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Carol R. Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 *Geo. J. Legal Ethics* 3 (2009).

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ARTICLES

The Lawyer's Oath: Both Ancient and Modern

CAROL RICE ANDREWS*

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* Professor of Law, University of Alabama School of Law. I am grateful for the financial support of Dean Ken Randall, the Law School Foundation, and particularly the William Sadler Fund. I also thank the faculty, students and library professionals at the University of Alabama School of Law, who have assisted my ongoing study of historical legal ethics standards.

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All lawyers take an oath upon their admission to the bar. The oath is literally a rite of passage that marks the transition from student to practitioner of law. It is a solemn promise of ethical conduct by the lawyer. The oath dates back to the ancient beginnings of the legal profession and is a tradition in both form and substance. Indeed, many lawyers today swear to a "do no falsehood" oath, which is substantially the same as one recorded over 350 years ago in a 1649 English book that reported oaths "both ancient and modern."¹ The oath once was the

1. The 1649 "Book of Oaths" stated the following attorney's 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 unto my Lord Chief Justice, or other his Brethren, that it may be reformed; you shall delay no man for lucre and malice; You shall increase no fees but shall be contented with old Fees 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

principal source of ethical regulation of lawyers, but it is now an often overlooked part of the labyrinth of laws and standards governing lawyer conduct. The modern oath does not live up to its potential. Relatively modest refinements would enhance the role of the oath so that it can better inspire lawyers to the ethical ideals of their profession.

This article examines the historical and modern lawyer oaths.² Part I tracks the evolution of lawyer oaths in Europe from antiquity to the nineteenth century. Ancient society used oaths as means to guarantee truth and to assure trust in office holders. Both roles applied to ancient legal advocates. The role of advocates faded as the ancient empires fell, but when lawyers began to reappear in medieval Europe, so did their oaths. Oaths became the principal form of lawyer regulation in the late Middle Ages. These oaths were “condensed codes of ethics,”³ under which lawyers swore to abide by a relatively detailed list of conduct standards. The English oaths focused almost exclusively on civil litigation, stating duties not only to clients but also to the court. The central vow of the most common English oath was to “do no falsehood.” The French oaths focused similarly on litigation, but they were broader than the English oaths and typically included both a duty of public service and a duty to maintain only “just” causes. By the nineteenth century, both England and France moved to a simple form of oath, in which the lawyer stated a general promise of good conduct, but some European nations, such as Switzerland, kept the tradition of the detailed oath.

Part II examines lawyer oaths as they evolved in the United States before the twentieth century. Colonial oaths typically were a variation on the traditional English detailed “do no falsehood” oath, and post-revolutionary oaths tended toward the English simple form of oath. During this era in the United States, legal

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: And furthermore you shall use and demean your self in the office of an Attorney within the Court according to your Learning and discretion; So help You God etc.

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 29-30 (1649) [hereinafter BOOK OF OATHS].

2. In an earlier article, I surveyed standards of conduct since the Middle Ages, of which lawyer oaths were an important component. In that review, I identified six core ethical principles that have governed lawyer conduct for centuries: litigation fairness, competence, loyalty, confidentiality, reasonable fees and public service. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1387 (2004). I also collaborated on a publication addressing the seminal 1887 code of ethics promulgated of the Alabama State Bar Association. Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 7 (2003) [hereinafter GILDED AGE].

3. This description was coined by Josiah Henry Benton in 1909. JOSIAH HENRY BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* (1909). Benton's work was an extensive collection of original lawyer oaths. Throughout this article, I principally rely on and cite to the work of Benton and other historians. This article is a collection and analysis of the oaths reflected in those other studies, rather than original historical research.

ethics regulation and debate was minimal in comparison to the modern era, but to the extent that states regulated lawyer behavior and scholars debated legal ethics, the oaths were a part of that regulation and debate. In the second half of the nineteenth century, the Field Code codified an 1816 Swiss oath, drawn from the French oath tradition. The Field Code was a significant innovation in that it codified the concept of “just” causes, distinguished duties of criminal defense lawyers, and stated duties of confidentiality and public service. Many states used the Field Code as their model, which in turn prompted further debate and evolution of legal ethics.

Part III looks in relative detail at the ABA’s 1908 model oath. At the turn of the twentieth century, state bar associations began to supplement the lawyer oaths and the Field Code statutes with detailed codes of ethics. The ABA followed this lead and in 1908 adopted model ethics standards, in the form of a model oath and Canons of Ethics. The model oath was a reworked version of the Field Code duties, and its “just” causes clause was at the center of the ABA’s primary drafting debate—the proper advocacy roles of lawyers. The model oath originally had equal prominence with the Canons; it was the regulatory portion of the 1908 ethics compilation. Today the model oath has fallen into the shadows of the more detailed “black letter” *Model Rules of Professional Conduct*.

Part IV concludes with a survey and critique of modern lawyer oaths. Modern oaths are surprisingly similar to oaths taken centuries ago. Lawyers in the United States swear to one of three basic forms of oath—the English simple oath, the English “do no falsehood” oath, or the Swiss (ABA) detailed oath. Unlike many other professional oaths, the lawyer’s oath has some force of law; in most states, statutes require lawyers to take the oath as a condition of their licensure and mandate punishment for oath violations. The oath also performs ethical functions. Although no longer the principal source of ethical guidance for lawyers, the oath is both a reminder of and a promise to abide by core ethical precepts. Unfortunately, some oaths are flawed in that they do not unequivocally state the essential ideals of the profession. Minor adjustment to both the language and administration of current oaths would allow the oath to build on its traditional function and inspire lawyers to their core ethical ideals.

I. EVOLUTION OF LAWYER OATHS IN EUROPE

Lawyer oaths have been a part of the legal profession in Europe from the time legal advocates first appeared. Oaths played important roles generally in ancient civilization, particularly in litigation, and as professional advocates began to appear in litigation, they also took oaths to maintain truth and fairness during litigation. When the ancient empires declined, the legal profession ebbed, but oaths, taken by the litigants themselves, continued to play a prominent role in litigation. As professional advocates began to reappear in medieval Europe, their oaths returned. Like the ancient oaths, the medieval oaths centered on ethics in

litigation, principally civil litigation, and they were relatively detailed in their dictates as to proper litigation behavior. The English oaths prohibited litigation falsehoods and misconduct, and the French oaths added a broader ideal of “just” causes. Over time, some oaths, particularly the French oaths, added other elements, such as duties to the poor. The detailed lawyer oaths eventually faded in Europe. Both England and France moved to simple oaths by the early nineteenth century. However, the detailed oaths did not disappear. In 1816, Switzerland formulated a detailed oath, based on the older French oaths, that later would have widespread and lasting influence in America.

A. THE ORIGINS OF LAWYER OATHS

Oaths are an ancient tradition.⁴ The ancient oath-taker invited a Supreme Being,⁵ including a variety of ancient pagan deities,⁶ to both witness his declaration and punish him if the statement proved false or he did not fulfill his promise.⁷ According to an ancient fable, the oath was the only means upon which mere mortals could be trusted.⁸ A nineteenth century writer argued that oaths must be of divine origin because oaths were both pervasive—used by “almost every tribe and nation upon earth,”⁹—and well-established by the time of the “earliest history records.”¹⁰

4. For discussion of the general use of oaths throughout history, see JAMES ENDELL TYLER, *OATHS; THEIR ORIGIN, NATURE, AND HISTORY* (London, John W. Parker 1834); HELEN SILVING, *ESSAYS ON CRIMINAL PROCEDURE* (1964); JOSEPH PLESČIÁ, *THE OATH AND PERJURY IN ANCIENT GREECE* (1970). See generally MATTHEW A. PAULEY, *I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH* (1999).

5. Cf. SILVING, *supra* note 4, at 4 (reporting that the oath originated as a self-curse, as opposed to an appeal to a deity, because “[s]upernatural beings were unknown, and man believed that he possessed magic power which could produce any desired result”).

6. See generally PAULEY, *supra* note 4, ch. 3 (surveying oaths to Greek and Roman deities).

7. Cicero is reported to have said that “an oath ‘is an assurance backed by religious sanctity; and a solemn promise given, as before God as one’s witness, is to be sacredly kept’” William R. Nifong, Note, *Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law*, 49 DUKE L.J. 1077, 1103-04 (2000) (quoting Cicero). See also TYLER, *supra* note 4, at 9 (“It is the calling upon God to witness, i.e., to take notice of what we say, and it is invoking his vengeance, or renouncing his favour, if what we say be false, or what we promise be not performed” (quoting Dr. Paley)) (emphasis in original).

8. Tyler recounted this fable:

Horcus, or the God of Oaths, is said to be the son of Eris, or Contention; and fables tell us, that in the golden age, when men were strict observers of the laws of truth and justice, there was no occasion for oaths, nor any use made of them, But when they began to degenerate from their primitive simplicity, when truth and justice were banished out of the earth, when every one began to take advantage of his neighbor by cozenage and deceit, and there was no trust to be placed in any man’s word, it was high time to think of some expedient, whereby they might secure themselves from the fraud and falsehood of one another; hence has oaths had their origin.

TYLER, *supra* note 4, at 7 n.* (quoting Potters *Antiq.*, b.ii. c.6).

9. D.X. JUNKIN, *THE OATH: A DIVINE ORDINANCE, AND AN ELEMENT OF THE SOCIAL CONSTITUTION: ITS ORIGIN, NATURE, ENDS, EFFICACY, LAWFULNESS, OBLIGATIONS, INTERPRETATION, FORM AND ABUSES*, 15 (New York, Wiley & Putman 1845).

10. *Id.* at 16 (citing early biblical references).

The ancient oath secured trust, which was important both in asserting facts and in making promises.¹¹ Ancient oaths therefore took two primary forms: declaratory and promissory.¹² When taking the declaratory oath, the oath-taker vowed to the truth of a matter. In ancient litigation, the parties swore to the veracity of their evidence and the merit of their claims, and in some cases, the oath decided the case.¹³ When taking the promissory oath, the oath-taker swore to do something in the future. A promissory oath had obvious uses in commerce, but it also promised ethical conduct by office holders and the emerging professional class.¹⁴ The most prominent example of the ancient professional promissory oath is the "Hippocratic oath," by which Greek physicians, beginning in the fifth century B.C., swore to abide by a variety of ethical principles.¹⁵

Both aspects of the oath applied to early legal advocates.¹⁶ Because lawyers were involved in litigation, their oaths reflected the truth function, and as professionals, their oaths stated standards of professional deportment. Roman advocates, for example, solemnly exhorted "to avoid artifice and circumlocution,"¹⁷ to not use "injurious language or malicious declamations against his adversary," and not "to employ any trick to prolong the cause."¹⁸ Likewise, ancient Greek advocates reportedly swore to "represent the bare truth, without

11. "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." TYLER, *supra* note 4, at 6-7.

12. *See id.* at ch. IX (defining assertory and promissory oaths). *Cf.* PLESCIA, *supra* note 4, at 13-14 (discussing types of oaths).

13. Tyler reported that "ancient Greek and Roman authors" spoke of oaths "by which the plaintiff or defendant in a suit, either at the desire of his antagonist, or by the direction of the judge, pleads himself to the justice of his cause, or confesses or denies some material point." Tyler, *supra* note 4, at 236 n.* *See also* Plescia, *supra* note 4, at 40-53 (reporting that in ancient Greece, the oath sometimes merely attested to the veracity of the evidence or the sincerity of the claims, but that at other times, the oath decided the case, through oath challenges and otherwise).

14. *See* PLESCIA, *supra* note 4 (describing ancient Greek oaths of citizenship and public office); Nifong, *supra* note 7, at 1093-1105 (describing the role of oath as a "sacred" form of); TYLER, *supra* note 4, at 297-300 (describing promissory oaths of ancient office holders).

15. There is modern disagreement as to the content and origin of the oath attributed to Hippocrates. *See* Robert D. Orr et al., *Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 J. CLINICAL ETHICS 377 (1997). Most versions of the Hippocratic oath state detailed duties of the physician, including duties to maintain confidentiality ("whatsoever I shall see or hear in the course of my profession . . . I will never divulge, holding such things to be holy secrets") and to do no harm ("I will enter to help the sick, and I will abstain from all intentional wrongdoing and harm, especially from abusing the bodies of man or woman"). Charles J. McFadden, *MEDICAL ETHICS*, 461-62 (6th Ed, 1968).

16. Legal advocates initially faced hostility but eventually gained recognition and legitimacy in the ancient world. *See* ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* ch. 10 (1927) (describing early Greek legal profession); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES*, 50-52 (West 1953) (discussing early Roman legal advocates).

17. BENTON, *supra* note 3, at 19 (reprinting oath in Latin and providing alternative translations, including "handle the cases of litigants without artfulness and with simple language without any circumlocution").

18. Joseph Cox, *Legal Ethics*, 19 *THE WKLY. L. BULL. AND THE OHIO L.J.* 47, 49 (Columbus, Capital Printing & Pub. 1888) (quoting a Roman oath).

any ornament or figure of rhetoric, or insinuating means to win the favor or move the affection of the judges.”¹⁹

By the end of the Roman Empire, the advocate's oath was remarkably similar to modern oaths. An oath reportedly used in the era of Justinian (sixth century A.D.) required advocates to swear that:

[T]hey will undertake with all their power and strength, to carry out for their clients what they consider to be true and just, doing everything with it is possible for them to do. However, they, with their knowledge and skill, shall not prosecute a lawsuit with a bad conscience when they know [beforehand] that the case entrusted to them is dishonest or utterly hopeless or composed of false allegations. But even if, while the suit is proceeding, it were to become known [to them] that it is of that sort [i.e., dishonest], let them withdraw from the case, utterly separating themselves from any such common cause.²⁰

The Justinian oath spoke exclusively to litigation candor and fairness, and in doing so, it stated a rather sophisticated balance of the lawyer's duties to client and court, including duties to pursue “just” objectives and to withdraw from “dishonest” causes. Justice Story, writing more than one thousand years later, proclaimed the Justinian oath as “well worthy . . . for the consideration of Christian lawyers in our day.”²¹

At some point, the legal profession faded or perhaps disappeared altogether in Europe.²² In the early Middle Ages, litigation was a relatively primitive form of dispute between the parties, wherein litigants appeared for themselves without outside help.²³ Oaths did not disappear. To the contrary, oaths were an important part of litigation, but they were made by the litigants or witnesses.²⁴ Oaths played a variety of roles in early Anglo-Saxon litigation, sometimes serving as a ritualistic form of proof or as the judgment itself.²⁵ In some uses, the oath was tested, often with

19. *Id.*

20. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW 26, n.1 (Boston, Little & Brown 1832) (quoting Justinian Code) (translated from Latin in Story's text). The oath may reflect earlier Roman practice as to the advocate's oath. Although Justinian ruled in the sixth century, his Justinian Code purported to capture Roman law going back to the time of Hadrian, in the second century, AD. For a concise summary of the Justinian Code, see O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY ¶¶ 1.2.1-1.2.2 (3rd ed. 2000).

21. STORY, *supra* note 20, at 26, n.1.

22. 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”).

23. POUND, *supra* note 16, at 61 (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 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 598-610 (2d ed. 1923) (describing the ancient modes of proof through ordeal, battle, and wager at law).

24. MAURIZIO LUPOI, THE ORIGINS OF THE EUROPEAN LEGAL ORDER, § 11.2, 339-40, 343-49 (Adrian Belton trans., Cambridge Univ. Press 2000) (describing the oath in litigation between the fifth and eleventh centuries).

25. See SILVING, *supra* note 4, at 57 (noting that the “oath played a role in several” forms of proof, which included the oath of “witnesses; the party's oath, with or without fellow-swearers; the ordeal; and battle.”).

God sitting in judgment and a potential penalty of eternal damnation.²⁶

In the late Middle Ages, litigation modernized and lawyers began to emerge again as a profession. In late twelfth century England, for example, courts were formal and centralized, pleadings were complex, and legal argument was common.²⁷ These developments caused English litigants to seek assistance from others—first from friends and then from professionals.²⁸ By the early thirteenth century, outside professional legal assistance was routine in English and likely other European courts.²⁹ As lawyers re-emerged, so did their professional oaths.

B. LAWYER OATHS IN EUROPE FROM THE MIDDLE AGES UNTIL THE COLONIAL PERIOD

The lawyer oaths of the early thirteenth century picked up where the ancient advocate oaths left off. An early example is the oath dictated in 1221 by Holy Roman Emperor Frederic II. He reportedly set forth the following oath, to be renewed every year by advocates:

That the parties whose cause they have undertaken they will, with all good faith and truth, without any tergiversation, succour; nor will they allege any thing against their sound conscience; nor will they undertake desperate causes, and, should they have been induced, by misrepresentation and the colouring of the party to undertake a cause which, in the progress of the suit, shall appear to them, in fact or law, unjust, they will forthwith abandon it. Liberty is not to be granted to the abandoned party to have recourse to another advocate. They shall also swear that, in the progress of the suit, they will not require an additional fee, nor on the part of the suit enter into any compact; which oath it shall not be

26. PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* 4 (1992) (describing litigation in the Anglo-Norman period as an exchange of pleadings followed by an “oath being put to the proof by compurgation, ordeal or trial by battle” and noting that “[b]ecause it was God who was judging between the parties, there was no need for the defendant to make any other kind of defence”); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L. J.* 301, 320 (1989) (describing trial by ordeal, where a litigant’s oath was tested by such means as enduring a “red-hot iron,” and noting that in the “wager of law, the oath was “everything” for the “penalty for a false oath was thought to be eternal damnation”).

