons needed substantial revision, in part because the ABA Canons failed to distinguish between

432. Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934). The speech was to the University of Michigan law school.

433. *Id.*

434. See ABA COMPENDIUM, *supra* note 2, at 331 & 342-45 (noting amendment dates and reporting Canons).

435. *Id.* at 342-45 (reprinting Canon 33 (“Partnerships-Names”), Canon 34 (“Division of Fees”) and Canon 45 (“Specialists”)).

436. *Id.* (reprinting Canon 37 (“Confidences of a Client”) and Canon 44 (“Withdrawal from Employment”)).

437. *Id.* at 331. See also *id.* at 345 (reprinting Canon 46 (“Notice to other Lawyers”), originally adopted in 1933 and rewritten in 1956, and Canon 47 (“Aiding the Unauthorized Practice of Law”), added in 1937).

438. See AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS (1967) (summarizing history of the ABA opinion process and reporting 315 “Formal” opinions); AMERICAN BAR ASSOCIATION, INFORMAL ETHICS OPINIONS (Two Volumes) (1975) (reporting hundreds of informal ethics opinions, most of which interpret the ABA Canons).

439. In 1958, an ABA study reported that the canons needed revision in the following respects:

(a) form, whereby the ideals and general principles are more clearly applicable to concrete situations; (b) rearrangement according to subject matter; (c) revision to meet changes in the professional environment; (d) new standards for new areas of law; and (e) consistency in standards likely to form the basis of disciplinary proceedings. Armstrong, *supra* note 318, at 1069 (committee report); see also 79 ABA REPORTS, *supra* note 2, at 507 (commissioning study).

440. 89 ABA REPORTS, *supra* note 2, at 381-83. Lewis Powell was later an Associate Justice of the United States Supreme Court, from 1972 to 1987.

“the inspirational and the proscriptive” and were thus unsuccessful in enforcement.⁴⁴¹ The drafting committee reformulated the canons into the Model⁴⁴² Code of Professional Responsibility, and, in August, 1969, the ABA House of Delegates approved the Model Code with little debate.⁴⁴³

The Model Code had a novel format, with three components: the Canons, Ethical Considerations, and the Disciplinary Rules. The Canons in the Model Code, unlike the original 1908 ABA Canons, were very broad statements of “primary principles of professional ethics.”⁴⁴⁴ Each of the Model Code’s nine Canons had two subparts—Ethical Considerations and Disciplinary Rules. The Ethical Considerations provided extended commentary, imparting meaning on each Canon,⁴⁴⁵ and embodying “the highest conduct aspired to by the profession.”⁴⁴⁶ In contrast, the Disciplinary Rules, which followed the Ethical Considerations, were black letter rules stating “the minimum standards by which a lawyer must abide.”⁴⁴⁷ Unlike the 1908 ABA Canons, where the ABA equivocated on the issue of enforcement,⁴⁴⁸ the ABA stated in the preamble to the Model Code that a violation of the disciplinary rules would subject the lawyer to discipline.⁴⁴⁹

Even though the Model Code was far more detailed than the ABA Canons, many of its seemingly new substantive provisions were not original. Rather, the chair of the drafting committee characterized the Model Code as a restatement of existing ethical principles, with new wording and detail.⁴⁵⁰ The Model Code formally incorporated many of the concepts that the ABA and the courts had developed over fifty years in ap-

441. Wright, *supra* note 429, at 5. In addition, the ABA Canons only partially covered or omitted important areas of conduct and did not properly reflect changes in society and the legal profession. *Id.* at 473 (reporting recommendation of the committee that Wright chaired). The Canons needed editorial revision in that they had outdated (“quaint”) language and were disorganized. *Id.*

442. Use of the word “model” was to ameliorate anti-trust concerns that the ABA was regulating competitive aspects of legal practice. WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 19, at 57.

443. 94 ABA REPORTS, *supra* note 2, at 389-92. The only debate concerned one of several provisions concerning group legal services – DR 2-103(D)(5). *Id.*

444. Wright, *supra* note 429, at 9. Canon 4, for example, broadly stated that a “lawyer should preserve the confidences and secrets” of a client. ABA COMPENDIUM, *supra* note 2, at 182.

445. Some of the ethical discussions were lengthy. Canon 7 (“Zealous Representation”), for example, eventually had 39 paragraphs of Ethical Considerations. ABA COMPENDIUM, *supra* note 2, at 237-46 (Ethical Considerations 7-1 through 7-39).

446. Wright, *supra* note 429, at 10.

447. *Id.*

448. See 33 ABA REPORTS, *supra* note 2, at 86 (1908 proceeding which rejected a proposed canon that would have stated a duty of each state bar association to investigate canon violations and bring disciplinary action).

449. “The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” ABA COMPENDIUM, *supra* note 2, at 182 (Preamble).

450. “Although some major substantive differences between the Canons of Professional Ethics and the Code of Professional Responsibility are readily apparent, by and large the Code could aptly be described as clothing the prior principles in new language and expanding their substance.” Wright, *supra* note 429, at 11.

plying and interpreting the ABA Canons. Virtually every paragraph of the Ethical Considerations cited to judicial cases or ABA opinions. The Model Code's discussion of conflicts of interest, for example, was considerably more detailed than the original ABA Canons,⁴⁵¹ but most of this detail had already been developed by the ABA and the courts.⁴⁵² The Model Code also included material from previous statements of ethics. A significant addition to the Model Code, for instance, was its provisions addressing lawyer competence,⁴⁵³ which had been a fundamental element of many statements of lawyer ethical standards, dating back to the medieval oaths.