27. See generally BRAND, *supra* note 26, at 14-43 (addressing emerging legal profession in England).

28. Outsiders assisted litigants to some degree in the twelfth century and perhaps before. 1 Pollock & Maitland, *supra* note 23, 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”); W.W. Boulton, *The Legal Profession in England: Its Organization, History and Problems*, 43 *A.B.A.J.* 507, (1957) (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”).

29. Most historians cite the thirteenth century as the origin of the legal profession, at least in England. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY 177-79* (1990); BRAND, *supra* note 26, at 2-5, 46. Lawyers were legitimized earlier in France. In 802, France first provided for professional lawyers, providing “that nobody should be admitted therein but men, mild, pacific, fearing God, and loving justice, upon pain of elimination.” BENTON, *supra* note 3, at 13-14.

sufficient for them to swear once only, but they shall renew it every year before the officer of justice.³⁰

This oath resembled the Justinian oath—imposing a duty of candor to the court that overrode the lawyer's advocacy duties on behalf of the client—and it added a dictate as to fee practice. This oath directly regulated lawyer conduct. Violation of the oath resulted in disbarment “with the brand of perpetual infamy” and a fine of “three pounds of the purest gold.”³¹ Similar oath practices may have been pervasive in Europe by the end of the thirteenth century; oaths were unquestionably present in the ecclesiastical and lay courts of both England and France during this period.

1. THE ENGLISH LAWYER OATHS

In England, as in many parts of Europe, the most prominent early use of advocate oaths was in the ecclesiastical courts.³² In 1234, the council in St. Paul's, London decreed that every ecclesiastical advocate 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.”³³ In 1273, the Court of Arches in London introduced a more detailed oath for lawyers in the ecclesiastical courts.³⁴ In this and similar English ecclesiastical oaths, litigation fairness was the central theme. Ecclesiastical advocates swore to bring only “true and just” causes, to not seek unjust delays, and to not knowingly infringe on ecclesiastical liberties. Additional client concerns also emerged. The advocates swore that they would diligently and faithfully serve their clients, not charge excessive fees, and not take a stake in the litigation.³⁵

30. BENTON, *supra* note 3, at 19-20 (reprinting oath); Tyler, *supra* note 4, at 300-01 (same).

31. BENTON, *supra* note 3, at 19-20.

32. See BRAND, *supra* note 26, 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).

33. 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. BENTON, *supra* note 3, at 14-15.

34. BENTON, *supra* note 26, at 147 (paraphrasing oath and noting that the 1273 oath “was much fuller than any of the preceding English oaths and consisted of five separate clauses”).

35. *Id.* Benton reports the oath dictated by the Archbishop of Canterbury in 1295:

[In addition to the oath of judges, advocates must swear] that they will observe the aforesaid customs and statutes, as far as they affect them, and that they will bring no case to trial, unless they believe it to be true and honest, upon the information on the part of their clients; that, in receiving information from their clients, they will elicit from them, with all possible caution, the truth of the case, and they will clearly show their clients the dangers to which they expose themselves in legal proceedings as far they know, declining to prosecute any further desperate, bad cases, and as soon as the cases or surrounding conditions show themselves to be unjust from the point of view of the law; they shall relinquish them entirely.

BENTON, *supra* note 3, at 23-24.

Early English lawyers took similar oaths in the lay courts. First, as to the early form of English lawyers known as pleaders or serjeants (the predecessors of the modern barrister),³⁶ Parliament first regulated their practice in 1275 through the Statute of Westminster, which provided for imprisonment of pleaders if they were guilty of “deceit or collusion in the King’s courts.”³⁷ Although the statute did not mandate an oath, thirteenth century pleaders in England’s courts took oaths. Sir Coke reported that the early pleader or serjeant swore generally to “truly and well serve the King’s people” and to “not delay causes for money.”³⁸ Another reported pleader’s oath of the era had more detail, including that the pleader “will not knowingly maintain or affirm a wrong or falsehood, but will abandon his client immediately that he perceive wrongdoing.”³⁹ In 1280, the *Liber Custumarum*,⁴⁰ a London ordinance, required pleaders to take an oath, upon penalty of disbarment, that they would abide by several listed duties, including the duty to “make proffers at the bar without baseness and without reproach and foul words and without slandering any man.”⁴¹

Parliament also regulated the early English lawyers known as attorneys (the predecessor of modern solicitors).⁴² In 1402, Parliament formally required that

36. English lawyers were known by different names depending on their function and era. Generally speaking, early pleaders or serjeants evolved into modern day barristers, and attorneys evolved into solicitors. Ecclesiastical courts made a similar distinction between advocates and proctors. See Andrews, *supra* note 2, at 1390-92 (describing different roles of English lawyers).

37. 3 James I (1605) provided:

If any serjeant, pleader, or other, do any manner of deceit or collusion in the king’s court, or consent unto it, in deceit of the court, or to beguile the court, or the party, and thereof be attainted, he shall be imprisoned for a yeare and a day, and from thenceforth shall not be heard to plead in that 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.

1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 316 (University of Oklahoma Press) (1965) (quoting statute).

38. In discussing the 1275 statute, Sir Coke explained that pleaders and pleaders (serjeants) took the following oaths:

Ye shall swear, that well and truly ye shall serve the King’s people as one of the Serjeants at the Law, and ye shall truly council them that ye shall be retained after your Cunning; and ye shall not defer, tract, or delay their causes willingly, for covetous of money, or other thing that they may turn you a profit; and ye shall give due Attendance accordingly; a god you help, and by the Contents of this Book.

EDWARD COKE, *SECOND INSTITUTE OF THE LAWS OF ENGLAND* 213 (1809); BENTON, *supra* note 3, at 11, 26 (quoting similar serjeant’s oath in the Roll of oaths).

39. *THE MIRROR OF JUSTICE* (Selden Society 1893) (stating thirteenth century standards of conduct for pleaders, including an oath that the pleader “will not knowingly maintain or affirm a wrong or falsehood, but will abandon his client immediately that he perceive wrongdoing”).

40. See Cohen, *supra* note 22, at 231-34 (1929) (reprinting *Liber Custumarum*).

41. *Id.*

42. See *supra* note 36 (discussing distinctions between early pleaders and attorneys).

attorneys take an oath.⁴³ The 1402 Act did not specify any form of the attorney's oath,⁴⁴ but the oath probably was some form of the following pledge to "do no falsehood:"

You shall doe noe Falsehood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lord Chiefe Baron or other his Brethren that it may be reformed you shall Delay noe Man for Lucre Gain or Malice; you shall increase noe Fee but you shall be contented with the old Fee accustomed. And further you shall use yourselfe in the Office of Attorney in the said office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God.⁴⁵

This attorney's oath went beyond barring falsehoods in litigation. The oath required the attorney to affirmatively report any falsity to the court ("you shall give knowledge thereof . . . that it may be reformed"). The oath also barred delays ("delay no man for lucre, gain or malice"), limited fee practices ("you shall increase no fee but you shall be contented with the old fee accustomed"), and pledged competence ("best learning and discretion").

The English oaths, whether the attorney's "do no falsehood" oath or the various oaths of the English pleaders and serjeants, spoke primarily to litigation. Some, such as the "do no falsehood" oath, also spoke to fees and competence, but none of the English oaths addressed confidentiality, conflicts of interest, or public service. Although aimed at litigation, the English oaths did not address two notable litigation issues. First, the predominant English oaths did not require a lawyer to assess the justness of his client's otherwise meritorious cause. By contrast, the French oaths of the era stated a "just" causes duty.⁴⁶ The early English ecclesiastical oaths suggested such a duty, but after the fourteenth century, English oaths apparently did not impose a "just" causes duty.⁴⁷ Second, the English oaths spoke primarily to civil litigation and did not speak directly to a lawyer's litigation duties in criminal cases. This is likely because early English

43. The 1402 Act addressed "attorneys ignorant and not learned in the law" and reportedly was the first to provide for admission of attorneys by the courts upon examination, an official oath and regulation of the conduct of attorneys. BENTON, *supra* note 3, at 27.

44. The Act stated that attorneys shall be "sworn well and truly to serve in their offices. *Id.* Professor Moliterno reported that the 1402 act required an attorney to take an oath to be "good and virtuous, and of good fame." James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 785-86 n. 37 (1997).

45. BENTON, *supra* note 3, at 28. Benton reported that the "do no falsehood" oath was used under the 1402 Act, that it was used from a "very early period, perhaps as early as the year 1246," and that the oath was "doubtless framed and in use certainly from the time of the Act of Henry IV in 1402." *Id.* See also BOOK OF OATHS, *supra* note 1 (reprinting 1649 version of "do no falsehood" oath).

46. See *infra* notes 56-59.

47. Brand's paraphrasing of the 1273 Court of Arches oath suggested a "just" causes duty, and a 1295 Archbishop of Canterbury oath imposed a duty for the lawyer to maintain causes that he believed to be "true and just." See *supra* notes 32-35.

lawyers did not frequently represent criminal defendants. In fact, at English common law in capital cases, the accused had to appear by himself and could not have counsel.⁴⁸ There was some lawyer representation of the accused in other settings, but the right to counsel was not formally recognized in England until the nineteenth century.⁴⁹

Some version of the "do no falsehood" oath was the usual attorney's oath in England for at least three hundred years, until 1729, when "An Act for the Better Regulation of Attorneys and Solicitors" replaced the older oath with a new, simple oath. In the new oath, English attorneys and solicitors swore: "that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability."⁵⁰ The reason for the formal shortening of the attorney's oath is a bit of a mystery. It likely did not signify a rejection of the ethical standards stated in the "do no falsehood" oath. Instead, the shortened attorney's oath may have been a more concise means to convey the entire litany of professional standards expected of English attorneys.⁵¹ The simplification also may have been a reaction to the multiplicity of oaths then in use⁵² since lawyers took many oaths at that time.⁵³ English citizens as a whole took oaths for all sorts of purposes, causing critics to call for reform of oath practices in general.⁵⁴

Although the "do no falsehood" oath fell out of practice in England, it did not

48. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 352 (Univ. Chicago Press, 1979) (Facsimile of the First Edition, 1769) ("it was anciently and commonly received practice, (derived from the civil law, which also to this day obtains in the kingdom of France) that . . . counsel was not allowed to any prisoner accused of a capital crime.").

49. Before the nineteenth century, criminal defendants typically defended themselves in England, with only a few exceptions: "star chamber" required counsel, counsel was allowed for trial of certain minor crimes, and ecclesiastical courts had jurisdiction over, and allowed counsel regarding, trials of "mortal sins." See *Faretta v. California*, 422 U.S. 806, 821-27 (1975) (recounting history of self-representation and limited right to counsel in England before the nineteenth century).

50. 2 Geo. 2, ch. 23, §§ 13, 14 (1729). The Act stated that this new form of oath was to be used "instead of the oath heretofore usually taken by the attorneys of such courts respectively." *Id.* See also Moliterno, *supra* note 44, at 786, n.38.

51. The detailed oath was the primary and most constant source of formal ethical dictates, but English lawyers had other sources of ethical guidance and regulation. See Andrews, *supra* note 2, at 1394-1409.

52. Benton attributed the change to the short oath as "a reaction against the multiplicity of oaths imposed by law and of oaths taken without warrant of law." Benton, *supra* note 3, at 9. See also Leonard Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404, 409 (1967) (stating that the oath mandated by the 1729 Act "was not the only oath required of the prospective attorney or solicitor; apparently what was lacking in the quality of the initial oath was thought to be found in the quantity of the required oaths").

53. In 1830, English lawyers took more than twenty-four required oaths, primarily oaths of allegiance and numerous oaths of office, rather than detailed ethics oaths. Goodman, *supra* note 52, at 409.

54. The criticism grew and took on religious tones by the early nineteenth century. See ENOCH LEWIS, OBSERVATIONS ON LEGAL AND JUDICIAL OATHS 5-6 (1848) (criticizing widespread use of oaths as unnecessary invocations of God's name: the "numerous trifling, not to say frivolous occasion on which oaths are legally required, must inevitably impair, if not totally annihilate, the sense of reverence with which the sacred Name ought always be expressed"); Tyler, *supra* note 4, at 86 (arguing in 1834 that oaths "be confined to oaths strictly and properly judicial, and to such promissory oaths of office as relate to the more important and solemn offices of state").

disappear. The “do no falsehood” oath was the principal form of oath used in the American colonies and was the only detailed oath used in the United States in the early nineteenth century. In fact, a number of jurisdictions in the United States still use a variation of the “do no falsehood” oath.⁵⁵

2. LAWYER OATHS IN FRANCE, SWITZERLAND AND OTHER EUROPEAN NATIONS

In France, the lawyer's oath followed an evolution similar to that of English oaths, but the French oaths stated a somewhat broader range of duties. As in England, the practice of oath-taking revived in the Middle Ages and did so first in the ecclesiastical courts. In 1231, the Council of Rouen issued a decree requiring an oath by ecclesiastical advocates. It principally addressed litigation candor and fairness, including both duties to refrain from false pleas and to “not support cases that are unjust or militate against his conscience.”⁵⁶ In the same year, the Bishops at the Council of Chateau-Gontier required a similar oath.⁵⁷

In 1274, King Philip III enacted an ordinance to protect the King's subjects and “to deter those who . . . offer their professional services, from maliciously

55. See *infra*, Part IV(A)(2) (discussing modern use of “do no falsehood” oath).

56. 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 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 3, at 20-21.

57. 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 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 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.

protracting legal contests or charging immoderate fees.”⁵⁸ The ordinance’s principal mode of operation was an oath requiring lawyers to swear to pursue only “just” causes:

We have it ordained and made a statute that all and each one exercising the functions of attorney either in your court or in that of bailiffs and our aforementioned officials, that is, in the courts of judges, shall swear upon the Sacred Gospels the oath, viz.:

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.⁵⁹

The ordinance also commanded that lawyers swear to follow a maximum fee schedule and to repeat the oath every year.⁶⁰ In 1344, a French ordinance expanded the oath’s litigation duties to include more specific prohibitions against “false citations,” postponements “by subterfuge or malicious pretext,” and contingent fees.⁶¹ The French oath was expanded again in 1536 to include more general principles, such as a ban against conflicts of interest⁶² and a duty to serve

58. *Id.* at 16-18.

59. *Id.* at 16-17.

60. *Id.* at 17.

61. Benton reported the 1344 oath ordinance as follows:

Those advocates who are retained shall not be allowed to continue their practice unless they bind themselves by oath to the following effect: 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. Edward S. Cox-Sinclair, *The Bar in the United States*, 32 THE LAW MAGAZINE AND REVIEW, 193 (1908) (reporting that the 1344 ordinance added: “They will not speak injurious words against adverse parties or others”).

62. BENTON, *supra* note 3, at 17 (“advocates must not give advice to both parties under punishment of being heavily fined by financial penalties, suspension or loss of all their property”); Cox-Sinclair, *supra* note 61, at 193 (“They will not be for two parties”).

the poor.⁶³ These detailed oaths continued in France until the early nineteenth century, when French advocates began using simpler oaths.⁶⁴

Professional oath-taking by lawyers extended to other parts of Europe. In 1683, Christian V of Denmark and Norway promulgated the following detailed lawyer's oath that stated vows of fairness in litigation, reasonable fees, honesty and competence:

[T]hat he will undertake no Cause he knows to be bad or iniquitous; that he will avoid all Fraud in pleading, bringing Evidence, and the like: That he will abstain from all Cavils, Quirks and Chicanery; and never seek by Absence, Delays or superfluous Exceptions, to procrastinate a Suit: That he will use all possible Brevity in transcribing Processes, Deeds, Sentences, etc.: That he will never encourage Discord, or be the least Hindrance to Reconciliation: That he will exact no exorbitant Fees from the Poor or others, And that he will act honestly, and to the best of his Power, for all his Clients.⁶⁵

Germany also used lawyer oaths, as evidenced by the simple and very detailed forms of oath used in Germany in the late nineteenth and early twentieth centuries.⁶⁶ The detailed German oath stated several duties, including service to the poor, reasonable fees, promotion of settlement, litigation candor and fairness, confidentiality, and safe-keeping of client funds.⁶⁷

An important European oath, in terms of its influence on American legal ethics,

63. Cox-Sinclair, *supra* note 61, at 193 ("They will serve the poor.").

64. The French oaths changed as the governments changed in France, but a predominant oath of the nineteenth century was a simple oath that generally spoke of competence and litigation fairness. See BENTON, *supra* note 3, at 119-21 (reporting early nineteenth century French oaths).

65. BENTON, *supra* note 3, at 24-25. See 192 (ABA dissemination of 1683 oath).

66. Benton reported a simple oath used in Germany as of 1878: "I swear by God almighty and all-knowing, to perform the duties of a lawyer conscientiously. So help me God."). BENTON, *supra* note 3, at 121.

67. In 1907, the ABA reported that German lawyers took the following oath:

You shall promise and swear, that, . . . you will be faithful, obedient and subject to his highness and his high legal successor in the government; show obedience to the constitution; faithfully keep and observe the laws and ordinances especially, according to you best knowledge and understanding; faithfully and industriously aid everybody, the poor man quite as willingly as the rich man, without fear of the courts to his right, by advice, speech and action; not overcharge parties with fees; not obstruct the amicable settlement of law suits, but further it as much as possible; not retard or hinder justice in any way whatsoever; never give countenance to dishonest designs of parties, particularly not suggest to any party or any accused person groundless subterfuges and statements contrary to the truth, or recantation; and if you should find the cause of a party, in your persuasion to be without foundation, or not based upon the law, and you could not amicably dissuade such party, as is your duty to do, from its intent, not represent it in court in such cause any longer; and never, in any case taken in hand by you, speak and act more than you are instructed to do; keep secrets intrusted to you inviolate; take care of an return in good time public papers and records laid before you or communicated to you; keep safely, funds which may be intrusted to you, and give a conscientious account of them; and finally, show to the public authorities and courts, before which you will appear as counsel due respect, and abstain from all invective against the same; also not to be prevented from the fulfillment of these duties, either by favor, gifts, friendship or enmity, any other impure motive, and altogether so behave as is becoming and befitting a conscientious and duteous attorney and counselor at law.

was the oath developed in Switzerland. The Swiss trace their lawyer oaths to those of medieval France,⁶⁸ but the Swiss made significant contributions of their own. For example, a 1674 Swiss oath required not only litigation honesty elements but also participation in "social causes."⁶⁹ Importantly, in 1816, the Canton of Geneva imposed the following oath:

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.⁷⁰

The 1816 Swiss oath was detailed, embracing a relatively broad range of ethics concerns—allegiance, fair litigation, civility, and public service. Of particular significance was the oath's third clause, which stated the "just" causes duties of the French oaths. Under this clause, the lawyer had a duty to refrain from causes that he did not believe to be "just or equitable." This duty was in addition to the oath's litigation honesty duty (to not use "means outside of the truth"), but interestingly, the Swiss oath exempted criminal defense lawyers from the "just" causes duty. The Swiss oath had a substantial impact on legal ethics in the United States. As discussed in the next section, several states in the late nineteenth century adopted versions of the Swiss oath, and in the twentieth century, the ABA

31 REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, at 735-36 (1907) [hereinafter *A.B.A. REPORTS*] (Report of the Committee on Professional Ethics, App. I).

68. Geneva Bar, *CAHIERS DE L'ORDRE GENEVE*, 7-11 (Feb. 1984) (written in French) (tracing history of Swiss lawyer regulations and oaths).

69. The oath provided:

... to observe laws and customs of the village, not to mention a false fact, deny the true facts, to not undertake any cause that they do not deem supportable, to not refuse their counsel and assistance, maintain their true honor, to not maintain any cause they do not find supportable in their conscience, or go against any of their relatives or friends, in degree of regulation for civil actions and also to take part in social causes, but not give money to their clients to plead at the penalty of suspension.

Id. at 8.

70. *Id.* (reprinting "Law on Judicial Organization," Title X, Article 146, February 15, 1816).

adopted a modified version of the Swiss oath as the ABA model oath.⁷¹ Throughout this process, the “just” causes duty of the Swiss oath sparked debate as to the proper advocacy role of lawyers.

II. LAWYER OATHS IN THE UNITED STATES BEFORE THE TWENTIETH CENTURY

As in the preceding periods in Europe, the oath in colonial America was the most pervasive mode of lawyer regulation. Not surprisingly, the early colonies followed the English oath practice. The most common colonial model was the English attorney’s “do no falsehood” oath, to which many colonies made minor modifications to reflect local regulation. A few colonies followed the example of the simple oath and, as states entered the union, they tended toward a simple model with an added vow of allegiance to the new state and nation.

In the early nineteenth century, the two English lawyer oaths—the “do no falsehood” oath and the simple oath—continued as the predominant forms of oath. This was an era of very little regulation of lawyers, but it was not an era in which lawyer oaths or legal ethics were forgotten. In the first half of the nineteenth century, regulation and debate of legal ethics were beginning to develop in the United States and the oath was a significant part of that development.

In the mid-nineteenth century, the Field Code brought the French oath tradition to the United States by codifying the detailed 1816 Swiss lawyer oath in the form of a statutory list of lawyers’ duties. The Field Code duties were greater in number and substantive breadth than previous American oaths and regulation. The Field Code included duties of public service and confidentiality, required lawyers to maintain only “just and equitable” causes, and set a different standard of conduct for criminal defense lawyers. Many states followed the example of the Field Code with local modifications as to both form and substance. By putting the Swiss oath’s statement of legal ethics duties squarely before legislators and lawyers, the Field Code acted as a catalyst for further debate and refinement of the American understanding of the proper duties of lawyers.

A. LAWYER OATHS IN COLONIAL AND REVOLUTIONARY AMERICA

Colonial America regulated lawyers sporadically.⁷² Some colonies burdened lawyers with strict regulation, and others almost ignored lawyers by employing essentially no regulation. Despite this disparity, lawyer oaths, particularly the English “do no falsehood” oath, were a relative constant in the American colonies, and the oaths helped legitimize the early colonial profession. Charles

71. See *infra* Part II(C) (discussing Field Code) and Part III (discussing ABA model oath).

72. See Andrews, *supra* note 2, at 1414 (discussing forms and content of colonial regulation of lawyers).

Warren credits Massachusetts' early adoption of the English "do no falsehood" oath for rendering law "a regular profession."⁷³ Likewise, Professor Douglass, in his study of lawyers in colonial Maryland, attributes the seventeenth century lawyer's oath as transforming pleaders into a profession of lawyers.⁷⁴

The content and function of the lawyer's oath varied, often depending on the other regulation in the colony. Massachusetts and Virginia are good examples. Lawyers in early Massachusetts⁷⁵ faced rather welcoming regulation compared to that of colonial Virginia.⁷⁶ In both colonies, however, lawyers took versions of the "do no falsehood" oath until the oath was simplified as the colonies became states.

Massachusetts lawyers likely used the English "do no falsehood" oath from the beginning of legal practice in the colony.⁷⁷ In 1701, a Massachusetts act formally mandated the oath, in substantially the same form as the traditional English "do no falsehood" oath, except that the Massachusetts oath omitted the reference to fees.⁷⁸ This modification of the oath was relatively common because most early colonies otherwise regulated the fees of lawyers.⁷⁹

In 1785, the Massachusetts legislature adopted a new "do no falsehood" oath with updated language but the same substantive content as the older oath.⁸⁰ This

73. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 77-78 (William S. Hein & Co., Inc. 1990) (1967).

74. John E. Douglass, *Between Pettifoggers and Professionals: Pleadings and Practitioners and the Beginnings of the Legal Profession in Colonial Maryland 1634-1731*, 39 *AMER. J. LEGAL HIST.* 359, 366 (1995) (arguing that the oath "was an important factor in effecting the transformation of pleaders to practitioners," that "persons without some knowledge of the law could now be excluded from pleading cases," that attorneys who took the oath became by virtue of that fact creatures of the courts," and that use of oaths, instead of letters of attorneys, "moved colonial Maryland's litigation onto a more professional footing").

75. For a general discussion of lawyers in early Massachusetts, see HOLLIS R. BAILEY, *ATTORNEYS AND THEIR ADMISSION TO THE BAR IN MASSACHUSETTS* (1907).

76. See 1 CHROUST, *supra* note 37, at (attributing early colonial Virginia hostility to lawyers to the "jealousy of the Virginia planters and merchants").

77. See BENTON, *supra* note 3, at 58-59 ("do no falsehood" oath adopted "certainly as early as July 27, 1686").

78. Section 2 of the 1701 Act required the following 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.

Id. at 60.

79. The 1701 Massachusetts act, for example, separately set maximum fees for lawyers. See BENTON, *supra* note 3, at 60-61. See generally Andrews, *supra* note 2, Part II(A)(3) (discussing colonial fee regulation); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 9-17 (1984) (same).

80. The 1785 oath stated:

You solemnly swear that you will do no falsehood nor consent to the doing of any in court; and if you know of an intention to commit any you will give knowledge thereof to the justices of the court or some of them that it may be prevented; you will not wittingly or willingly promote or sue any false,

oath continued until 1836, when the Massachusetts legislature mandated a simple oath: "You solemnly swear, that you will conduct yourself, in the office of an attorney, according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as to your clients."⁸¹ Massachusetts apparently used the simple oath until 1860, when it reinstated a modified, shortened version of the "do no falsehood" oath,⁸² which Massachusetts continues to use today.⁸³

By contrast, the Virginia legislature in the seventeenth and early eighteenth centuries vacillated on an almost yearly basis between strictly regulating lawyers and barring them altogether.⁸⁴ In the mid-eighteenth century, Virginia permanently allowed lawyers and thereafter imposed substantive standards, primarily through varying oaths. In 1732, "An Act to prevent frivolous and vexatious suits" required lawyers to take the English "do no falsehood" oath and provided for suspension or disbarment of any attorney in Virginia who violated the oath.⁸⁵ Ten years later, Virginia repealed the 1732 Act and prescribed merely an oath against "exorbitant fees."⁸⁶ In 1748, due to "the great number of ignorant and unskillful attornies," Virginia revived the 1732 Act but shortened the oath.⁸⁷ Over the next several decades, Virginia passed a succession of statutes that modified the form of oath.⁸⁸ In 1792, Virginia set a short form of oath that required lawyers to swear to

groundless or unlawful suit, nor give aid or consent to the same; you will delay no man for lucre or malice; but you will conduct yourself in the office of an attorney within the courts according to the best of your knowledge and discretion and with all good fidelity as well to the courts as your clients. So help you God.

Id. at 61-62; Bailey, *supra* note 75, at 32.

81. Bailey reported that the legislature in 1836 changed "the entire system," which included a simplified oath of office for an attorney. Bailey, *supra* note 75, at 56-57. The 1836 act also provided for a lawyer's removal "for deceit, malpractice or other gross misconduct." *Id.* at 63-64.

82. The 1860 oath was similar to the 1785 form, but the 1860 oath omitted the duty to report false statements *Id.* at 63.

83. See MASS. GEN. LAWS ANN. ch. 221, § 38 (West 2005).

84. In 1642, "An Act for the Better Regulating of Attorneys and the great fees exacted by Them," forbade persons who did not have a special license to plead cases on behalf of another and limited fees to a maximum of twenty pounds of tobacco in county court. Cf. BENTON, *supra* note 3, at 102-103; 1 CHROUST, *supra* note 37, at 268-69, n.134. Just a few years later, in 1645, Virginia repealed the earlier licensing act and outlawed all "mercenary" attorneys who sought "their own profit and inordinate lucre." BENTON, *supra* note 3, at 103; 1 CHROUST, *supra* note 37, at 269 n.135.

85. BENTON *supra* note 3, at 108; 1 CHROUST, *supra* note 37, at 273-74.

86. The 1745 oath provided "that I will truly and honestly demean myself in the practice of attorney, according to the best of my knowledge and ability." BENTON, *supra* note 3, at 109.

87. *Id.* 1 CHROUST, *supra* note 37, at 275-76 n.166-74.

88. For example, a 1748 Virginia statute adopted the "do no falsehood" oath. Moliterno, *supra* note 44, at 786, n.42. In 1777, the oath swore "that I will be faithful and true to the Commonwealth of Virginia, and that I will well and truly demean myself in the office of attorney at law." 2 CHROUST, *supra* note 37, at 261 n.172. In 1785, Virginia modified the "do no falsehood" oath:

You solemnly swear, that you will do no falsehood nor consent to the doing of any in Court, and if you know of an intention to commit any [you shall prevent it]; You will not wittingly or willingly promote or sue any false, groundless, or unlawful suit . . . ; you will delay no man for lucre or malice; but will

“honestly demean” themselves and to act to the best of their abilities,⁸⁹ which oath Virginia continues to use today.⁹⁰

The move to a shorter oath was a trend of sorts. As early as 1714, Maryland used a simple form of oath, combining a vow of allegiance with a pledge of fair and honorable behavior.⁹¹ As discussed in the previous section, the English Parliament adopted a simple attorney’s oath in 1729,⁹² and as with other statutory matters, the Georgia colony expressly incorporated that English practice as its own.⁹³ After the revolution, five new states—New Jersey,⁹⁴ New York,⁹⁵ North Carolina,⁹⁶ Rhode Island,⁹⁷ and South Carolina⁹⁸—adopted a simple oath as part of their new judicial systems.

The simple lawyer oaths typically included both a pledge of good conduct and a vow to support the laws and constitution of the state and federal governments.

conduct yourself . . . according to the best of your knowledge and discretion, and with all good fidelity.

Moliterno, *supra* note 44, at 786 n.42. The following year, the oath was shortened again: “I will honestly demean myself in the practice of a counsel, attorney, or proctor, and will execute my office according to the best of my knowledge and ability.” 2 CHROUST, *supra* note 37 at 261 n.172 (1786 Act).

89. In 1792, a new act required lawyers to swear only that “I will honestly demean myself in the practice of law . . . , and will in all respects execute my office, according to the best of my abilities.” 2 CHROUST, *supra* note 37, at 263.

90. In 1909, Benton reported that the Virginia statute required the attorney to “take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office of attorney-at-law; and also, when he is licensed in this state, take the oath of fidelity to the commonwealth.” See BENTON, *supra* note 3, at 110. Today, Virginia requires a lawyer to take “an oath of fidelity to the Commonwealth, stating that he will honestly demean himself in the practice of law and execute his office of attorney-at-law to the best of his ability.” VA. CODE ANN. § 54.1-3903 (2008).

91. See BENTON, *supra* note 3, at 52; WARREN, *supra* note 73, at 53. Maryland used some form of lawyer’s oath as early as the mid-seventeenth century. See Douglass, *supra* note 74, at 366.

92. See *supra* notes 50-54 (discussing 1729 act).

93. See WILLIAM SCHLEY, DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA 353-54 (J. Maxwell, Printer)(1826).

94. See *infra* note 101.

95. New York, after using different oaths, likely including the “do no falsehood” oath, adopted a short oath in 1787: “I will truly and honestly demean myself in the practice of an attorney . . . according to the best of my knowledge and ability.” BENTON, *supra* note 3, at 79-84. See generally Robert A. Emery, *I Do Solemnly Swear: The Evolution of the Attorney’s Oath in New York State*, 77 Jan. N.Y. St. B.J. 48 (Jan. 2005) (reviewing evolution of the lawyer’s New York, “from specific to generic, and from complexity to perhaps vacuous simplicity”).

96. In 1777, a North Carolina Act established a short oath. BENTON, *supra* note 3, at 88-89; 2 CHROUST, *supra* note 37, at 166 n.193.

97. Under a 1705 Act, Rhode Island used a unique oath: “not to plead for favor nor affection for any person, by the merit of the case according to law.” BENTON, *supra* note 3, at 94-95. In 1837, the Rhode Island Supreme Court adopted a more common short oath: “that I will demean myself as an Attorney . . . uprightly and according to law, and that I will support the constitution and laws of this State, and the Constitution of the United States.” BENTON, *supra* note 3, at 96. At some later date, Rhode Island adopted the traditional “do no falsehood” oath. See *infra* note 283 (current oath).

98. South Carolina may have used either form: its 1785 legislation required that lawyers take an “oath of allegiance and fidelity to this State, and likewise the oath of an attorney.” BENTON, *supra* note 3, at 99, 101; 2 CHROUST, *supra* note 37, at 268 n.201.

For example, in 1799, New Jersey's first legislature passed a comprehensive "Act to Regulate the Practice of the Courts of Law,"⁹⁹ under which the New Jersey Supreme Court issued a rule requiring attorneys to take both an oath of allegiance to the state¹⁰⁰ and the following general oath of office:

I, _____, do solemnly promise and swear, that I will faithfully and honestly demean myself in the practise of an attorney (or of a counselor or solicitor, as the case may be) and will execute my office according to the best of my abilities and understanding. So help me God.¹⁰¹

Likewise, in 1790, the newly established United States Supreme Court required a lawyer admitted to practice before it to swear to support the constitution of the United States and to "demean myself as an attorney (or counsellor) of the court, agreeably and according to law."¹⁰²

Not all early states followed this trend toward simplification. Connecticut,¹⁰³ New Hampshire,¹⁰⁴ and Vermont¹⁰⁵ continued to use the longer form of the traditional English "do no falsehood" oath, and all three use that form of oath today. Delaware¹⁰⁶ and Pennsylvania¹⁰⁷ adopted a modified, shortened form of the "do no falsehood" oath. This modification added a vow of allegiance and

99. The act also required licensing and civil damages against attorneys, provided for removal of licenses of attorneys who were guilty of 'malpractice,' and a fine for excessive fees. 2 CHROUST, *supra* note 37, at 252-53; BENTON, *supra* note 3, at 74-75.

100. The allegiance element of the 1799 New Jersey oath was as follows: "I do and will bear true faith and allegiance to the government established in this state, under the authority of the people. So help me God." BENTON, *supra* note 3, at 75.

101. *Id.*; 2 CHROUST, *supra* note 37, at 254 n.132.