Virtually every state adopted the Model Code in some form.⁴⁵⁴ Yet, critics almost immediately charged that the Model Code was too "conservative" and failed to correct many substantive problems of the ABA Canons.⁴⁵⁵ Many believed that even though the Model Code modestly improved on the ABA Canons regarding access to justice, it continued to favor elite lawyers over other elements of the bar.⁴⁵⁶ Others complained of the Model Code's continuing emphasis on litigation.⁴⁵⁷ Some criticized the Model Code as confusing and uncertain as to enforcement.⁴⁵⁸ To further compound matters, the United States Supreme Court issued First Amendment and antitrust rulings that questioned the ability of states to regulate some areas of attorney conduct, particularly lawyer ad-

451. As ultimately amended, the Model Code's provisions on conflicts of interest included twenty-four Ethical Considerations and seven Disciplinary Rules. ABA COMPENDIUM, *supra* note 2, at 223 (Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"); *id.* at 223-28 (Ethical Considerations); *id.* at 228-31 (Disciplinary Rules). By contrast, the ABA Canons had four sentences addressing conflicts. 33 ABA REPORTS, *supra* note 2, at 576-77.

452. See ABA COMPENDIUM, *supra* note 2, at 231-35 (official notes to Model Code conflicts provisions, as amended). See also Wright, *supra* note 429, at 14-15 (discussing the Model Code's provisions on conflicts and the confusion that had occurred under the ABA Canons, which required numerous judicial and ABA interpretative opinions).

453. ABA COMPENDIUM, *supra* note 2, at 235-37 (Canon 6, stating that "a lawyer should represent a client competently"). See also Wright, *supra* note 429, at 15 (stating that the "former Canons did not specifically require that a lawyer be competent or that he exercise due care in dealing with the legal interests of his client.").

454. All but three states adopted a version of the Model Code by 1972. 97 ABA REPORTS, *supra* note 2, at 268 (Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility). See also WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 56-57 (discussing ABA committee and state adoption of Model Code).

455. Armstrong, *supra* note 318, at 1069 (arguing that "where new ground could easily have been broken" the Model Code was "especially disappointing"). See also WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 60 & 60 n.67 (noting critics who charged that "opportunities had been missed to make the Code clearer and more responsive to modern practice."); Wolfram, *The More Things Change*, *supra* note 19, at 28 (noting that the Model Code gave conflicts its "first serious and extended treatment" but that the "Code's omissions . . . were striking").

456. See AUERBACH, *supra* note 421, at 287-89; WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 60 & 60 n.69 (collecting criticisms).

457. WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 60 n.68 (collecting criticisms).

458. See LEGISLATIVE HISTORY, *supra* note 2, at 3.

vertising.⁴⁵⁹ The ABA attempted to address these concerns by amending the Model Code (every year beginning in 1974),⁴⁶⁰ but states did not adopt the amendments as readily as they had accepted the original code.⁴⁶¹ Thus, the Model Code never achieved stability.

3. *The 1983 ABA Model Rules of Professional Conduct*

In 1977, the ABA appointed a commission to consider another redraft of the model standards.⁴⁶² Initially, the commission considered a bold substantive reworking of the model standards, but early drafts drew such criticism that the commission toned down the substantive changes.⁴⁶³ Still, even the more modest proposed draft drew debate. The debate in the ABA House of Delegates was particularly intense surrounding the proposed exceptions to the confidentiality duty, with the House rejecting some of the proposed exceptions.⁴⁶⁴ The House finally adopted the new "Model Rules of Professional Conduct" (as amended by the House) in August 1983.⁴⁶⁵

The Model Rules were in what the commission called the "restatement format,"⁴⁶⁶ whereby the conduct standards were set-out in rules, with comments following each rule. The new format was intended to give better guidance and clarity for enforcement "because the only enforceable standards were the black letter Rules."⁴⁶⁷ The Model Rules eliminated

459. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-83 (1977) (limiting, on free speech grounds, ability of state bar association to restrict lawyer advertising); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780-93 (1975) (applying antitrust laws to invalidate state bar minimum fee schedules). See generally Schneyer, *supra* note 367, at 688-89 (discussing impact of rulings); Armstrong, *supra* note 318, at 1070-71 (same).

460. Wolfram, *MODERN LEGAL ETHICS*, *supra* note 19, at 57 (discussing amendments).

461. See *id.* at 57 (discussing state rejection of amendments to Code); Schneyer, *supra* note 367, at 689 (same).

462. ABA COMPENDIUM, *supra* note 2, at 11. This time, the ABA went through a series of public distribution drafts and comment periods. See generally Schneyer, *supra* note 367 (describing the drafting of and public comment on the Model Rules).

463. See WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 19, at 61-62 (discussing the "bold" first draft and "milder" subsequent drafts of Model Rules); HAZARD & HODES, *supra* note 13, at 1-21 (noting that the Discussion Draft of the proposed rules "provoked intense controversy and criticism"); Daly, *supra* note 427, at 1132 (describing the drafting and adoption of the Model Rules as a "tortuous process").

464. The proposed Model Rules included exceptions that would have allowed a lawyer to reveal client confidences to the extent necessary to prevent client fraud and other crimes, but the only crime exception that the House approved was limited to cases of imminent death or substantial bodily injury. See LEGISLATIVE HISTORY, *supra* note 2, at 47-54 (summarizing the House's amendment of Model Rule 1.6(b) setting confidentiality exceptions). See also 1 HAZARD & HODES, *supra* note 13, §§ 9.2, 9.6 & 9.26 (discussing confidentiality debate).

465. The House of Delegates' review and adoption came in three stages: in the annual meeting in August 1982, in the February 1983 mid-year meeting, and in August 1983. See LEGISLATIVE HISTORY, *supra* note 2.

466. *Id.* at 3.