102. Appointment of Justices, 2 U.S. 399, 399-400 (1790).

103. Connecticut adopted an oath in a May 1708 Act "for the better regulating proceedings and pleas at the bar . . ." BENTON, *supra* note 3, at 42. In a 1875 act, Connecticut imposed the following "do no falsehood" oath:

You solemnly swear that you will do no falsehood, nor consent to any to be done in court, and if you know of any to be done, you will give information thereof to the judges, or one of them, that it may be reformed; you will not wittingly or willingly promote, sue, or cause to be sued, any false or unlawful suit, or give aid, or consent, to the same; you will delay no man for lucre or malice; but will exercise the office of attorney, within the court wherein you may practice, according to the best of your learning and discretion, and with fidelity, as well to the court as to your client; so help you God.

CONN. GEN. STAT. § 2- (1875). Connecticut uses substantially the same oath today. *See infra* note 278 (current oath).

104. As once part of the Massachusetts colony, New Hampshire used the "do no falsehood" oath in the seventeenth century. *See* BENTON, *supra* note 3, at 69-70. In 1791, after New Hampshire became a state, it adopted the "do no falsehood" oath and reportedly used a similar oath in 1909. BENTON, *supra* note 3, at 71-73. New Hampshire uses this oath today. N.H. REV. STAT. ANN. § 311:6 (LexisNexis 2008).

105. In 1787, Vermont enacted its first law regulating lawyers, setting admission standards and mandating a "do no falsehood" oath. BENTON, *supra* note 3, at 111-113. This oath continued in Vermont, through 1909, *id.* and it is in use today. VT. RULE ADMISSION § 12.

106. Delaware first adopted the "do no falsehood" oath in 1704. *See generally* BENTON, *supra* note 3, at 44-45; 2 CHROUST, *supra* note 37, at 255. In 1721, Delaware adopted a shortened "do no falsehood" oath: "Thou shalt behave thyself in the Office of an 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

deleted the older oath's statements regarding fees and reporting falsehoods.¹⁰⁸ Both states continue to use this oath today.¹⁰⁹

B. LAWYER OATHS IN THE UNITED STATES IN THE FIRST HALF OF THE NINETEENTH CENTURY

As new states joined the union in the early and middle nineteenth centuries, they followed the lead of the original states and adopted either the "do no falsehood" or the simple oath. The era is seen by modern observers as one in which American lawyers had relatively little guidance as to proper conduct—perhaps a "dark ages" of legal ethics.¹¹⁰ Modern scholarly reviews of the era usually acknowledge the oath but dismiss its importance in guiding lawyer conduct. Professor Wolfram, for example, argues that, after the revolution, courts would "occasionally refer to the oath required of lawyers on admission to the bar, but those oaths were invariably quite general in form and could hardly have provided either guidance to a questioning lawyer or restraint on a court inclined otherwise to impose discipline."¹¹¹ Professors Zacharias and Green assert that the oath in the nineteenth century was not a "source of the lawyer's distinctive obligations."¹¹² They acknowledge that the oath represented an agreement by the lawyer "to comply with his public obligations, whatever they may be," but maintain that "the oath itself [did] not enumerate the lawyer's obligations."¹¹³ Instead, the lawyer was "supposed to learn or identify his obligations" from "socialization, professional lore, independent reflection on the expectations of the lawyer's professional 'office.'"¹¹⁴

There is truth in these observations. Lawyers were largely unregulated,

cause through lucre or malice." BENTON *supra* note 3, at 45. Delaware uses this form of oath today. Del. Rules; Rule 54.

107. Pennsylvania reportedly used the traditional "do no falsehood" oath in the early eighteenth century, and by at least 1833, Pennsylvania had shortened the oath:

You do swear . . . that you will support the constitution of the United States and the constitution of this Commonwealth, and that you will behave yourself in the office of attorney within this court, according to the best of your learning and ability, and with all good fidelity, as well to the court as to the client, that you will use no falsehood, nor delay any person's cause for lucre or malice.

1833 Pa. Laws 354; *see also* 1 CHROUST, *supra* note 37, at 222 n.295; WARREN, *supra* note 73, at 78. Pennsylvania uses this oath today. 42 PA. CONS. STAT. § 2522 (2008).

108. *See supra* notes 5 & 106.

109. *Id.*

110. 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) (student paper on file at Harvard Law School library)(analyzing whether the nineteenth century was a "nadir" or "dark ages" of legal ethics).

111. Charles Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 479 (2001).

112. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 32-36 (2005).

113. *Id.* at 34.

114. *Id.* at 35.

especially when compared to the modern legal profession. Unquestionably, the nineteenth century lawyer oath lacked the detail of today's standards for lawyer behavior, and lawyers in the early nineteenth century learned much of their ethics from socialization, lore and reflection.¹¹⁵ This does not mean that the lawyer's oath did not serve any regulatory or ethical function. To the contrary, the oath played a fairly significant role in guiding legal ethics throughout the nineteenth century. In some applications, the oath directly dictated lawyer conduct, and in others, the oath, as part of the professional lore of the era, indirectly guided lawyers.

The mere requirement of the oath conveyed a sense of obligation to lawyers. Oaths were serious rituals in this era. Oaths were important enough that the first act of the new Congress of the United States in 1789 was to pass a bill regarding the oath for office-holders.¹¹⁶ As Professor Horwitz explains, oaths had a gravity that is not fully appreciable today, but was well understood by the founding generation, because oaths both appealed to God and implicated the oath-taker's personal sense of honor.¹¹⁷

The oath reflected the role of the lawyer as an officer of the court. Although there was some debate in the nineteenth century as to whether lawyers were governmental "office holders," all seemingly agreed that lawyers were officers of the court.¹¹⁸ George Sharswood, the prominent nineteenth century jurist, academic and legal ethicist—best known for his influential 1854 *Essay on Professional Ethics*¹¹⁹—explained the role of the oath in conferring this office to lawyers:

It is an oath of office, and the practitioner, the incumbent of an office—an office in the administration of justice—held by authority from those who represent in her tribunals the majesty of the commonwealth, a majesty truly more august than that of kings or emperors. It is an office, too, clothed with many privileges

115. See Andrews, *supra* note 2, at 1423, 1426, 1431.

116. I Public Statutes at Large, Statute I, Ch. 1 ("An Act to regulate the Time and Manner of administering certain Oaths") (1789).

117. Paul Horwitz, *Religious Tests in the Mirror: The Constitutional Law and Constitutional Etiquette of Religion in Judicial Nominations*, 15 WM. & MARY BILL RTS. J. 75, 106-08 (2006) (explaining that the "root" of the importance of oaths "lay in two aspects of the oath." "First, to swear an oath was a deeply significant act for religious reasons" and "Second, the religious aspects of the oath . . . were buttressed by the founding generations' keenly felt sense of honor.").

118. See *Ex Parte Garland*, 71 U.S. 333, 378 (1866) (stating that attorneys "are not officers of the United States" but instead "officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character"); *Benjamin Watkins Leigh's Case*, 15 (1 Munf.) 468 (Va. 1810) (holding that lawyers must take the lawyer's oath but need did not take Virginia's anti-dueling oath applicable to "every person who shall be appointed to any office or place, civil or military, under this commonwealth").

119. HON. GEORGE SHARSWOOD L.L.D., AN ESSAY ON PROFESSIONAL ETHICS § Memorial (T. & J. W. Johnson & Co., Law Booksellers and Publishers 5th ed. 1884). Sharswood was a professor and dean at the University of Pennsylvania law school, served on the Pennsylvania Supreme Court, and was its chief justice from 1879 to 1883. See *id.* ("Memorial," discussing Sharswood's life and achievements).

—privileges, some of which are conceded to no other class or profession. It is therefore that the legislature have seen fit to require that there should be added to the solemnity of the responsibility, which every man virtually incurs when he enters upon the practice of his profession, the higher and more impressive sanction of an appeal to the Searcher of all Hearts.¹²⁰

In 1867, Bethune Duffield spoke to the University of Michigan law class in praise of the oath as a special means to secure the “moral fitness” and “allegiance to the State” of the holder of this “high service.”¹²¹ Professor Hoeflich, in his study of nineteenth century ethical debate, reports that the oath was a recurring theme in ethical discourse and that the “lawyer’s oath elevated the lawyer from being a private citizen to being a public official, and, as such, gave the lawyer a whole new set of obligations.”¹²²

The oath also was a basis for lawyer discipline in the early nineteenth century. As Professor Wolfram notes, there is a dearth of early American case law addressing or imposing lawyer regulation.¹²³ Professors Zacharias and Green have studied the opinions of John B. Gibson, Chief Justice of the Pennsylvania Supreme Court, as examples of early judicial regulation of lawyers.¹²⁴ At least two of Justice Gibson’s cases show that the oath was a basis for disciplining lawyers.

In the 1835 case of *In re Austin*, Justice Gibson explained that courts had a broad range of disciplinary options with respect to lawyers appearing before them, including “expulsion from the bar,” reprimand, and fines.¹²⁵ He urged caution in assessing the extreme punishment of expulsion,¹²⁶ but stated that expulsion was the appropriate penalty for a lawyer’s violation of his or her oath:

It is not doubted that any breach of the official oath is a valid cause, for proceeding for the former [expulsion]; for the man who deliberately violates the sanctions of a lawful oath, proves himself to be unworthy of further confidence; society has no other hold upon him. The most insignificant breach of the fidelity enjoined may, therefore, be visited with this measure.¹²⁷

120. *Id.* at 58-61 (citations omitted).

121. D. Bethune Duffield, *The Lawyer’s Oath: An Address Delivered Before the Class of 1867, of the Law Department of the University of Michigan* 5 (Mar. 27, 1867).

122. M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The “Other” Tradition*, 47 KAN. L. REV. 793, 798 (1999) (oaths “were taken quite seriously” because “[t]hey bound the taker before God and man”).

123. See MOORE, *supra* note 110.

124. See generally Zacharias & Green, *supra* note 112.

125. *In re Austin*, 1835 WL 2736, *12 (Pa. 1835).

126. “[T]he end to be attained by removal, is not punishment, but protection. As punishment, it would be unreasonably severe, for those cases in which the end is reclamation and not destruction, and for which reprimand, suspension, fine, or imprisonment seem to be the more adequate instruments of correction; for expulsion from the bar blasts all prospects of prosperity to come, and mars the fruit expected from the training of a lifetime.” *Id.*

127. *Id.*

Austin concerned the question of whether a series of letters by lawyers, published in the press and critical of a judge, were a violation of the lawyers' ethical duties.¹²⁸ Justice Gibson concluded that the lawyers did not violate their duties,¹²⁹ and he did not decide the question in the abstract. He looked in part to the terms of the oath itself: as "fidelity is exacted by the terms of the oath . . . 'in the office of attorney,' and 'within the court,' the act which may violate it, must be done in the face of the court."¹³⁰

Ten years later, in *Rush v. Cavanaugh*,¹³¹ Justice Gibson discussed the ethical duties of a lawyer in response to a demand by a client to prosecute a man that the lawyer believed to be innocent.¹³² Attorney Rush had been retained to bring a private prosecution for forgery, but he withdrew it, over his client's objection, after Rush became "convinced" that "the accusation was false."¹³³ Rush expected to be paid for his work, and, in response, his client called Rush a "cheat."¹³⁴ The *Rush* case was a slander action brought by Rush against his former client.¹³⁵ Justice Gibson characterized the "material question" as whether the lawyer "violat[e] his professional duty to his client."¹³⁶ He held that lawyer Rush acted properly in withdrawing from the prosecution. Justice Gibson relied in part on the oath, stating that a lawyer "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as to the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man."¹³⁷

The more difficult question is the extent to which the oath itself set or guided ethical standards. The answer depends upon both the oath taken by the lawyer and the conduct at issue. Lawyers who took the simple oath got very little ethical guidance from that oath. Even the "do no falsehood" oath did not give much guidance outside of litigation. A few states retained the longer traditional form of the "do no falsehood" oath, which stated generally applicable duties of fees and basic competence,¹³⁸ but the oath's primary focus was litigation.

Yet, the "do no falsehood" oath gave reasonable direction to lawyers as to litigation conduct. Both versions of the "do no falsehood" oath stated that the lawyer had duties to the court as well as to the client. In the shortened version of the "do no falsehood" oath, the lawyer swore that he would behave "with all good

128. *Id.*

129. *Id.*

130. *Id.* "The oath undoubtedly looks to nothing like allegiance to the person of the judge, unless in those cases where his person is so inseparable from his office, that an insult to the one, is an indignity to the other." *Id.* at 15.

131. 2 Pa. 187, 1845 WL 5210 (Pa.).

132. See generally Zacharias & Green, *supra* note 112 (analyzing *Rush*); 1845 WL5210, *2.

133. *Rush v. Kavanaugh*, 2 Pa. 187 (Pa. 1845).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See *supra* notes 102-104.

fidelity, as well to the court as to the client, that [he would] use no falsehood, nor delay any person's cause for lucre or malice."¹³⁹ The longer traditional version of the oath also stated that the lawyer must not bring "false or groundless" suits and that the lawyer must inform the court of falsehoods made to the court.¹⁴⁰ These statements of litigation duties were broad enough to directly guide lawyers as to many ethical dilemmas in litigation. For example, in *Rush*, once lawyer Rush concluded that his client's "accusation was false," a fair reading of his own oath— Pennsylvania's modified "do no falsehood" oath—would have instructed Rush that he owed a duty to the court not to press the false claim.¹⁴¹ Moreover, the historical prominence of the longer "do no falsehood" oath suggests that this oath gave litigation guidance to all American lawyers, even those who took a simple oath or the shortened "do no falsehood" oath. Put another way, the litigation honesty elements of the "do no falsehood" oath likely were dominant components of the professional lore of American lawyers in the early nineteenth century.

The "do no falsehood" oath, even in its longer form, did not address all ethical issues in litigation. It did not address what would become a focal point of legal ethics debate in the nineteenth and early twentieth centuries: cases where the claim or defense had legal and factual merit, but where the lawyer did not believe the cause to be otherwise "just." The "do no falsehood" oath did not address this case, but it was part of the older oaths of Europe—the Justinian oath, some ecclesiastical oaths and the French oaths.¹⁴² These other oaths instructed lawyers to maintain only "just" causes (or to refrain from "unjust" causes). In some early forms, the duty might have been a substitute or shorthand statement of general litigation fairness,¹⁴³ but in many older oaths, the "just" causes duty was independent of the litigation honesty duties.¹⁴⁴

The question is the practical impact that these other oaths had on early nineteenth century lawyers. To some extent, the "just" causes concept was part of the professional lore of some early American lawyers. Justice Story, for example,

139. See *supra* note 107 (Pennsylvania oath).

140. Three early states—Connecticut, New Hampshire and Vermont—used the longer, traditional "do no falsehood" oath throughout the nineteenth century. See *supra* notes 103-105. In addition, a few new states adopted the longer oath later in the century. See *infra* note 169.

141. But see Zacharias & Green, *supra* note 112, at 32 (stating that Rush "was accountable to that standard (i.e., a duty to refrain from pursuing unjust prosecutions), though it had not been explicitly spelled out in the lawyer's oath or in prior state court opinions, because Gibson evidently believed that lawyers would know of it independently").

142. See *supra* notes 45 & 46.

143. The Justinian Oath instructed lawyers to "carry out for their clients what they consider to be true and just, doing everything which is possible for them to do." See *supra* note 20. In the 1221 oath of Frederic II, lawyers swore that they would not "allege any thing against their sound conscience." See *supra* note 30.

144. The 1231 oath the Council of Roëun instructed lawyers to swear both that they would "not support cases that are unjust or militate against his conscience" and that they would not use false pleas or other falsehoods. See *supra* note 56. The 1344 French ordinance required lawyers to swear that they would not "take charges of any causes which they know to be unjust" and that they would "abstain from false citations." See *supra* note 61.

in his 1832 treatise on agency law, quoted the “well worthy” ancient oaths,¹⁴⁵ and derived two essential maxims of lawyers—“one, never to defend a cause, which is unjust; and the other, not to defend just causes but by the ways of justice and truth.”¹⁴⁶ Nevertheless, the “just” causes duty, as an independent duty, was not as deeply embedded in the lore of American lawyers as the honesty elements of the “do no falsehood” oath.¹⁴⁷ Unlike the litigation honesty standard, which was stated in many oaths of the era, the “just” causes duty had not been stated in Anglo-American oaths for generations.¹⁴⁸

The difference in prominence between the honesty standard and the “just” causes standard offers an important perspective on nineteenth century legal ethics. It arguably describes one of the key points of disagreement of the era—the proper limits of litigation advocacy. Many modern scholars attribute to the era two opposing views of the proper advocacy role of lawyers—a client-oriented view and a lawyer morality view.¹⁴⁹ The leading nineteenth century statement of the client-oriented view was that of English Lord Brougham in his 1820 defense of Queen Caroline, in which he urged that the lawyer knew but one person, his client, and that he must use all means expedient in his defense of the client.¹⁵⁰ The leading example of the lawyer morality view was the 1836 work of American legal educator David Hoffman—*Fifty Resolutions In Regard to Deportment*¹⁵¹—wherein Hoffman instructed young lawyers to resolve that “[m]y client’s conscience, and my own, are distinct entities”¹⁵² and that a lawyer must decline cases or refuse to present defenses that the lawyer believed to be unjust.¹⁵³ Professors Zacharias and Green claim that Justice Gibson, in the *Rush* and *Austin* cases, reflected a “middle ground” to these two views of advocacy—one of “professional conscience,” in which the lawyer owed duties to the court that

145. Story, *supra* note 20, § 24, at 26.

146. *Id.*

147. See *supra* note 47 (noting early English ecclesiastical oath’s suggestion of a “just” causes duty but absence of the duty in later lay oaths).

148. See *supra* note 54 (noting that English oaths likely did not state a “just” causes duty after the fourteenth century).

149. See Zacharias and Green, *supra* note 112 (collecting commentary); see also Andrews, *supra* note 2, at 1429-31 (discussing debate and perspectives on advocacy).

150. See Monroe H. Freedman, *Henry Lord Broughman and Zeal*, 34 HOFSTRA L. REV. 1319, 1322 (2006) (quoting Brougham’s statement at 1820 trial). Professor Freedman is an outspoken proponent of zealous advocacy, and he argues that Lord Brougham’s view of zealous advocacy remains the dominant theory of modern lawyering. *Id.* at 1324.

151. Hoffman was a law professor at the University of Maryland, who published a plan for legal education, and to the second edition of his work, he appended his ethical resolutions, for which he is now best known. David Hoffman, *COURSE OF LEGAL STUDY*, 752-75 (2d ed. 1836) (“Fifty Resolutions In Regard to Deportment”).

152. *Id.* at 755 (Resolution 14).

153. *Id.* at 754. Among other things, Hoffman admonished lawyers to not present technical defenses such as the statute of limitation or infancy, if his client actually owed the debt: “I shall claim to be the sole judge (the pleas not being compulsory) of the occasions proper for their use.” *Id.* at 755 (Resolution 12, statute of limitations, and Resolution 13, infancy).

overrode client wishes, dictated by professional standards, not the lawyer's own sense of morality.¹⁵⁴ George Sharswood, in his seminal 1854 essay, took an approach similar to that of Justice Gibson.¹⁵⁵

These differing views can be recast as debate as to the validity and meaning of a lawyer's duty to assess the justness of his client's cause. Lord Brougham's statements can be seen as rejecting the duty altogether, at least in criminal cases.¹⁵⁶ David Hoffman's resolutions can be seen as a broad reading of the "just" cause duty in which the lawyer's own morality determined what was "just." Gibson and Sharswood can be characterized as taking a middle approach under which lawyers principally adhered to the litigation honesty elements of the "do no falsehood" oath but also engaged in modest assessment of the justness of their client's cause.

The perspective of the oath offers similar insights as to the debate about the proper advocacy role of criminal defense lawyers. This was the area in which the legal ethics debate was most profound, and it also was an area in which the oaths lacked guidance. Criminal defense had never been the focus of litigation oaths, particularly in England.¹⁵⁷ In the early nineteenth century, American lawyers and courts were beginning to define the unique American constitutional right to counsel in criminal cases, both federal¹⁵⁸ and state.¹⁵⁹ Lawyers and ethicists for good reason pondered the interrelationship of these "new" constitutional rights and their traditional advocacy duties, as reflected by oaths and other professional lore that did not speak directly to the issue.¹⁶⁰

154. Zacharias & Green, *supra* note 112, at 4-5 (stating that modern notions of proper advocacy do not find their origins in Brougham or Hoffman but instead are "primarily indebted" to Gibson).

155. Justice Gibson was Sharswood's predecessor on the Pennsylvania Supreme Court, and Sharswood shared many of Gibson's views. For example, in discussing a lawyer's obligations to a judge under the "do no falsehood" oath, Sharswood states a proposition drawn from *Austin*:

Fidelity to the court requires outward respect in words and actions. The oath, as it has been said, undoubtedly looks to nothing like allegiance to the person of the judge; unless in those cases where his person is so inseparable from his office, that an insult to the one is an indignity to the other.

Sharswood, *supra* note 119, at 61-62 (citing *Austin*). See *supra* note 130 (discussing this aspect of *Austin*).

156. The views attributed to Lord Brougham also might be seen as rejecting (at least in criminal cases) the duties stated in the longer "do no falsehood" oath to abandon clients who insist on falsehoods and to report falsehoods to the court. Whether a criminal defense lawyer has a duty to inform the court of a client's falsities is an issue that has prompted considerable modern debate. See Monroe Freedman, *Getting Honest About Client Perjury*, 21 *Geo. J. Legal Ethics* 133 (2008). See also *supra* note 150 (discussing Freedman and Lord Brougham).

157. See *supra* notes 48-49.

158. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense").

159. Most states have constitutional provisions governing right to counsel, often different from the federal version. See Joseph Colquitt, *Hybrid Representation: Standing the Two-Side Coin on its Edge*, 38 *Wake Forest L. Rev.* 55, 81 (2003) (surveying state constitutional provisions).

160. For example, Sharswood, after citing Lord Brougham's and others' views, noted the difficulty of particularizing a lawyer's ethical duty in a criminal case, and, given the constitutional rights of the accused, he made a "distinction" between prosecution and defense of criminal charges and between criminal and civil cases. Civil counsel, according to Sharswood, was "duty bound" to refuse a plaintiff whose demand offends the lawyer's "sense of what is just and right." Sharswood, *supra* note 119, at 90, 96. A civil defense lawyer could

This is not to say that the oaths—either those oaths with the “just” causes duty or those without it—actually prompted the debate. Instead, the oaths’ differences provide a broader historical perspective from which to assess the early nineteenth century ethical discourse. In other words, the gap between the litigation honesty duty of the “do no falsehood” oath (a vow sworn by many early nineteenth century lawyers) and the “just” causes duty of other oaths (a duty that the lawyers perhaps knew but did not swear to abide) might help explain the degree of disagreement as to proper litigation advocacy.

In the second half of the nineteenth century, the oath took on a new role in this debate. The Field Code codified the 1816 Swiss oath, and it became the catalyst for debate. The Swiss oath both stated a “just” causes duty and exempted criminal defense lawyers from this duty.¹⁶¹ The Field Code brought these ethical statements to America, not as professional lore, but as a formal codification of a lawyer’s duties.

C. LAWYER OATHS IN THE FIELD CODE ERA OF THE LATE NINETEENTH CENTURY

In 1848, David Dudley Field drafted a proposed code of civil procedure for New York, and his “Field Code” became a popular model for codes in the growing nation.¹⁶² Section 511 of the Field Code codified the 1816 Swiss oath in the form of eight statutory 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 defen[s]es, only[,] as appear to him legal and just, except the defen[s]e 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

insist that the case be tried upon its merits, but he could not defend against “an honest and just claim, by insisting upon the slips of the opposing party, by sharp practice, or special pleading.” *Id.* at 99.

¹⁶¹. See *supra* note 69 (1816 Swiss oath).

¹⁶². The “Field Code” is difficult to identify as a single document. Although the Field Code is most noted for modernization of civil procedure, Field drafted codes for other areas of the law. The code underwent revisions by both Field’s commission and the New York legislature. Some authorities cite to the original code proposed by Field in 1848 as the “Field Code,” while others refer to the slightly modified version, published in 1850. 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]*.

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 consideration[s] personal to [my]self, the cause of the defen[s]eless or the oppressed.¹⁶³

According to Field, the 1816 Swiss oath “so justly [expressed] the general duties of lawyers, that we cannot do better than take almost the very terms of it.”¹⁶⁴ Rather than binding lawyers by oath, the Field Code bound lawyers by statute. The Field Code provided for professional discipline for a willful violation of the duties,¹⁶⁵ but it did not contain any form of oath.¹⁶⁶ Some states added a simple oath promising to abide by the duties in Section 511,¹⁶⁷ and Washington, perhaps along with other states, converted the list of duties back into oath form.¹⁶⁸ Other new states, such as Oklahoma, North Dakota and South Dakota, elected to couple the Field Code duties with a “do no falsehood” oath.¹⁶⁹

By the turn of the century, at least seventeen states had adopted some version of the Field Code statement of duties.¹⁷⁰ Even though the Field Code statement of duties is a modest list by modern standards, the Field Code helped develop and

163. *Id.* § 511, pages 204-09.

164. *Id.* at 205 (commentary).

165. *Id.* § 525(4) (providing for professional discipline for a “willful violation of any of the provisions of § 511”).

166. The Field Code otherwise addressed admission by setting standards— “[a]ny male citizen, of the age of twenty-one [. . .], of good moral character, and who possesses the requisite qualifications of learning and ability,” *Id.* § 507—and by requiring the court to conduct an examination of the applicant in open court. *Id.* § 508.

167. ALA. CODE § 738 (1852) (duties); *Id.* § 735 (oath); Idaho Gen. Law. § 120 (1880-81) (duties); *Id.* § 117 (oath); Indiana Rev. Stat. XLV Sections 769 (oath) and 771 (duties) (1852); IOWA CODE, § 1610 (1851) (oath); *Id.* § 1614 (duties); Laws of the Territory of Nebraska, ch V., § 4 (1857) (oath); *Id.* § 5 (duties); Laws of Oregon, 1843-1872, Title II, § 1004 (Semple 1874) (oath); *id.* § 1006 (duties).

168. In 1863, the Washington Territory adopted the Field Code statement of duties, but by 1908, Washington converted the statement to an oath without the duty to not encourage suits out of “any motive of passion or interest.” Washington Session Laws, 1909, ch.139 § 6 (stating oath); *see also* 31 A.B.A. REPORTS, *supra* note 67, App. D (reprinting Washington oath in 1908).

169. Oklahoma, for example, in Section 4 of its 1890 Territorial Act, adopted the Field Code duties, *see* Statutes of Oklahoma, Ch. 7, § 4 (1890), and in Section 2 imposed the following “do no falsehood” oath:

You do solemnly swear that you will support, protect and defend the [C]onstitution of the United States, and [the Constitution of] the Organic Act of the Territory of Oklahoma; that you shall do no falsehood or consent that any be done in court[,] and if you know of any you will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed; you shall not wittingly, willingly or knowingly promote, sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client, so help you God.

Id. § 2. Oklahoma uses substantially the same oath today. *See infra* note 282. The combined territory of Dakota had a similar scheme. *See Revised Codes of the Territory of Dakota*, Chapter 18, § 2 (1862)(oath); *Id.* § 4 (duties).

170. *See Andrews, supra* note 2, at 1426, n. 284. New York, where the Field Code began, did not adopt the statement of duties. *Id.* at 1426, n. 283.

refine standards of lawyer conduct by adding “new” substantive provisions not previously stated in American oaths or statutes. The Field Code codified duties of confidentiality and public service, and this formalization seemingly was without controversy.¹⁷¹ By contrast, the Field Code’s statement of litigation advocacy duties provoked some dissent and debate.

The Field Code codification likely was the first time that the “just” causes duty was part of a formal dictate in the United States. It also seemingly was the first formal distinction made between the litigation duties of criminal defense lawyers and those of lawyers involved in civil litigation. Under the Field Code, criminal defense lawyers were subject to limitations against use of false evidence and other misconduct but, unlike civil litigators, they did not have to consider whether their client’s cause was “just.” Field himself added commentary (unusual for the Field Code) as to the limits of proper advocacy. He explained that contrary to the position attributed to Lord Brougham,¹⁷² lawyers had limits on their advocacy even in criminal cases.¹⁷³

Other commentators soon joined Field in endorsing the “just” causes limitation. For example, in 1867, Bethune Duffield spoke to Michigan law students on legal ethics, explaining each line of the 1816 Swiss oath, and with regard to the “just” causes clause, he stated:

Under this clause, may a Lawyer properly advocate a bad cause? There are some lawyers who will tell you that he may . . . In support of his cold-steel style of practice, they will refer you to so eminent a person as Lord Brougham . . . I

171. Although confidentiality and public service were not stated in earlier formal oaths or statutes, both concepts were part of the general lore and tradition of lawyers in the United States. *See* Andrews, *supra* note 2, at 1422-23.

172. Field Code, *supra* note 162, at 207 (suggesting that the view attributed to Lord Brougham, that the lawyer must “lose sight of every other consideration than of success,” is a doctrine “unsound in theory, and most pernicious in practice”); *see also id.* at 206 (lamenting the popular misconception—“grave errors”—that lawyers were indifferen[t] to the moral aspect of the cause they advocate).

173. Field commented:

We by no means assert, that an advocate may not take upon himself the defense of a man whom he believes to be guilty. He may. The section we propose permits him to do so. If he have derived his belief from the confession of the accused, he should pause in assuming his defense. The law gives to every man charged with crime, the benefit of the rule that his innocence is to be presumed by his judges, until the prosecution have established his guilt, by proof beyond a reasonable doubt. Of this rule the advocate is the intermediate minister. Notwithstanding his own conjectures, surmise, or even beliefs to the guilt of his client; he may not become his judge, but is justified if not bound to enforce its application to the inconclusiveness of the evidence of guilt. He may do this, the more readily, because even the jury themselves are bound to secure to the accused the benefit of its application. He may also undertake to show the circumstances of his case; to present the palliating circumstances of temptation, or of provocation, or anything else, that may affect the moral quality of the action, or determine the degree of punishment But here the advocate should stop. The law and all its machinery are means, not ends; the purpose of their creation is justice; and he, who, in his zeal of the means, forgets the ends, betrays not only an unsound hear, but an unsound understanding.

Id. at 207-08.

trust it is not necessary for you to be told, that when this principle is adopted by the legal profession, and approved by the courts, it can only be, when the latter have long ceased to be tribunals for the administration of Justice, and Attorneys have become licensed robbers, and moral outlaws in society.¹⁷⁴

Not everyone agreed. Indeed, many modern observers claim that David Dudley Field later changed his own position, as reflected by his representation of high profile corporate clients in the late nineteenth century.¹⁷⁵ Some states formally rejected some of the Field Code's litigation components. Alabama, Georgia, Mississippi and Louisiana deleted the "just" causes clause from their Field Code statement.¹⁷⁶ Nebraska and Washington omitted from their codes the duty to not encourage cases out of "any motive of passion or interest."¹⁷⁷

Thus, the end of the nineteenth century was a turning point in American legal ethics.¹⁷⁸ Jurists, lawyers, and academics were increasingly addressing legal ethics, and lawyers in many states had statutes dictating their standards of conduct. The oath played a role throughout this development and as the twentieth century dawned, the oath continued to guide development of ethical standards. This new development came in a different form—bar association codes of ethics.

III. THE ABA MODEL OATH

In 1908, the American Bar Association adopted national model standards of conduct. The oath was an essential part of the ABA's 1908 project, in both form and substance. The ABA proposed that the oath serve as the regulatory portion of its model compilation with the more detailed Canons supplementing the model oath's basic provisions. Moreover, the content of the oath was a catalyst for debate: the oath's "just" causes duty was a focal point for the ABA's central debate as to proper litigation conduct. Yet the model oath soon encountered the modern regulatory state. Demand for "black letter" rules and regulatory detail rendered the oath inadequate as the primary form of lawyer regulation. The ABA turned its attention to further developing the Canons and its successors, the *Model Code of Professional Responsibility* and the *Model Rules of Professional Conduct*. The model oath fell into the shadows of these new rules.

174. Duffield, *supra* note 121, at 9-10. Duffield further argued that lawyers should "pause well and long before assuming" the defense of "an evil minded man" who has "freely and frankly confesse[d] his guilt." *Id.* at 10.

175. See Hoeflich, *supra* note 122, at 814-16 (discussing Field's legal work and correspondence).

176. See ABA Memorandum For Use of ABA's Committee to Draft Canons of Professional Ethics, at 112 (March 23, 1908) [hereinafter *REDBOOK*] (reporting state variations as of 1907). Louisiana deleted this duty and added an eighth duty "to live uprightly; and in our persons, to justify before men the dignity, honor, and integrity of great and noble profession." 31 A.B.A. REPORTS, *supra* note 67, at 714 (App. C).

177. Laws of the Territory of Nebraska, ch. V., § 5 (1857). See *supra* note 168 (Washington oath).

178. See generally ANDREWS, *supra* note 2, Part III (discussing evolution of legal ethics in nineteenth century legal ethics).

A. EARLY STATE BAR ASSOCIATION CODES

At the end of the nineteenth century, some states began to ponder creation of more detailed rules of conduct for lawyers, in the form of bar association codes of ethics, to supplement their Field Code statements of duty and their lawyer oaths. Alabama took the lead. In 1887, the Alabama State Bar Association promulgated a new code of ethics for Alabama lawyers.¹⁷⁹ The state of Alabama already had adopted a modified version of the Field Code statutory duties and a simple oath by which the lawyer swore to abide by the statutory duties.¹⁸⁰

The Alabama 1887 bar association code included fifty-six relatively detailed rules that built upon these pre-existing duties.¹⁸¹ Of particular note were the rules expounding on the proper litigation role of Alabama lawyers. Alabama did not adopt the Field Code “just” causes duty,¹⁸² and its bar association’s code took a nuanced position on this issue. Rule 13 stated that a lawyer could not reject a criminal defendant “because he knows or believes him guilty,”¹⁸³ and Rule 14 required a lawyer to decline a civil case “when satisfied” that the client had improper purposes.¹⁸⁴

Other states followed Alabama’s example. By 1907, at least ten states had adopted codes substantially similar to the 1887 Alabama Code, and more states were considering such codes.¹⁸⁵ Thus, at the beginning of the twentieth century, there was a growing array of formal statements of legal ethics. Most lawyers swore to the same oaths that lawyers took a century earlier, but many also had statutory and bar association statements of their duties. State regulation continued to be sporadic, both in form and content. In 1908, the newly formed American Bar Association acted to help regularize and promote standards of conduct.