467. *Id.* at 3-4. See also Wolfram, *Toward a History II*, *supra* note 19, at 218 (describing the Model Code as "an even more explicitly regulatory set of lawyer rules"); Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 *MERCER L. REV.* 839, 841 (stating that "the Model Rules are intended principally as a statement of rules, the violation of which can lead to professional discipline.").

the broad canons altogether and reduced the emphasis on narrative discussion, by placing comments after the rules and limiting comment discussion to the content of the black letter rules.⁴⁶⁸

The Model Rules made a number of substantive improvements. They incorporated sophisticated rules governing conflicts of interests. In particular, Model Rule 1.9 corrected a “notable” omission in the Model Code, by providing standards for dealing with conflicts arising from former clients.⁴⁶⁹ The Model Rules also brought back standards from earlier statements of legal ethics, such as the requirement of prompt communication with clients.⁴⁷⁰ Additionally, the Model Rules added a number of new provisions that better reflected the realities of modern law practice. And, for the first time, the Model Rules addressed ethical issues arising out of practice in law firms, including provisions on imputed conflicts of interest⁴⁷¹ and the relative responsibilities of supervising and subordinate lawyers.⁴⁷² They lessened the litigation focus of the previous ABA models by addressing the lawyer’s roles as advisor, intermediary, evaluator and negotiator.⁴⁷³ The Model Rules also recognized the reality that a client is not always an individual and included a separate rule addressing organizational clients, such as corporations.⁴⁷⁴ Finally, the Model Rules took a first step at recognizing that modern lawyers do not always practice in a single jurisdiction.⁴⁷⁵

468. LEGISLATIVE HISTORY, *supra* note 2, at 4 (the committee stated that this focus of the comments would “give individual lawyers more reliable guidance for their conduct”).

469. See Wolfram, *The More Things Change*, *supra* note 19, at 28 & 29, n.12 (discussing Model Code omission and Model Rules provisions regarding conflicts with former clients).

470. Model Rule 1.4 required prompt communications with a client and thus echoed Rule 33 of the 1887 Alabama Code. See LEGISLATIVE HISTORY *supra* note 2, at 37-39 (Model Rule 1.4) GILDED AGE, *supra* note 5, at 55 (Rule 33 of the 1887 Alabama Code). In addition, the official commentary relating to conflicts of interests explained that a lawyer “could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client,” which provision had been part of the 1887 Alabama Code. See LEGISLATIVE HISTORY, *supra* note 2, at 71 (Model Rule 1.9, Comment ¶1); GILDED AGE, *supra* note 5, at 52-53 (Rule 23 of the 1887 Alabama Code).

471. The Model Rules addressed imputed conflicts of interest – under which one lawyer is imputed to have the same conflicts of another lawyer in the same firm – in several rules, but the general provision was in Model Rule 1.10. See LEGISLATIVE HISTORY, *supra* note 2, at 74-77 (Model Rule 1.10); see also *id.* at 82-84 (Model Rule 1.11, addressing imputed conflicts when a lawyer leaves or enters government service).

472. Model Rules 5.1 and 5.3 set out the responsibility of partners and supervising lawyers for the professional conduct of their subordinate lawyers and non-lawyer staff, respectively. *Id.* at 154-55 (Model Rule 5.1); *id.* at 157-59 (Model Rule 5.3). Model Rule 5.2 set out the responsibility of the junior lawyer for his own professional conduct, when acting under the direction of a supervising lawyer. *Id.* at 156-57.

473. Model Rule 2.1 addressed the lawyer’s general duty as advisor. *Id.* at 109-10. Model Rule 2.2 set out the duties of a lawyer who acts as intermediary between two clients. *Id.* at 112-15. Model Rule 2.3 addressed the lawyer’s duties with regard to preparing evaluations for use by non-clients, such as title opinions. *Id.* at 116-18. Rule 4.1 set forth the lawyer’s obligations with regard to truth in negotiations. *Id.* at 145-48.

474. *Id.* at 87-96 (Model Rule 1.13). The Model Code had provided some guidance to lawyers with organizational clients, through a few Ethical Considerations. See ABA COMPENDIUM, *supra* note 2, at 227 & 228 (EC 5-18 & EC 5-24).

475. The move was relatively modest. Model Rule 8.5 merely provided for continuing disciplinary jurisdiction of the licensing state even if the lawyer is engaged in practice elsewhere. LEGISLATIVE HISTORY, *supra* note 2, 200-201.

By 2000, most states had adopted some form of the Model Rules,⁴⁷⁶ but despite widespread adoption of the Model Rules, there was still variation in the actual standards of conduct.⁴⁷⁷ Most every state modified the Model Rules to fit local needs and policy.⁴⁷⁸ And, the Supreme Court issued First Amendment opinions that sent mixed messages as to the validity of the solicitation rules.⁴⁷⁹ The ABA itself amended individual rules—fourteen times in twenty years—and states did not keep up with the ABA amendments.⁴⁸⁰ Some states initiated their own amendments, particularly with regard to lawyer advertising and solicitation.⁴⁸¹ Finally, in 2000, the American Law Institute published the final version of its Restatement of the Law Governing Lawyers,⁴⁸² which stated somewhat different standards of conduct than the Model Rules, creating further uncertainty as to proper lawyer behavior.⁴⁸³

4. *The Ethics 2000 Amendments to the ABA Model Rules*

In April 1997, the ABA began once again to consider comprehensive

476. 2 HAZARD & HODES, *supra* note 13, App. B, at B-3 to B-4 (tabulating state adoption of Model Rules by year). State adoption of the Model Rules took longer than adoption of the Model Code. *See id.* at vol. 2, at 1-26 to 1-28 (describing ABA lobbying efforts).

477. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS, 9-440 (2004) (reporting drafting history and state variations as to each Model Rule).

478. *See generally id.* (reporting significant state variations to Model Rules).

479. In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court invalidated the Model Rule ban on targeted mail solicitation, 486 U.S. at 479-80, and in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court held constitutional a state bar rule that imposed a waiting period for targeted mail solicitations. 515 U.S. at 626-35.

480. *See* ABA COMPENDIUM, *supra* note 2, at 8. Most of the changes were to existing rules, but the ABA also added a few rules to the compilation. For example, the ABA in 1990 added Model Rule 1.17 to address the lawyer's duties with regard to the sale of the law practice. *See* GILLERS & SIMON, *supra* note 477, at 177-85 (stating Model Rule 1.17, its legislative history and selected state variations).

481. The ABA itself made changes in the Model Rules to keep up with the Supreme Court, but the ABA did not push the limits of the First Amendment as did many states. *See* GILLERS & SIMON, *supra* note 477, at 372-73 (reporting 1989 ABA amendment to Model Rule 7.3, addressing solicitation, in response to Supreme Court decision in *Shapero*, 486 U.S. 466. States, such as Alabama, reworked their rules to restrict advertising and solicitation as much as they deemed permissible in response to the Court's First Amendment rulings. *See* ALA. R. PROF. COND. 7.3 (adopted in 1996, months after the *Went For It* decision, 515 U.S. 618, setting numerous restrictions on written solicitations).

482. American Law Institute, RESTATEMENT OF THE LAW GOVERNING LAWYERS (2000). *See also* GILLERS & SIMON, *supra* note 477, at 455-509 (reprinting "black letter" portions of Restatement, without commentary or illustrations). The ALI restatement project began in the mid-1980s and went through several stages of public drafts. *See* 1 HAZARD & HODES, *supra* note 13, §§1.19-21 (describing restatement project).

483. The restatement covered many areas of law outside the scope of the Model Rules, such as a lawyer's civil liability, but it also addressed subjects within the purview of the Model Rules. *See* GILLERS & SIMON, *supra* note 16, at 509-16 (tables comparing restatement provisions with Model Rule provisions); 2 HAZARD & HODES, *supra* note 13, App. C (same). The Restatement, for example, set out a different confidentiality standards than the (original) Model Rules. *See* GILLERS & SIMON, *supra* note 478, at 484 (Restatement § 59, defining confidential information as excluding information that is generally known); *id.* at 486 (Restatement § 67, permitting disclosure of confidential information to prevent, rectify or mitigate substantial financial loss). *Compare* LEGISLATIVE HISTORY, *supra* note 2, at 51-55 (Model Rule 1.6, addressing confidentiality).

changes to the Model Rules, in a project known as "Ethics 2000."⁴⁸⁴ The ABA was concerned about the "growing disparity in state ethics codes,"⁴⁸⁵ as well as technological developments and changes in the legal profession.⁴⁸⁶ Because there was general satisfaction with the format of the Model Rules,⁴⁸⁷ the ABA decided to make changes only to individual rules and comments.⁴⁸⁸ In February 2002, the ABA House of Delegates debated and approved the Ethics 2000 proposals, with some modifications.⁴⁸⁹

The Ethics 2000 project made changes to virtually every rule or comment in the Model Rules. Many changes were clarifications or improvements in form. For example, the Ethics 2000 amendments substituted a single standard of "informed consent" for the varying standards of consultation and consent in the 1983 Model Rules.⁴⁹⁰ The new rules stated the lawyer's pro bono duty somewhat more strongly than the original Model Rules.⁴⁹¹ They also better articulated the standards of lawyers with regard to fees⁴⁹² and litigation candor.⁴⁹³ A few changes brought back the courtesy elements of the nineteenth century discourses. New comments, for example, explained that the duty of diligence "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect" and "does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client."⁴⁹⁴

484. See generally ABA COMPENDIUM, *supra* note 2, at 15 (reprinting Chair's Introduction to the Report of the Commission on Evaluation of the Rules of Professional Conduct).

485. *Id.*

486. *Id.* (noting the "explosive dynamics" of modern legal practice which "lent a sense of urgency" to the project).

487. *Id.*

488. *Id.* at 15-16 (noting that the commission "retained the basic architecture of the Model Rules" and the "primary disciplinary function of the Rules"). The level of public comment was unprecedented: the commission held over fifty days of open meetings and ten public hearings, and it also created a 250-person advisory council to give comments and suggestions. *Id.* at 16. See generally Love, *supra* note 1 (describing work of the Ethics 2000 commission).

489. ABA COMPENDIUM, *supra* note 2, at 8. Model Rule 1.6 and its provisions governing confidentiality continued to be a primary source of controversy, as it had been with the original Model Rules in 1983. See *supra* note 2 (discussing earlier debate on confidentiality). The Ethics 2000 commission proposed additional exceptions to the duty of confidentiality, including ones that would allow the lawyer to "whistle-blow" on a client in some cases of fraud similar to those set forth in the Restatement. See *supra* note 483. The House of Delegates, however, rejected the whistle-blowing exceptions and approved only those exceptions that arguably already had been accepted practice under former Model Rule 1.6. See Love, *supra* note 1, at 451.

490. See ABA COMPENDIUM, *supra* note 2, at 23 (Rule 1.0(e), defining informed consent).

491. Model Rule 6.1 now provides that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay." *Id.*

492. The amendments clarified the duties of lawyers with regard to both initial discussions as to fees and later billing procedures. *Id.* (Model Rule 1.5).

493. In particular, the changes clarified the lawyer's duties with regard to the perjury of a client. *Id.* (Model Rule 3.3(a)(3)); *id.* (Comment ¶¶ 5-11).