B. ADOPTION AND PURPOSE OF THE 1908 ABA MODEL OATH

In 1908, the ABA adopted and published a national set of model ethics standards that consisted of both a model oath and *Canons of Ethics*.¹⁸⁶ This project began three years earlier, in 1905, when the president of the ABA asked the ABA to respond to criticism about lawyers and ethics,¹⁸⁷ including

179. See generally GILDED AGE, *supra* note 2 (exploring the 1887 Alabama Code).

180. From 1852 to 1907, Alabama statutes generally dictated that lawyers take an oath to support the laws of Alabama and the United States and to abide by the (Field Code) statutory duties. See *supra* note 167. In 1907, an Alabama statute dictated the “[do] no falsehood” form of oath. See Alabama Code § 2978 (1907).

181. See GILDED AGE, *supra* note 2, at 46-59 & 110-130 (reprinting 1887 Alabama Code).

182. See *supra* note 173.

183. *Id.* at 50-51.

184. *Id.* at 51 (“merely to harass or injure the opposing party or to work oppression and wrong”).

185. See 31 A.B.A. REPORTS, *supra* note 67, at 685.

186. For a detailed review of the drafting history of the *Canons*, see James M. Altman, *Considering the ABA’s 1908 Canon of Ethics*, 71 FORDHAM L. REV. 2395 (2003).

187. See 28 A.B.A. REPORTS, *supra* note 67, at 384 (address of ABA president, Henry St. George Tucker); *id.* at 132 (appointing committee to study advisability of a professional ethics code).

disparaging remarks by President Theodore Roosevelt.¹⁸⁸ The next year, an ABA committee responded that there was a need to “crystallize abstract ethical principles” and to promote uniform standards.¹⁸⁹ The ABA asked a committee to draft a model code of ethics.¹⁹⁰

The ABA drafting committee surveyed existing statements of ethics and concluded that the 1887 Alabama Code was both the prevailing model and a “safe” basis on which to build the ABA code.¹⁹¹ The drafting committee elected to use the 1887 Alabama Code as a form of draft code, which it sent to its members for comment, along with samples of other ethics statements, primarily lawyer oaths.¹⁹² The ABA drafting committee received over 1,000 comment letters in response, and the committee collected these in a single notebook, called the “Red Book.”¹⁹³ The committee then drafted the *Canons of Ethics* and a model oath, a scheme that corresponded to those existing in many states.

The ABA approved both the model oath and the *Canons of Ethics*, with relatively little debate, at its 1908 annual meeting.¹⁹⁴ The final version of the ABA 1908 Canons of Ethics closely mirrored the 1887 Alabama Code.¹⁹⁵ The approved 1908 version of the ABA model oath was as follows:

I will support the Constitution of the United States and the Constitution of the State of . . . ;

I will maintain the respect due to the Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defenses except such as I believe to be honestly debatable under the law;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

188. See Altman, *supra* note 186, at 2399, 2402-09 (noting Roosevelt’s June 1905 Harvard address in which he, among other things, described lawyers as “hired cunning”).

189. 29 A.B.A. REPORTS, *supra* note 67, at 603-04.

190. *Id.* at 600-04 (“Report of the Committee on Code of Professional Ethics”) (recommending appointment of a committee to investigate and draft a model code).

191. 28 A.B.A. REPORTS, *supra* note 67, at 61-64 (reporting that the 1887 Alabama Code was “a form which may be safely adopted”).

192. 31 A.B.A. REPORTS, *supra* note 67, at 676-736 (compilation of ethics materials). The compilation started with the 1887 Alabama Code and its preamble recited Alabama’s version of the Field Code; as a comparison, the ABA printed Michigan’s modified “do no falsehood” oath. *Id.* at 685-88. Appendix C reprinted the Louisiana Bar Association’s Code of Ethics, modeled on the Field Code. *Id.* at 714. Appendix D stated the Washington oath, which was the Field Code in oath form. *Id.* at 714-15. Appendix E stated the original 1816 Swiss oath. *Id.* at 715-16. The last three appendices reprinted the 1683 oath of Denmark and Norway, David Hoffman’s resolutions, and a twentieth century German lawyer’s oath. *Id.* at 717-36. Finally, the ABA distributed a separately bound copy of George Sharswood’s essay. 32 A.B.A. REPORTS, *supra* note 67.

193. REDBOOK, *supra* note 176.

194. The ABA House of Delegates made only one change to the committee’s draft Canons, regarding contingent fees, and no changes to the proposed model oath. See REDBOOK, *supra* note 176, at 55-86.

195. See GILDED AGE, 2, at 111-32 (rule-by-rule comparison of 1887 Alabama Code and ABA 1908 Canons).

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.¹⁹⁶

Much has been written about the Canons and their drafting,¹⁹⁷ but the model oath remains unexplored. This dearth of attention belies the role of the model oath in 1908. The ABA intended the oath to be the proposed regulatory part of its new ethics compilation.

The most significant statement as to the purpose of the ABA model oath was in the drafting committee's final report, dated August 1908.¹⁹⁸ The final report stated that the oath "resulted" from the first of two proposals made by former United States Supreme Court Justice David Brewer.¹⁹⁹ Soon after the ABA project began, Justice Brewer suggested that the drafting committee keep two objectives in mind: one, preparation of a "clear and concise" "body of rules to be given operative and binding force," and two, "preparation of a canon of ethics, which shall discuss the duties of lawyers under the various conditions of professional action."²⁰⁰ Justice Brewer joined the drafting committee, and according to the final report, the committee drafted the model oath to satisfy Justice Brewer's first stated objective of a short set of binding duties.²⁰¹

196. 33 A.B.A. REPORTS, *supra* note 67, at 584-85 (commending model oath "for adoption by the proper authorities in all the states and territories").

197. *See generally* Andrews, *supra* note 2, at 1441-42 (collecting and discussing commentary on ABA 1908 Canons).

198. 33 A.B.A. REPORTS, *supra* note 67, at 567-86 ("Final Report of the Committee on Code of Professional Ethics").

199. The final report of the drafting committee stated:

The committee approved the suggestions of Mr. Justice Brewer . . . The first of his two proposals, 'the preparation of a body of rules,' few in number, clear and precise in their provisions, so that there can be no excuse for their violation,' 'to be given operative and binding force by legislation or the action of the highest courts of the states, assuming that those courts have, as doubtless they have in some states, the power to make and enforce such rules,' has resulted in the recommended form for Oath of Admission.

Id. at 579 (emphasis and citation omitted).

200. 31 A.B.A. REPORTS, *supra* note 67, at 62-63 (quoting Brewer letter). The drafting committee invited Justice Brewer to join the committee. *Id.*

201. The final report stated:

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyer as defined by statutory enactments in that and many other states of the union—duties which are sworn on admission to obey and for the willful violation of which disbarment is provided.

The member comments as to the model oath primarily addressed its general form and function. Some argued that the oath should serve as a reminder of a lawyer's duties.²⁰² For example, one comment argued "strongly in favor of embodying in the lawyer's oath of office some statement of the principles which are to govern him in the future conduct of his office."²⁰³ Another said that a detailed oath would remind the lawyer upon admission "in brief form, what his duties as an attorney would be, and advise him that any neglect to perform this duty would be followed by disbarment, or other proper proceedings."²⁰⁴ On the other hand, one commentator wanted a simple oath, arguing that the detailed oath was like asking lawyers "to swear to the separate sections of the Revised Statutes."²⁰⁵

The substantive content of the oath prompted less comment and debate than did the Canons, but this does not diminish the role of the oath.²⁰⁶ The oath was to be the legally binding element of the ABA ethics compilation. This disparity in comments likely was due to two factors. First, the Canons were far more detailed statements of ethics than those in the oath, and as such, they necessarily drew more attention.²⁰⁷ Justice Brewer anticipated this different level of commentary: he predicted that drafting the Canons, as opposed to the short list of duties (in the oath), would "open a wide field for discussion and the temptation will be to cover too much ground."²⁰⁸ Second, the ABA had a longer tradition to draw upon in framing the oath. The Canons, by comparison, were new articulations of particularized application of the duties, some dating back only twenty years to the 1887 Alabama Code.

C. THE SUBSTANCE OF THE 1908 ABA MODEL OATH

The ABA model oath differed from both the Swiss oath and the Field Code in its statement of duties. It also differed from the Washington oath, which the ABA

33 A.B.A. REPORTS, *supra* note 67, 584-85.

202. The Redbook contained five pages of comments directed specifically to the oath. REDBOOK, *supra* note 176, at 108-113 ("In Re Form of Oath to Be Administered on Admission to Bar"). Three comments argued for either the Swiss oath or the Washington version. *Id.* at 108-09. Three others argued for the "do no falsehood" oath, as then used in Michigan, North and South Dakota and Massachusetts. *Id.* at 109-10. Another stated a preference for New York's simple oath. *Id.* at 108.

203. *Id.* at 109.

204. *Id.*

205. *Id.* at 68. In the margins, in response to this comment, a member of the drafting committee noted: "It would be if these things [the "duties" of attorneys] were in the Statutes." *Id.* at 108.

206. See *supra* notes 202-205 (member comments on oath). In the final ABA adoption debate in 1908, only one delegate addressed the oath by stating: "I presume the committee simply means to recommend that ancient form of oath—not the precise words." 33 A.B.A. REPORTS *supra* note 67, at 86. The ABA president and member of the drafting committee responded "[t]hat is all." *Id.*

207. For example, most ethicists and lawyers will agree to the general concept of loyalty, but they may not agree as to its application to a variety of specific conflicts of interest scenarios. See Andrews, *supra* note 2, at 1456 (discussing this phenomenon).

208. 31 A.B.A. REPORTS, *supra* note 67, at 62-63.

final report credited as the source of the model oath.²⁰⁹ The ABA model oath did not match any oath or Field Code statement collected by the ABA. Some of the changes to the oath were minor, but others reflected the ABA's larger debate as to evolving standards of proper litigation ethics.

1. THE "JUST" CAUSES CLAUSE

The most important change in the ABA oath was the rewording of the duty regarding "just" causes. The Field Code and the Washington oath stated the duty affirmatively, mandating that the lawyer maintain only such actions that appear to him to be just.²¹⁰ These versions of the duty subjected all civil claims and defenses to the "just" standard, but they limited criminal defense only by the general bar against false or misleading statements.

The ABA oath reversed the standard, from "just" to "unjust." Under the 1908 ABA model oath, lawyers could not maintain claims or proceedings that appear "unjust" ("I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust").²¹¹ In addition, the ABA oath applied a new single "honestly debatable" standard to both civil and criminal defenses ("nor any defenses except such as I believe to be honestly debatable under the law").²¹²

The issues raised by the "just" causes clause were not just a matter of the wording of the oath; they comprised the core debate in the entire 1908 ethics project.²¹³ As part of the drafting process, the ABA sent to its members an "earnest" request for comments on a question the ABA termed as "acceptance of retainers."²¹⁴ This label is misleading today. The ABA request and ensuing debate did not concern fees or formalization of the attorney client relationship but instead the proper advocacy role of the lawyer. This was "the most hotly

209. 33 A.B.A. REPORTS, *supra* note 67, at 584-85.

210. *See supra* note 166.

211. *See supra* note 196.

212. *Id.*

213. *See* Susan D. Carle, *Lawyers' Duty To Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOCIETY INQUIRY 1, 2 (1999) ("Perhaps no issue in legal ethics has been debated more often, and resolved less satisfactorily, than that of lawyers' duties—in civil cases—to concern themselves with the 'justice' of their client's cause.").

214. The ABA committee, in distributing the draft code and compilation of ethics materials to the ABA membership, posed the following "earnest" request:

... give us the benefit of your advice, *crystallized into specific canons*, concerning the principles which should ever guide the lawyer, true to his country, his client and himself, in accepting the retainers of individuals and of corporations and in representing or advising them, knowing that by virtue of the establishment of the relation of counsel and client it will be his duty, *within the scope of the retainer*, to guard by every honorable means and to the best of his learning and ability the legal rights of the client. A full discussion of the principles involved will be found running throughout *Sharswood's Ethics*. . . .

REDBOOK, *supra* note 176, at 98 (emphasis in original); *see generally id.* at 98-107 ("Replies In Re Acceptance of Client Retainers") (collecting comments in response the question).

discussed topic'” among members of the drafting committee,²¹⁵ and the debate extended to both the model oath and the Canons.²¹⁶

The ABA, as part of its initial request for member comments, sent its members numerous oaths and the works of both David Hoffman and George Sharswood.²¹⁷ In response, many ABA members challenged Hoffman's views on litigation, particularly his position that a lawyer in some cases should not assert valid defenses, such as the statute of limitation.²¹⁸ Others questioned the “just” causes clause of the oath. One member urged that lawyers must be free to argue cases for the court's decision.²¹⁹ Simeon Baldwin, the founder and former president of the ABA, in a 1908 article²²⁰ reported that both the Swiss oath and the Washington oath “were subject to serious criticism” regarding the “just” causes clause because the clause required the lawyer to be “satisfied that a suit or defen[s]e is just, before he can take the first step in court.”²²¹ The oath duty forced “the lawyer into the position of a Judge, before the case has been brought and heard.”²²² This criticism was not universal. Several states used this clause in their oath or in their Field Code statement of duties, and Thomas Hubbard, a prominent legal ethicist and a member of the drafting committee, wanted the clause in both the model oath and the Canons.²²³

In the end, the ABA did not reject the “just” causes clause altogether but instead adopted a more restrained version. The ABA committee's final report on the oath stated that the committee had “reframed” the clause in order to embody

215. Altman, *supra* note 186, at 2457. See Carle, *supra* note 213, at 6-31 (exploring ABA debate as to “duty to do justice”).

216. The Red Book compilation of comments as to the model oath concluded by referring the reader to related comments regarding selected Canons. REDBOOK, *supra* note 176, at 113 (referring the reader to “the comments in subdivision I of this Memorandum with reference to Canons 11, 14, 15 and 23”). See also Altman, *supra* note 186, at 2420 n.159 (reporting correspondence of drafting committee that stated that Canon 30 and the oath “just causes” clause needed further redrafting).

217. See *supra* note 192.

218. “I do not believe that it would be proper to embody in the code a rule which makes it unprofessional for a lawyer to make defense expressly sanctioned by the laws of the land.” REDBOOK, *supra* note 176, at 92. The Red Book devoted an entire section to member comments concerning Hoffman's resolutions.” *Id.* at 91-94 (“In Re Hoffman's Resolutions”).

219. “Is it plain, even that Washington 3 [the “just” cause clause] is correct? May a man not argue what he thinks is not the law to a Court? He may be wrong—and to decide is the Court's job?” REDBOOK, *supra* note 176, at 113 (anonymous “XYZ”).

220. Simeon Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541 (1908) (advocating multi-state adoption of the model oath and Canons of Ethics). See Altman, *supra* note 186, at 2417 n.142 (discussing Baldwin's role in founding ABA, his political and judicial career in Connecticut and his professorship at Yale Law School).

221. Baldwin, *supra* note 220, at 545.

222. *Id.*

223. *Id.* at 107. Thomas Hubbard taught legal ethics at the Albany Law School and established a foundation for legal ethics there. Carle, *supra* note 213, at 18; *id.* App. A. Altman reports that Hubbard in an inaugural speech at Albany Law School in 1903 urged the importance of the lawyer's oath: “[t]he whole oath puts the responsibility of bringing suit, interposing defense, and of conducting either, exactly where that responsibility should be put, upon the conscience and honor of the lawyer.” Altman, *supra* note 186, at 2449-51 n.312.

the ethical views and model distinctions espoused by Sharswood.²²⁴ As to the details of this change, the final report stated only that “[t]he subject is too abstruse to discuss within the limitations of this report.”²²⁵ Again, Simeon Baldwin added some insight. He described the turn of the phrase from “just” to “unjust” as rendering the duty “much less onerous” because, under the model oath, a lawyer no longer had to affirmatively satisfy himself that the case was just.²²⁶ Instead, a lawyer had only to refrain from bringing a claim if he was satisfied that it was unjust.²²⁷ A lawyer could assert defenses, perhaps even those he considered “unjust,” so long as the defenses were legally and factually debatable.²²⁸

2. THE MOTIVE (DELAY) CLAUSE

Although the “just” causes clause was the most debated change, the ABA also refined other litigation duties in the model oath. The ABA omitted the Field Code duty that lawyers not encourage or continue suits from any “motive of passion or interest.” This change was not novel. The Washington oath excluded this duty, and Nebraska and Wisconsin also deleted this duty from their statutory statements of duties.²²⁹ However, the Swiss oath, the Alabama Code, the Louisiana Code, and seemingly all other Field Code statements stated the duty.²³⁰

The ABA membership most likely did not disapprove of the substance of the “motive” duty. Canon 28 strongly spoke against a lawyer stirring up litigation for his own interest,²³¹ and Canon 30 barred a lawyer from bringing a claim “when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.”²³² The issues underlying these Canons were discussed and debated at length in the drafting process, but no comment argued against the motive duty in the oath.²³³ To the contrary, the ABA president, a member of the drafting committee, argued for including the clause.²³⁴

Another variation between the ABA model oath and the Field Code may explain the deletion of the “motive” clause. In the seventh clause of the model

224. The ABA committee stated: “We have reframed the third paragraph of the recommended form for oath of admission, embodying therein the distinction made by Sharswood . . . which should be made ‘between the case of prosecution and defense for crimes; between appearing for a plaintiff in pursuit of an unjust claim, and for a defendant in resisting what appears to be a just one.’” 33 A.B.A. REPORTS, *supra* note 67, at 572.