494. ABA COMPENDIUM, *supra* note 2, at 30 (Rule 1.3, Comment ¶¶ 1 & 3).

Some changes were more substantive, but even these changes were largely in the manner and detail in which the core duties were stated and applied. Ethics 2000 improved the conflicts rules, for example. It entirely restructured Model Rule 1.7, the general rule on concurrent conflicts of interests,⁴⁹⁵ in order to make conflicts analysis more straightforward.⁴⁹⁶ In addition, new Model Rule 1.18 addressed for the first time the conflicts implications of a person consulting but not retaining a lawyer.⁴⁹⁷ As to confidentiality, the Ethics 2000 project modified the circumstances under which a lawyer may disclose client confidences. The Ethics 2000 commission had proposed more aggressive “whistle-blowing” provisions, to allow lawyers to reveal certain client frauds, but the House of Delegates approved only modest additional exceptions to the duty of confidentiality.⁴⁹⁸

The Ethics 2000 project may never achieve its goal of uniformity and stability. It will take years to determine whether most states will adopt the revisions as their own law.⁴⁹⁹ Moreover, the ABA itself jeopardized this aim by twice amending the Model Rules after approval of the Ethics 2000 amendments. In August 2002, the House of Delegates adopted new amendments to the Model Rules to better address the problems of a lawyer’s multi-jurisdictional practice.⁵⁰⁰ In August 2003, the ABA amended the rule on confidentiality to add new exceptions that would allow limited whistle-blowing, including the unsuccessful proposals of the Ethics 2000

495. *Id.* at 40-49 (Model Rule 1.7 and comments).

496. The old version had caused a lot of confusion, requiring several interpretative opinions by courts and the ABA. See Wolfram, *The More Things Change*, *supra* note 19, (describing the evolution of ABA conflicts standards with a focus on the Ethics 2000 proposals). See also Love, *supra* note 1, at 451-54 (describing Ethics 2000 changes to Model Rule 1.7).

497. ABA COMPENDIUM, *supra* note 2, at 78-80 (Model Rule 1.18, “Prospective Clients”).

498. *Id.* at 78-80 (Model Rule 1.6). The commission had proposed even broader exceptions. *Id.* (discussing House of Delegate rejection of proposed amendments to Model Rule 1.6).

499. By spring 2004, many states had begun to consider adoption of some or all of the Ethics 2000 proposals. See GILLERS & SIMON, *supra* note 477 (noting that “[m]any states are comprehensively reviewing their ethics rules in light of the work of the Ethics 2000 Commission” and reporting on significant state developments); Charlotte K. Stretch, *State Committees Review and Respond to Model Rules Amendments*, 15 No. 1 PROF. LAW. 14, 14-16 (Spring 2004) (reporting that as of March 1, 2004, eight states had adopted new rules in response to the Ethics 2000 proposals and thirteen more states had published proposed rules for consideration). Some states had adopted at least a few of the Ethics 2000 proposals, but the pattern of state variation in adoption of ABA proposals seemingly continues. See *id.* (noting state adoption or modification to significant Ethics 2000 rule proposals).

500. ABA COMPENDIUM, *supra* note 2, at 8 (noting August 2002 amendments to Model Rules 5.5 and 8.5); *id.* at 107-11 (Model Rule 5.5, addressing multi-jurisdictional practice of law); *id.* at 8.5 (Model Rule 8.5, setting out choice of law principles). The issues arising from multi-jurisdictional practice are by no means settled. States must adjust their laws governing unauthorized practice of law as well as their conflicts of law rules and professional standards, and the ABA will likely need to fine tune its new provisions. See generally GILLERS & SIMON, *supra* note 477, at 5 & 1043-56 (discussing the multi-jurisdictional practice “debate”)

project.⁵⁰¹ These will not be the last amendments. The question of multi-disciplinary practice lingers,⁵⁰² and new issues will undoubtedly develop. The ABA will continue to adjust the standards of conduct for lawyers to better reflect modern practice.

5. Enforcement of the ABA Standards of Conduct

As of 2003, forty-four states and the District of Columbia had adopted some version of the Model Rules.⁵⁰³ The remaining states have some other form of standards for lawyers, most of which are based on the Model Code.⁵⁰⁴ In addition, a number of federal courts have directly adopted the Model Rules as their governing standards, or have done so indirectly, by adopting the local state's rules of conduct.⁵⁰⁵ The standards are now binding rules of law, typically enforced through professional disciplinary proceedings by state bar association, courts, or both.

As noted in the discussion of the 1887 Alabama Code and the 1908 ABA Canons,⁵⁰⁶ the enforceability of bar association standards was not always certain. Increased enforcement resulted from several factors, largely attributable to ABA initiatives.⁵⁰⁷ One change was the transfor-

501. See GILLERS & SIMON, *supra* note 477, at 61-66 & 71-73 (reporting and discussing the new exceptions added to Model Rule 1.6(b) in August 2003); *id.* at 143-49 & 151-53 (reporting and discussing the new disclosure provision added to Model Rule 1.13(c) in August 2003). These amendments were in response to Enron and other corporate scandals. *Id.* at 6. The two new exceptions to Model Rule 1.6(b) had been proposed earlier by the Ethics 2000 commission, but in 2002 the House of Delegates rejected one and the commission withdrew the other; see *id.* See also *supra* note 498.

502. Multi-disciplinary practice refers to forms of practice by which lawyers join with non-lawyers and offer multiple services to clients, such as legal and accounting advice. The traditional stance of the ABA, as reflected by Model Rule 5.4, discourages such alliances by forbidding lawyers from sharing legal fees with non-lawyers. See LEGISLATIVE HISTORY, *supra* note 2, at 163-64 (Model Rule 5.4, "Professional Independence of a Lawyer"). In the 1990s, increasing numbers of lawyers and other professionals urged the ABA to soften its stance, in part so that American lawyers could better compete in the global legal market. A special commission was appointed, and it recommended a change to allow some sharing of fees. See 125 ABA REPORTS, *supra* note 2, at 183-94 (Report of the Commission on Multi-Disciplinary Practice). In July 2000, the House of Delegates rejected proposals for change, the commission withdrew its recommendation, and the House adopted a resolution urging states to ensure professional independence of lawyers. See 125 ABA REPORTS, *supra* note 3, at 21-26 (House debate and resolutions). Some of the House debate, however, urges further study and one of the resolutions asked for such study. *Id.* at 25.

503. GILLERS & SIMON, *supra* note 477, at 3.

504. New York retained the Model Code format, but amended the code to incorporate some of the Model Rule provisions. See GILLERS & SIMON, *supra* note 477, at 925-1022 (reprinting full New York Code as of 2001). California has developed largely its own set of rules and code provisions governing lawyer conduct. *Id.* at 705-93 (excerpting California rules and code).

505. See 1 HAZARD & HODES, *supra* note 13, at 1-28 & 1-30 (stating that the Model Rules are enforced by the United States District court as local rules). There is some movement, however, to "federalize" the standards of conduct at least as to selected issues. See *id.* § 1.17 (discussing existing federal regulation of lawyers and proposals for separate federal rules of conduct).

506. See *supra* notes 396-400 (1887 Alabama Code) and 424, 442, & 449 (ABA Canons).

507. A number of law review articles have recently focused on the increasing enforcement or "legalization" of legal ethics standards. See Daly, *supra* note 427; Devlin, *supra*

mation of many state bar associations, in the mid-twentieth century, from being merely voluntary professional organizations into "integrated" or "unified" bar associations, in which lawyer membership is mandatory.⁵⁰⁸ A second change came from the increasing professionalization of the disciplinary process. Whether disciplinary authority rests in the unified bar or a court agency,⁵⁰⁹ most states now have professional staff dedicated solely to lawyer discipline,⁵¹⁰ and the ABA has promulgated model standards for disciplinary procedure and sanctions.⁵¹¹

Finally and most important for this study, the standards themselves changed to better accommodate enforcement. The essence of the core duties remained the same, but the standards were refined from vague or aspirational statements into clear and absolute standards of conduct. This was a primary aim in developing both the Model Code and Model Rules. Indeed, when compared to older standards of conduct, the primary distinguishing characteristic of the modern standards is their added detail and precision.

C. OTHER SOURCES OF MODERN STANDARDS OF CONDUCT FOR LAWYERS

The ABA Model Rules and the state variations on them are the primary source of standards for conduct of lawyers in modern America, but they are not the only source. As in the previous centuries, common law, court rules and statutes continue to govern specific areas of a lawyer's conduct, and such regulation is more widespread than in earlier eras. Too numerous to catalog in any detail, these other sources of standards come in many forms and typically set standards for civil or criminal liability that are in addition to the professional rules.⁵¹² In other words, the other laws are supplements, rather than alternatives, to the standards promulgated by the ABA.

Courts continue to develop an extensive common law concerning lawyers, as reflected by the Restatement of the Law Governing Lawyers.⁵¹³

note 426; Hazard, *The Future of Legal Ethics*, *supra* note 13; Wolfram, *Toward a History II*, *supra* note 19.

508. See generally Devlin, *supra* note 426, at 919-21 (discussing transformation to unified bars).

509. As of 1994, thirty-three states required membership in the bar association as a condition of practice, and most states delegated lawyer discipline to the bar associations. In the states without unified bar associations, and in a few states with unified bars, the power of discipline usually rested in an agency off-shoot of the state's highest court. *Id.* at 933-34.

510. This professionalization came about largely due to a critical 1970 ABA study on disciplinary enforcement. See *id.* at 921-22 (describing the "bombshell" of the ABA report and summarizing the move to professional disciplinary staff).

511. See *id.* at 927-29 (discussing the various model disciplinary standards and rules); see also ABA COMPENDIUM, *supra* note 2, at 353-564 (same); *id.* at 349-79 (reprinting ABA Standards for Imposing Lawyer Sanctions).

512. See generally WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, Ch. 2 (discussing different forms of regulation of modern lawyers); 1 HAZARD & HODES, *supra* note 13, §1.3 (discussing sources of law governing lawyers).

513. See *supra* notes 482-483 and accompanying text discussing restatement.

Some states regulate attorney's fees and collection procedures by rule or statute.⁵¹⁴ A number of substantive criminal and civil statutes, such as the federal securities laws, have special application to lawyers.⁵¹⁵ Court rules, such as Rule 11 of the Federal Rules of Civil Procedure,⁵¹⁶ regulate attorney behavior in litigation, and statutes often address particular forms of litigation abuse by lawyers.⁵¹⁷ Indeed, the early federal vexatious lawyer statute, originally enacted in 1813, remains in effect today.⁵¹⁸

Finally, a number of states carry on the traditions of earlier eras. Bar associations and courts are experimenting with lawyer creeds of professionalism; they typically are pledges to abide by a variety of courtesy principles which reflect many of the gentlemen's code notions of the nineteenth century works.⁵¹⁹ Some state codes continue to state the Field Code list of a lawyer's duties,⁵²⁰ and a number of courts administer oaths modeled on either the Field Code duties or the "do no falsehood" oath.⁵²¹ The modern incarnations of the Field Code and "do no falsehood" oath of course have some substantive variation from their original forms. Significantly, the so-called duty to do justice is sometimes omitted from modern statements of the Field Code.⁵²² The ABA, for example, continues to have an official model oath,⁵²³ but in 1977, the ABA deleted from the oath the statement that a lawyer must not bring "unjust"

514. Many states provide for a lawyer's retaining and charging liens. *E.g.*, Ala. Code §§ 34-3-61 & 34-3-62 (2003); *see generally* WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, § 9.6.3 (discussing attorney's liens); HAZARD & HODES, *supra* note 13, § 8.23 (same). Some states provide for arbitration of fee disputes. WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, § 9.6.2 (discussing arbitration of fee disputes); HAZARD & HODES, *supra* note 13, § 8.24 (same). Other states limit the amount of contingent fee that a lawyer may collect and strictly regulate the disclosures necessary to enter into a contingent fee arrangement. *See* MICHIGAN RULES OF COURT, Rule 8.121.

515. *See* WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, § 12.6.6 (discussing securities law application to lawyers)

516. Rule 11 imposes a duty on counsel to conduct a reasonable inquiry before filing civil papers and to not file for improper purposes, such as delay. FED. R. CIV. P. 11(b).