225. *Id.*

226. Baldwin, *supra* note 220, at 545.

227. *Id.*

228. *Id.*

229. See REDBOOK, *supra* note 176, at 112 (noting Nebraska and Wisconsin variations).

230. See *supra* notes 166-177.

231. 33 A.B.A. REPORTS, *supra* note 67, at 582-83 (Canon 28).

232. *Id.* at 583 (Canon 30).

233. REDBOOK, *supra* note 176, at 29-30 (discussing proposed Canon 15, which became final Canon 30); 33 A.B.A. REPORTS, *supra* note 67, at 42-46 (discussing proposed Canon 23, which became final Canon 28); *id.* § IV, 98-107 (comments concerning “Acceptance of Retainers”).

234. *Id.* at 108.

oath, the ABA added a duty that the lawyer not “delay any man’s cause for lucre or malice.”²³⁵ This clause stated duties similar to those in the deleted “motive” clause, and it may have been seen as a superior substitute. Both clauses barred litigation tactics based on specified ill motives. They both mirrored the prohibition, in Canon 30, against bringing claims or making defenses “merely to harrass, or to injury or to work oppression or wrong.”²³⁶ ABA members possibly preferred the phrasing of the delay clause, with which they were more familiar, as part of the “do no falsehood” oath.²³⁷

3. THE “NEVER MISLEAD” CLAUSE

The model oath added “or jury” to the duty in the fourth clause not to mislead the judge. The ABA comments do not mention this change, but Simeon Baldwin explained it as correcting an oversight in the American adoption of the Swiss oath (Field Code).²³⁸ In Baldwin’s view, the Swiss duty “may have been sufficient in a country having no system of trial by a jury, but the committee, in view of the prevalence of that system here, properly added [juries to the duty].”²³⁹

4. THE “NO COMPENSATION” CONFLICT CLAUSE

The final change was in the fifth clause of the model oath. The ABA added a duty that the lawyer not accept any compensation from persons other than the client without the client’s approval. This duty did not have an obvious model in the oaths and other materials collected by the ABA. The “new” duty was a relatively modest and non-controversial rule governing a particular conflict of interest,²⁴⁰ but its insertion into the oath is somewhat mystifying. In 1908, the ABA discussed conflicts concerns generally in connection with the Canons, but no member comment specifically raised the problem of a lawyer receiving compensation from a person other than the client.²⁴¹ The oath arguably needed to state a conflict of interest duty—the oath otherwise had no provision addressing conflict of interest—but this narrow duty did not fit the ABA’s intention to list “general principles” in the model oath. Simeon Baldwin described this addition as

235. See *supra* note 196.

236. See 33 A.B.A. REPORTS, *supra* note 67; *id.* at 583 (reprinting Canon 30).

237. Baldwin reported that the model oath version of this clause was taken from “the ancient New England form, dating back to early colonial days” (likely the Massachusetts “do no falsehood” oath). Baldwin, *supra* note 220, at 546.

238. *Id.*

239. *Id.*

240. In 1928, the ABA added a new Canon to state this duty: a “lawyer should accept no compensation, commission, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.” *ABA Comm. on Prof’l Ethics and Grievances*, at 173-75 (1967) (Canon 38).

241. See REDBOOK, *supra* note 176, at 57 (comments concerning draft canon, entitled “Disclosing Adverse Influences”). In 1908, the ABA approved with no debate Canon 6 (“Adverse Influences and Conflicting Interests”). 33 A.B.A. REPORTS, *supra* note 67, at 576-77.

having "doubtful merit, because it refers to a practice which can never be of common occurrence."²⁴² Baldwin argued that the ABA's addition of this clause was ill advised, because "a lawyer's oath of office should be confined to obligations of fundamental importance and general concern."²⁴³

D. THE FADING OF THE ABA MODEL OATH

For many years after 1908, the ABA prominently featured the model oath alongside the Canons. The ABA annual reports regularly reprinted both the Canons and the model oath together.²⁴⁴ Over time, the focus shifted to the Canons, and the Canons sparked increasing debate. Over a period of sixty years, the ABA substantially reworked the Canons.²⁴⁵ In 1970, in response to demand by lawyers and critics for more detailed regulatory standards, the ABA abandoned the Canons and adopted the *Model Code of Professional Responsibility*, which had broad ethical principles, followed by "disciplinary rules," and commentary.²⁴⁶ Thirteen years later, in 1983, the ABA went one step further and replaced the *Model Code* with the *Model Rules of Professional Conduct*, which were explicitly "black letter [r]ules" for enforcement and discipline of lawyers.²⁴⁷

Meanwhile, the model oath garnered relatively little notice. The only portion of the model oath to draw debate was, once again, the "unjust" causes clause. Beginning in the 1950s, one lawyer, Murray Seasongood, repeatedly urged the ABA to reform the clause.²⁴⁸ Seasongood argued that a lawyer must not prejudge his client's case and that the oath clause suggested otherwise.²⁴⁹ Seasongood also believed that the oath improperly subjected claims to a different standard than defenses.²⁵⁰ His efforts ultimately succeeded. In 1977, the ABA deleted the "unjust" standard from the clause altogether and subjected all litigation proceedings—claims and defenses—to the same "honestly debatable" standard.²⁵¹ This was the lone modification to the ABA model oath after its adoption in 1908.

The ABA's move in 1977 to remove the "just" (unjust) standard from the model oath had little practical impact. Apparently no state has adopted the 1977

242. Baldwin, *supra* note 220, at 546.

243. *Id.*

244. 43 A.B.A. REPORTS, at 7-16 91923) (reprinting Canons and model oath); 62 A.B.A. REPORTS, at 1105-1122 (1937) (same).

245. See Andrews, *supra* note 2, Part IV, 1440, 1443.

246. MODEL CODE OF PROF'L RESPONSIBILITY (1970).

247. THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES, at 3-4 (1987).

248. See Murray Seasongood, *What Employment Must a Lawyer Accept?*, 1956 PRAC. LAW. 43; See Murray Seasongood, *Sequel to "What Employment Must a Lawyer Accept?"*, 9 PRAC. LAW. 41 (1963).

249. *Id.*

250. *Id.*

251. 102 A.B.A. REPORTS, *supra* note 67, at 224-25 (adopting revision of oath); *id.* at 259 (report of committee recommending change). The oath new model was as follows: "I will not counsel or maintain any suit or proceeding, nor any defense except such as I believe to be honestly debatable under the law of the land." *Id.* at 259.

version of the ABA model oath, and many states retain either the original 1908 model oath language or the original Field Code statement of the “just” causes duty.²⁵² This practice persists even though the “just” causes standard arguably is inconsistent with the *Model Rules*’ substantive standards regarding litigation conduct. This is a flaw of modern oath practice that is discussed in the next section. The point here is the reason for the incongruity: lawyer oaths no longer are the focal point of legal ethics. Indeed, putting attorney Seasongood aside, the model oath was mostly ignored during the latter half of the twentieth century.

Today, ABA model ethics compilations typically do not include the model oath.²⁵³ Lawyers and academics study the *Model Rules*, but few today know that a model oath exists. Even within the ABA, the status of the model oath is unclear. Recently, ABA officials investigated and determined that the model oath was never formally repealed, and they were unable to determine whether the model oath was “archived.”²⁵⁴

The obscurity of the model oath is not surprising. The ABA’s intended role for the model oath was a short list of legally enforceable rules.²⁵⁵ This short list was not sufficient in the regulatory age of the late twentieth century, when the *Model Code* and then the *Model Rules* assumed standard-setting and regulatory functions. Nevertheless, the oath lives on, in one of three basic forms, albeit in a more modest and less defined role.

IV. MODERN LAWYER OATHS IN THE UNITED STATES

The oaths in most jurisdictions in the United States today can be traced to either the French tradition (the Swiss and ABA model oath) or the English tradition (the “do no falsehood” and the simple oath). Even though the oath today no longer plays as prominent a role as it once did, it is not a meaningless gesture. The oath, in all its forms, continues to serve regulatory functions, as a prerequisite to the practice of law and as a basis for discipline, and ethical functions, as a reminder and as an inspiration to ethical ideals. Both the regulatory and ethical functions of the modern oath, however, can be enhanced. The oath would better serve the profession if it more accurately and clearly stated the essential ethical maxims by which lawyers swear to abide.

A. FORMS OF MODERN LAWYER OATHS

Lawyer oaths are surprisingly constant over both place and time. Oaths are not identical, but the variation is relatively minor. Almost all oaths or statements of

252. See *infra* notes 273-276.

253. For example, in the ABA Reports for 1983, the ABA reprinted the newly adopted Model Rules without an accompanying model oath. 108 A.B.A. REPORTS, at 1215-1316 (1983).

254. Archival is not a formal repeal or change in policy, but archived material is not considered current ABA policy. Email from Art Garwin (Jan. 9, 2007) (on file with author).

255. See *supra* Part III.B.

duty are derived from three basic forms: the Swiss or ABA oath, the English “do no falsehood” oath, and the English simple oath.

1. THE SWISS (ABA) OATH

Many lawyers may be surprised to learn that their oath has a French rather than Anglo origin. The French influence is reflected by the widespread adoption of some version of the Swiss oath. The Swiss oath itself is almost 200 years old, but its lineage dates back even further, to medieval France.²⁵⁶ This tradition prompted one observer in 1908 to remark that “[a]s a matter of historical sequence it is strange how, step by step, the regulations which are imposed on the Bar of the Greatest Republic of modern times [the United States], can in each instance be placed parallel with some similar ordinance promulgated by the Kings of France to the Bar of Paris.”²⁵⁷

Almost half the states in the union now bind lawyers to some version of the duties of the Swiss oath.²⁵⁸ At least ten states follow the Field Code model and assert the duties as a statutory obligation, rather than in oath form.²⁵⁹ Idaho,²⁶⁰ Indiana²⁶¹ and New Mexico²⁶² use two variations of the list—one as an oath and another as a statutory list of duties. Ten states today use a

256. See *supra* note 68.

257. Cox-Sinclair, *supra* note 61, at 180.

258. Iowa and Utah recently repealed their statutory statement of duties and now use a simple oath and the rules of professional conduct. See 2005 Iowa Acts (81 G.A.), ch. 179, H.F. 882 § 79 (repealing IOWA CODE § 602-10112); UTAH CODE ANN. § 78-51-1 (West 2006) (historical and statutory notes) (noting repeal of § 78-51-26 which provided for “duties of attorneys and counselors”).

259. At least six states—Arizona, California, Georgia, Nebraska, North Dakota, and Oregon—use a simple oath and a Field Code statement of duties. AZ. SUP. CT. R. 41(g) (stating Field Code duties but substituting “unprofessional conduct” for “offensive personality,” and adding obligation to follow Arizona Rules of Professional Conduct); CAL. BUS & PROF. CODE § 6068 West (stating Field Code duties, omitting “offensive personalities” clause, modifying duty of confidentiality and adding duties concerning the disciplinary process); GA. CODE ANN., § 15-19-4 West (stating Field code duties and omitting the “just causes” clause); NEBRASKA STAT. § 7-105 (stating Field Code duties and omitting “defenseless or oppressed” duty); N.D. CENT. CODE § 27-13-01 (2006) (listing duties based on 1908 ABA oath, deleting duties concerning confidentiality and “offensive personalities,” and adding civility duties); OR. REV. STAT. ANN. § 9.260 (West 2006) (listing four Field Code duties—to support the constitution, never use misleading or false statements, maintain confidences and never reject the cause of the oppressed or defenseless). See *infra* note 292 (citations to simple oath). At least four states—Alabama, Minnesota, Mississippi and Oklahoma—state the Field Code statutory duties and use the “do no falsehood” oath. See *infra* note 285 (Ala.), note 288 (Minn.), note 289 (Miss.), and note 282 (Okl.).

260. See *infra* note 271 (Idaho oath and duties).

261. Indiana in 2005 updated its oath, which stated the original Field Code duties with the 1908 model oath “unjust” language, to include an expanded duty to never reject the “cause of the defenseless, the oppressed or those who cannot afford legal assistance.” Indiana Rules for Admission to the Bar, R. 22. As its statutory duties, Indiana uses the Field Code list, adding duties to “promptly account” for client funds and to refrain from solicitation. IND. CODE ANN. § 33-43-1-3 (West 2006).

262. New Mexico used the 1908 model oath with a commitment to “comply with the Rules of Professional Conduct adopted by the New Mexico Supreme Court.” N.M. Rules Governing Admission to Bar, R. 15-304. New Mexico also has a statutory statement of duties identical to the Field Code. N.M. STAT. ANN. § 36-2-10 (West).

version of the ABA oath. Four states—Florida,²⁶³ Louisiana,²⁶⁴ South Dakota,²⁶⁵ and Wisconsin²⁶⁶—use oaths very close to the original 1908 ABA model. Michigan²⁶⁷ and Washington²⁶⁸ use modified versions of the 1908 model plus an additional clause promising compliance with the rules of professional conduct. Alaska made more significant modifications to its version of the 1908 oath.²⁶⁹

Idaho and South Carolina made variations to the ABA oath that reflect the modern “civility” movement.²⁷⁰ Both states follow the basic format of the model oath but with some variation; they delete the “unjust” causes clause and the duty to “abstain from all offensive personality” and instead state litigation duties in more modern, affirmative language. Idaho’s oath promises, among other things, to “scrupulously honor promises and commitments made” and to “attempt to resolve matters expeditiously and without unnecessary expense.”²⁷¹ South Carolina states a duty to “maintain the dignity of the legal [profession],” a pledge

263. See FLORIDA STAT. ANN. Oath of Admission.

264. Louisiana’s Bar Association’s website lists an oath identical to the 1908 ABA form. See www.lsba.org/2007memberservices/lawyersoath.asp (last visited []).

265. See S.D. CODIFIED LAWS § 16-16-18 (2006).

266. WIS. SUP. CT. R. 40.15.

267. Michigan adds a clause stating: “I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed on members of the bar . . .” Mich. Rules of Bar, R.15 § 3(1). Michigan has slightly updated language as to the “just” causes clause: “I will pursue a claim only if it is just, and will offer a defense only if it may be honestly debatable.” *Id.*

268. Washington combines the 1908 ABA “unjust” causes with the Field Code exception for criminal cases (“I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust or any defense except as I believe to be honestly debatable under the law, unless it is a defense of a person charged with a public offense.”). WASH. REV. CODE ANN. § 2.48.210 (West 2006).

269. See *infra* note 372 and accompanying text (quoting Alaska oath).

270. See Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) (summarizing and criticizing “civility” pledges and other moves to mandate courtesy and civility).

271. Idaho added civility elements throughout the oath:

I will support the Constitution of the United States and the Constitution of the state of Idaho.

I will abide by the rules of professional conduct adopted by the Idaho Supreme Court.

I will respect courts and judicial officers in keeping with my role as an officer of the court.

I will represent my clients with vigor and zeal and will preserve inviolate their confidences and secrets.

I will never seek to mislead a court or opposing party by false statement or fact or law and will scrupulously honor promises and commitments made.

I will attempt to resolve matters expeditiously and without unnecessary expense.

I will contribute time and resources to public service, and will never reject, for any consideration personal to myself, the cause of defenseless or oppressed.

I will conduct myself personally and professionally in conformity with the high standards of my profession.

Idaho Bar Comm’n Rules, R.214. Idaho also has a statutory statement of duties in the original Field Code form. IDAHO CODE ANN. § 3-201 (LexisNexis 2006).

to the client, promising “faithfulness, competence, diligence, good judgment and prompt communication,” and a pledge to opposing parties and their counsel, promising “fairness, integrity, civility, not only in court, but also in all written and oral communications.”²⁷²

Not surprisingly, the significant area of deviation among states using some version of the Swiss oath (either in oath form or as statutory duties) is the “just” causes duty. Some follow the 1908 ABA version of the duty, which bars a lawyer from bringing claims he believes to be “unjust,” but which subjects all defenses, civil and criminal, to the “honestly debatable standard.”²⁷³ Some state the original Field Code duty barring all civil claims and defenses that the lawyer does not believe to be “just.”²⁷⁴ A few states use two different versions of the duty, one in oath form and a different one as the statutory duty.²⁷⁵ Some states have deleted the duty entirely, either in a move made many decades ago or in a recent move to modernize the oath, but none of these deletions seem to have been the result of the 1977 ABA modification to the model oath.²⁷⁶

2. THE “DO NO FALSEHOOD” OATH

Thirteen states currently use a “do no falsehood” oath, an oath at least 600 years old.²⁷⁷ Connecticut,²⁷⁸ Kansas,²⁷⁹ Maine,²⁸⁰ New Hampshire,²⁸¹ Okla-

272. The South Carolina oath otherwise tracks the 1908 model oath. S.C. APP. RULES OF CT., R.402(k).

273. See S.D. CODIFIED LAWS § 16-16-18 (2008) (South Dakota oath); FLA. R. CT. (LexisNexis 2007) (Florida oath); WIS. SUP. CT. R. 10.15 (Wisconsin oath); *supra* note 264 (Louisiana oath). See also WASH. REV. CODE ANN. § 2.48.210, *supra* note 268 (variation in Washington).