517. Most states have court rules and statutes addressing lawyer abuses in litigation. *See generally* Andrews, *Motive Restrictions*, *supra* note 104, at 704-36 (collecting court rules and statutes); Byron S. Keeling, *Toward A Balanced Approach to "F frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994) (same).

518. 28 U.S.C. § 1927 (2003). *See supra* note 245 (discussing 1813 statute); *see also* Andrews, *Motive Restrictions*, *supra* note 100, at 734-36 (discussing modern application of § 1927).

519. *See* ABA COMPENDIUM, *supra* note 2, at 393 (setting forth "Pledge of Professionalism" of the ABA Young Lawyers Division); *id.* at 394-96 (ABA Section of Tort and Insurance Practice "Creed of Professionalism").

520. Both Washington and Wisconsin, for example, use an oath close to the Field Code statement of duties. *See* WASH. CT. R. 5(d); WIS. SUP. CT. R. 40.15. Likewise, some federal courts use this form of oath. *See* U.S. DIST. COURT RULES, LOCAL CIVIL RULES, E.D. Okla., App. I.

521. Alabama, for example, uses a modified version of the "do no falsehood" oath. *See* ALA. CODE § 34-3-15 (2003).

522. *Compare supra* note 278 (original Field Code statement of duties), with ALA. CODE § 34-3-20 (2003) (current Alabama version, omitting the duty to refrain from bringing unjust causes).

523. *See supra* note 414 (discussing initial adoption of ABA model oath).

causes.⁵²⁴ The ABA feared that the reference might cause a lawyer to wrongly prejudice his client's cause before giving a court the opportunity to do so.⁵²⁵ Thus, the debate as to the proper application of the duty to do justice—reflected by the Hoffman and Sharswood discussions⁵²⁶—has caused some modern authorities to question the duty itself. Nevertheless, most modern standards of lawyer conduct continue to reflect the centuries-old ideals of proper lawyer behavior.

V. CONCLUSION

The foregoing history of legal ethics standards will mean different things to different observers. Some might focus on the changes in the standards. The current Model Rules look very different than the medieval lawyer oaths and statutes, both in terms of detail and subject matter. Other observers might be struck by the similarity in the core concepts. The basic elements of the medieval provisions—fairness in litigation, competence, loyalty, confidentiality, reasonable fees, and public service—continue to be the central principles of modern legal ethics. Both views of this history are legitimate and can inform our understanding of legal ethics.

First, the persistence of the core ideals tells us about the continuing role of lawyers and societal concerns about that role. The original oaths and statutes were aimed at the legal practice of the day, one that revolved around litigation. Accordingly, the early works primarily addressed litigation practices, and in this regard, their provisions were relatively detailed. They did not merely state a duty to do justice; they also addressed a number of specific litigation abuses, such as false evidence, harassment of witnesses, disrespect of the courts, and purposeful delay tactics. This litigation focus continues. To be sure, the Model Rules today address lawyer roles other than litigator, but advocacy remains a primary focus of the Model Rules.⁵²⁷

The continuing focus on litigation tells us not only that the lawyer's traditional role has been that of litigator, but also that society has been concerned about abuse of that role. Early medieval statutes complained of "deceit by pleaders"⁵²⁸ and lawyers "maliciously protracting legal causes."⁵²⁹ These concerns were not unique to medieval practice. Colonial Virginia warned of lawyers who were more concerned about "their own profit and their inordinate lucre than the good and benefit of their

524. 102 ABA REPORTS, *supra* note 2, at 224-25 (revising oath).

525. *Id.* at 259 (report of committee recommending change).

526. *See supra* notes 319-330 (discussing Hoffman and Sharswood's interpretations of duty to do justice).

527. All nine rules in Section 3 of the Model Rules ("Advocate") are dedicated to litigation issues. *See* ABA COMPENDIUM, *supra* note 2, at 85-98 (Model Rules 3.1 through 3.9).

528. *See supra* notes 72-82 (discussing Chapter 29 of 1275 First Statute of Westminster).

529. *See supra* notes 184-188 (quoting 1274 French ordinance).

clients.”⁵³⁰ These complaints should resonate today among the politicians and critics who blame “greedy trial lawyers” for litigation abuses and cry for reform.⁵³¹ To be sure, there are and always have been many political motivations behind such reforms, but the persistence of both the political debate and reform statutes tells us something about lawyers and society’s reaction to them. On the one hand, there likely always has been a group of lawyers who cross the line of propriety in litigation, but on the other hand, the nature of litigation itself—even legitimate litigation imposes costs and proclaims winners and losers—causes society at times to overreact and blame lawyers for non-existent wrongs. In any event, history suggests that litigation abuse, real or perceived, will always be a focal point of standards of conduct for lawyers.

The standards for legal ethics have other common elements over the centuries. One is concern about the lawyer’s relationship with his client. Essential attributes of this relationship—loyalty, competence, confidentiality and fees—were sources of client discontent and regulation in medieval times and have remained so ever since. Another common element is public service. That oaths and statutes continually have required, or at least urged, service to the poor underscores society’s long held view that lawyers are essential to the administration of justice. These common themes suggest both society’s worries about and dependence on lawyers throughout history.

The changes in the standards, as well as the common elements, inform us about the role and regulation of lawyers. There have been countless variations in the statement of lawyer duties, both over time and across jurisdictions. Most changes fall into one of two basic categories: addition of new subject matter on isolated issues, or, increased detail as to the continuing core duties. Both types of change teach us about lawyer ethics and behavior.

First, the addition of truly new subject matter has been relatively modest. There are very few topics in the modern statement of lawyer standards that cannot be tied in some way to the centuries-old statements of duty. As to truly new matter, most additions reflected changes in the day-to-day practice of lawyers. Many additions to the standards essentially act as a record of practice developments. For example, a comparison of the current Model Rules with earlier standards suggests that modern lawyers practice in law firms, multiple jurisdictions, and non-litigation matters to a greater degree than their predecessors.

Only a few new subjects in modern ethics codes (“new” in that they were not part of the medieval provisions) reflect differing perceptions of proper ethical behavior as opposed to changes in the underlying lawyer

530. See *supra* note 203 (quoting 1645 Virginia statute).

531. See Rose, *Medieval England*, *supra* note 17, at 118 (stating that the current attacks on lawyers “bear strong resemblance to the medieval litany: excessive litigation, greedy lawyers who create a demand for their services and whose misconduct and poor training exacerbate the harm”); see generally Rose, *Medieval Attitudes*, *supra* note 17 (exploring persistent hostility toward lawyers since medieval times).

behavior. The rules on lawyer advertising and solicitation are prime examples. There is nothing particularly modern about a lawyer's desire to drum up business, yet lawyer advertising and solicitation were not mentioned in the early oaths and statutes. In more modern times, attempts were made in both England and the United States to regulate lawyer advertising and solicitation, but these moves met protests, judicial backlash and reversals of position in both countries.⁵³² This struggle may suggest that when standards address matters outside the core values of the profession, they are difficult to define and prone to controversy.

The more prevalent change has been the detail in which the core principles are stated, and this change itself suggests several possible lessons about legal ethics. First, detail begets detail. One apparent reason for this phenomenon is that new detail is often necessary to address behavior that falls outside of earlier detailed applications of a duty. For example, litigation practices and fees have always been the source of relatively specific regulation, and as lawyers over the centuries operated within these rules, they developed new litigation practices or new forms of fees to abide by, or avoid the regulation. These new practices, in turn, prompted more detailed regulation.

Another reason that detail begets detail is that it is far easier to state a concept in generalities rather than with precision. This is illustrated by the attempt to define a lawyer's duty of loyalty. That a lawyer must be loyal to clients is easy to state and covers a broad spectrum of conduct, but when any detail is added to that statement, it necessarily begs the question of every other specific application. Accordingly, modern statements of the duty of loyalty have become increasingly more detailed with each set of new standards. The Model Rules now have scores of provisions detailing conflict scenarios, and more rules are sure to follow, especially as the ABA tackles the problem of multi-disciplinary practice.

Often, the new detail can reveal uncertainty and division as to the meaning of the core duty itself. The seemingly simple concept of confidentiality, for instance, became a hotbed of controversy when rulemakers in the twentieth century tried to spell out the parameters of the duty, particularly its exceptions.⁵³³ Modern American lawyers seemingly cannot agree on the meaning of confidentiality, and this uncertainty has continued into the twenty-first century. The ABA House of Delegates in February 2002, rejected proposed changes to the confidentiality rule—"whistle-blowing" provisions—only to turn around in August 2003 to approve them.⁵³⁴

In some cases, the controversy caused by added precision can prompt fundamental rethinking of the underlying duty. The best example is the

532. See *supra* notes 129, 257, 386, 416, 459, 479 & 481 (discussing changing regulation of lawyer advertising in England and in the United States).

533. See *supra* notes 464, 489 & 501 (discussing confidentiality debates under Model Rules).

534. See *supra* note 501 (discussing August 2003 adoption of new whistle-blowing exceptions to duty of confidentiality).

duty to refrain from unjust causes. This duty was broadly stated in the early standards.⁵³⁵ As Hoffman, Sharswood, Jones, and the ABA attempted to give the duty more meaning, they revealed that the duty to do justice meant different things to different people. The debate that followed their statements caused some to question the duty itself. Although many modern statements of lawyer standards continue to reflect a duty to do justice, there has been a general narrowing, and in cases such as the ABA model oath, elimination of the broad standard.⁵³⁶

Another lesson learned from added detail is that regulatory needs have changed. Although generations of lawyers were able to operate under general dictates as to their proper behavior, modern lawyers demanded more clear and precise standards. Indeed, precision to achieve regulatory effect was a primary aim of the ABA in refining its model standards. This phenomenon could be attributable to many factors, such as the increased regulatory environment of modern America, but it does not reflect a shift in the function of standards of conduct from aspirational to regulatory. Standards of conduct have long served both functions. Some, such as the nineteenth century commentaries, tended to state aspirational goals for lawyer behavior, while others, such as the colonial fee statutes, were aimed at curbing misconduct. Many, such as the medieval oaths and Field Code statement of duties, were both aspirational and regulatory. Likewise, the Model Rules today serve both functions. The black letter Model Rules are precise enforceable standards, but many of the comments and even a few rules, such as the Model Rule 6.1 statement regarding service to the poor, state aspirational rather than disciplinary standards.

This leads to a final question as to how legal ethics standards over the years have related to actual lawyer behavior. Neither form of standard— aspirational or regulatory—by itself accurately reflects lawyer conduct of a particular time. Modern lawyers, as a whole, do not usually live up to the ideals of the aspirational statements, but they rarely behave as poorly as reactionary statutes suggest. There is nothing to suggest that this phenomenon has changed over the centuries. The persistence of both types of standard suggests that lawyer behavior always has fallen within the two extremes. In other words, ethics standards can serve as outside poles for determining actual lawyer behavior.

There obviously is much more research to be done, as to both lawyer behavior and ethical standards, but the foregoing history helps in understanding lawyer ethics and regulation. Standards of conduct for lawyers are best appreciated when viewed over the broad spectrum of their development. The standards do not magically appear or shift at any given time. They are not the product of one person or one era. They are evol-

535. See *supra* notes 58 & 59 (discussing 1274 ecclesiastical oath), note 197 (discussing 1816 Swiss oath), and note 279 (Field Code).

536. See *supra* notes 414 & 521-523 (discussing ABA oath and deletion of duty to not bring unjust causes).

ing concepts that to some degree reflect their respective eras, but, for the most part, lawyer ethical standards seem to be inherent in the very nature of the lawyer. The standards may have shifted over time, but the core values of fairness in litigation, competence, loyalty, confidentiality, reasonable fees, and public service have remained relatively constant for 800 years.