274. See CAL. BUS. & PROF. CODE § 6068 (West 2008); MINN. STAT. ANN. §358.07(9) (West 2008). See also MICH. PROF. COND. R. 15 § 3(1) (Michigan modified “just” duty).

275. See *supra* notes 261-262 (Indiana and New Mexico model oath and Field Code duties).

276. See ALA. CODE § 34-3-15 (2008) (Alabama statutory duties); GA. CODE ANN. § 15-19-4 (West [] (Georgia duties); IDAHO CODE ANN. § 3-201 (LexisNexis 2006) (Idaho duties); MISS. CODE ANN. § 73-3-35 (West 2006) (Mississippi duties); N.D. CENT. CODE § 27-13-01 (2006) (North Dakota duties); OR. REV. STAT. ANN. § 9.260 (West 2006) (Oregon duties).

277. See *supra* note 45.

278. See CONN. GEN. STAT. ANN. § 1-25 (West 2008).

279. Kansas has a longer version of the “do no falsehood” oath:

You do solemnly swear or affirm that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; that you will neither delay nor deny the rights of any person through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all other courts of the State of Kansas with fidelity both to the Court and to your cause, and to the best of your knowledge and ability. So help you God.

KAN. SUP. CT. R. 704, available at <http://www.kscourts.org/rules/> (follow “Rules Relating to Admission of Attorneys” hyperlink; then follow “704 Admission to the Bar Upon Written Examination” hyperlink).

280. See 4 ME. REV. STAT. ANN. tit. 4 § 806 (2008).

281. See *supra* note 104.

homa,²⁸² Rhode Island,²⁸³ and Vermont²⁸⁴ all use a longer form of the “do no falsehood” oath, close to the traditional English version. Six states—Alabama,²⁸⁵ Delaware,²⁸⁶ Massachusetts,²⁸⁷ Minnesota,²⁸⁸ Mississippi,²⁸⁹ and Pennsylvania²⁹⁰—use a shortened, modified version of the “do no falsehood” oath. This modification had its origins in colonial America and typically omits the fee provisions and some variations also omit the duty to report falsehoods.²⁹¹

3. THE SIMPLE OATH

Twenty-one states and most federal courts use a simple oath in which the lawyer swears to support the relevant laws and constitution and also promises good conduct.²⁹² These oaths have at least a 300-year history, dating back to the 1729 English oath that was later adopted and modified by some colonies and early states. For instance, the United States Supreme Court adopted its simple oath in 1790 and continues to use that oath today, with only minor refinements.²⁹³ The Supreme Court version is the prevailing oath in federal courts,²⁹⁴ but a few

282. See OKLA. STAT. ANN. tit. 5 § 2 (West 2008). In addition, Oklahoma continues to use the Field Code statutory statement of duties. *Id.* § 3.

283. See R.I. SUP. CT. R. 8.

284. See *supra* note 105.

285. ALA. CODE § 34-3-15 (2008). Alabama has retained its statutory statement of duties without the “just” causes clause. *Id.* § 34-3-20.

286. See DEL. SUP. CT. R. 54.

287. MASS. GEN. LAWS ch. 221 § 38 (2008).

288. MINN. STAT. ANN. § 358.07(9) (West 2008). Minnesota also has a Field Code statute that adds a duty “to observe and carry out the terms of the attorney’s oath.” *Id.* § 481.06.

289. MISS. CODE ANN. § 73-3-35 (West 200) (modified “do not falsehood” oath). Mississippi has retained its statutory statement of duties without the “just” causes clause. *Id.* § 73-3-37.

290. 42 PA. CONS. STAT. ANN. § 2522 (West 2007).

291. See *supra* note 79, 106-107 (omission of fee provision from colonial oaths and early Delaware and Pennsylvania “do no falsehood” oaths).

292. See ARIZ. R. SUP. CT. 32(c)(3); ARK. CODE ANN. § 16-22-205 (West 2008) (Arkansas simple oath); CAL. BUS. & PROF. CODE § 6067 (West 2008); GA. CT. R. § 16; ILL. COMP. STAT. 205/4 (2006); IOWA CODE ANN. § 602-10110 (West 2006); MD. CODE ANN., BUS. OCC. & PROF., § 10-212 (West 2008); MONT. CODE ANN. § 37-61-207 (2008); NEB. REV. STAT. § 7-104 (2007); N.J. STAT. ANN. § 2A: 13-1 (West 2008); N.Y. JUD. CT. ACTS/LAW § 466 (McKinney 2008); NY. CONST. art. XIII, § 1; N.C. GEN. STAT. ANN. § 11-11 (West 2008); N.C. GEN. STAT. ANN. § 84-28 (West 2008); N.C. CONST. art. VI, § 7; N.D. CENT. CODE § 27-11-20 (2008); N.D. CONST. art. XI, § 4; OR. REV. STA. ANN. § 9.250(2) (West 2007); TENN. SUP. CT. R. 6(4); TEX. GOV’T CODE ANN. § 82.037(a) (Vernon 2007); UTAH RULES OF PROF’L CONDUCT, preamble (2008); VA. CODE ANN. § 54.1-3903 (West 2008); W.V. SUP. CT. R. 7.0(d); WYO. R. OF ADMISSION 215. Finally, Kentucky uses a simple oath with an additional duty to forbear from participating in duels. KY. CONST. § 228.

293. “I . . . do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.” SUP. CT. R. 5.4. In 1970, the Court modified the oath slightly, substituting “conduct” for the older “demean” language. *Spencer v. Kugler*, 404 U.S. 1027 (1972) (Rule 5.4). See *supra* note 102 (1790 oath).

294. Federal oaths vary slightly, usually as to the “demean” versus “conduct” language. See LA. R. CT. 83.2 (“conduct”); E.D. PA. R. Civ. P.83.5 (“demean”). A few federal district courts use a slightly longer oath, with a more detailed allegiance element and additional vows to respect the court and comply with local rules and ethical standards. The Western District of Washington, for example, has the following oath:

federal courts use the ABA oath²⁹⁵ or the “do no falsehood” oath.²⁹⁶

Five states have simple oaths with some additional language concerning civility and the rules of professional conduct. Hawaii, for example, requires lawyers to swear to the following:

I will support and defend the Constitution of the United States and the Constitution and laws of the State of Hawai'i, and that I will at all times conduct myself in accordance with the Hawai'i Rules of Professional Conduct.

As an officer of the courts to which I am admitted to practice, I will conduct myself with dignity and civility towards judicial officers, court staff, and my fellow professionals.

I will faithfully discharge my duties as attorney, counselor, and solicitor in the courts of the state to the best of my ability, giving due consideration to the legal needs of those without access to justice.²⁹⁷

Missouri,²⁹⁸ Colorado,²⁹⁹ Nevada,³⁰⁰ and Ohio³⁰¹ have similar oaths.

I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will well and faithfully discharge my duties as a lawyer, counsellor and proctor of this court; that I will maintain the respect due to the courts of justice and judicial officers and that I will demean myself uprightly and according to law and the recognized standards of ethics of the legal profession and abide by the Local Rules of this court.

W.D. WASH. R. 2(b)(3). *See also* N.D. GA. R. 83.1A(2)(b); D. UTAH CIV. R. 83-1.1(D).

295. The Western District of Missouri and the Eastern District of Oklahoma both use the 1908 ABA oath. W.D. MO. R. 83.5(d); E.D. O. CIV. R. app. I. The Eastern District of Michigan attaches the 1908 oath as an appendix to its “civility principles.” *See* E.D. MICH. R. app.

296. The Southern District of Alabama and the Western District of Texas, for example, use a modified, shortened version of the “do no falsehood” oath. S.D. ALA. R. app. 2 (2008); W.D. TEX. R. AT-1(e)(1). The District of Kansas uses the longer “do no falsehood” oath. D. KAN. R. 82.52(c).

297. HAW. SUP. CT. R. 1.5(c).

298. Missouri's oath is a blend between the model oath and the simple oath. MO. SUP. CT. R. 8.15 (2007).

299. A Colorado lawyer swears as follows:

I will support the Constitution of the United States and the Constitution of the State of Colorado; I will maintain the respect due to Courts and judicial officers; I will employ only such means as are consistent with truth and honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty. I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

Robert J. Truhlar, *Colorado Bar Association President's Message to Members: CBA Distributes Gold Cards and Remarks to New Attorneys*, 32 COLO. LAW. 27 (2003) (reprinting oath).

300. Nevada uses the following oath:

I will support the Constitution and government of the United States and of the State of Nevada;

I will maintain the respect due to courts of justice and judicial officers;

I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court; and

I will faithfully and honestly discharge the duties of an attorney at law to the best of my knowledge and ability.

B. MODERN FUNCTIONS OF LAWYER OATHS

In whatever form, the oath continues to have some regulatory and ethical functions but not to the degree that it once had. It no longer serves as the primary statement of ethics standards for lawyers. State rules of conduct, based on the ABA's *Model Rules*, have assumed that function. Instead, the oath serves other regulatory and ethical roles. The oath is an absolute condition on the right to practice law and is a basis for professional discipline. The oath also gives some ethical guidance by restating, in varying degrees, ethical concepts. The oath will never regain its central position as the source of ethical guidance and regulation, but it can more clearly and accurately state the core ethical duties of a lawyer. In that way, the oath can better inspire lawyers to live up to the ideals of the profession.

1. THE OATH AS A CONDITION OF PRACTICE

An important modern function of the oath is its condition on the right to practice law. Would-be lawyers cannot practice their profession without taking an oath. In most states, the legislature has mandated by statute that lawyers take the oath as a condition of their license.³⁰² In some states, the oath requirement is dictated by court rule.³⁰³ Federal courts usually require, by court rule, that a lawyer take an oath before practicing in the court.³⁰⁴

The oath requirement distinguishes lawyers from many other professionals. States often require oaths for government office-holders,³⁰⁵ jurors and witnesses,³⁰⁶ but they do not usually require that other professionals take an oath. To the extent that other professions take oaths, even professionals subject to state licensing, the oath usually is a custom, not a legal mandate. For example,

NEV. SUP. CT. R. 73

301. A lawyer in Ohio swears allegiance and that "I will abide by the Code of Professional Responsibility," that "[i]n my capacity as an attorney and officer of the Court, I will conduct myself with dignity and civility and show respect towards judges, court staff, clients, fellow professionals, and all other persons," and that "I will honestly, faithfully and competently discharge the duties of an attorney." OHIO GOV. BAR R. 1 § 8(A).

302. See IDAHO CODE ANN. § 3-102 (2006); MD. CODE ANN., [Bus. Occupations and Professions] § 10-212 (West 2006); MISS. CODE ANN. § 73-3-35 (2006); MONT. CODE ANN. § 37-61-207 (2006); N.C. GEN. STAT. § 84-1 (2006); N.D. CENT. CODE § 27-11-20 (2006); TEX. CODE ANN. § 82.037 (Vernon 2006).

303. See ARIZ. R. SUP. CT. 32(c)(3); HAW. SUP. CT. R. 1.5.

304. E.g., Dist. Nebraska Local Rules 83.4(c) (providing for admission of attorneys who are licensed in a state upon a showing of good moral character and "upon his or her taking the prescribed oath").

305. See N.C. GEN. STAT. § 89C-4 (2006) (requiring "written oath or affirmation for faithful discharge of duties" of State Board of Examiners for Engineers and Surveyors).

306. See CONN. GEN. STAT. ANN. § 1-25 (West 2006) (setting forms of oath for members of the general assembly, executive and judicial officers, notaries, electors, attorneys, jurors, witnesses, interpreters, assessors, and other officials); KY. REV. STAT. ANN. § 228 (West 2006) (mandating oath for members of the general assembly, all officers and members of the bar); MINN. STAT. ANN. § 358.07 (West 2006) (setting forms of oath for grand jurors, petit jurors, officers attending juries, witnesses, interpreters, attorneys and affiants).

although most medical students take the Hippocratic oath at their graduation,³⁰⁷ state medical licensing statutes typically do not require the oath as a condition of practice.³⁰⁸

The oath requirement grew out of the history and function of lawyers as advocates before courts. Most lawyers take the oath in a court; some statutes and rules require that the oath be taken in open court.³⁰⁹ Oath-taking is a common occurrence in courts, but unlike jurors and witnesses who take oaths relating solely to their participation in judicial proceedings, lawyers take oaths regardless of whether they will practice in court. Although some oath requirements speak in terms of practice before particular courts—such as those set by federal courts—state licensing schemes require oaths of all lawyers who practice any sort of law.

Because the oath is a condition on the right to practice law, it seemingly should act as a basis for excluding persons from the profession. The ability of a state to deny a license to anyone who is unwilling or unable to take the oath, or an affirmation of similar content, raises some difficult constitutional questions.³¹⁰ The courts have addressed these issues primarily in connection with the element of the oath in which the lawyer must swear to support the laws of the United States and the licensing jurisdiction.

In *Ex Parte Garland*, the United States Supreme Court examined the post-Civil War loyalty oath that both Congress and the Court itself required of lawyers.³¹¹ An Arkansas lawyer, who had been a member of the Confederate congress and who later received a presidential pardon, asked to be relieved from the requirements in the federal lawyer's oath that he swear that he had never borne arms or supported powers hostile to the United States.³¹² The Court granted his request, holding that these oath clauses violated the federal constitution's prohibition against *ex post facto* laws.³¹³ The Court distinguished the last clause of the oath, which required the lawyer to swear that he "will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same."³¹⁴ That clause, according to the Court, was valid: it was "promissory only, and require[d] no

307. See Ott et al., *supra* note 15, at 379-80 (reporting that 135 surveyed medical schools administered an oath to their graduates, usually at commencement); see also *id.* (noting occasional practice in Canada of the provincial body giving oath to doctors).

308. See, e.g., MD CODE ANN. § 14-307 (West 2006) (licensing requirements for physicians); TEXAS CODE ANN. § 155.002 (VERNON 2006) (standards for issuance of license to practice medicine).

309. See ME. REV. STAT. ANN. tit. 4, § 806 (2006); N.Y. JUD. CT. ACTS LAW § 466 (McKinney 2006).

310. See generally Ruth Bader Ginsburg, *Supreme Court Discourse on the Good Behavior of Lawyers: Leeway Within Limits*, 44 DRAKE L. REV. 183, 188 (1996); see also W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONSTITUTIONAL L. Q. 305 (2001).

311. *Ex parte Garland*, 71 U.S. 333 (1866). The oath originally applied to officers of the federal government, and Congress extended it to lawyers practicing in federal court. *Id.* at 374.

312. *Id.* at 375.

313. *Id.* at 376-78.

314. *Id.* at 376.

consideration.”³¹⁵

In 1945, the Court in *In re Summers* clarified that a state may exclude an applicant from the bar if he in good faith cannot take the required oath to support the constitution.³¹⁶ There, the applicant was a conscientious objector to the war, and the Illinois constitution required service in the militia during time of war.³¹⁷ The Court held that although Illinois could not exclude applicants from the bar based solely on their religious beliefs, the state could require support of its laws and exclude those who could not take the oath in good faith.³¹⁸ Because Illinois’ law regarding militia service was itself proper, Illinois could exclude applicants who could not sincerely swear to obey that law.³¹⁹

In 1971, the Court in *Wadmond* upheld a New York state bar rule that required bar examiners to certify that the applicant “believes in the form of the government of the United States and is loyal to such government.”³²⁰ The Court reiterated that “there can be no doubt of [the] validity” of a lawyer’s oath that “merely requires an applicant to swear or affirm that he will ‘support the constitution of the United States’ as well as that of the [licensing state].”³²¹ The rule as interpreted by the state bar “performs only the function of ascertaining that an applicant is not one who ‘swears to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath.’”³²²

This doctrine has its limits, however. In *Bond v. Floyd*, the Court held unconstitutional Georgia’s refusal to allow Julian Bond to take the oath as a state legislator, allegedly due to his anti-government statements in connection with the Vietnam War.³²³ The Court stated that Bond’s case was not “a case where a legislator swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath,” and that the ability to question the oath in such *pro forma* cases “does not authorize the majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution.”³²⁴

In some recent high-profile cases, this doctrine has been applied to deny admission to persons who openly espoused racial bias and hatred. In 2000, the Rhode Island Supreme Court denied admission to an applicant based in part on that court’s view that the applicant could not abide by the terms of the Rhode

315. *Id.*

316. *In re Summers*, 325 U.S. 561, 573 (1945).

317. *Id.* at 562.

318. *Cf. id.* at 569-73.

319. *Id.* at 571-73.

320. *Id.* at 161.

321. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 161 (1971).

322. *Id.* at 163-64 (quoting *Bond v. Floyd*, 385 U.S. 116, 132 (1966)). See also Hale Opinion, *infra* note 329, at:1040-42 (citing *Bond* and *Wadmond* and questioning whether its doubts as to Hale’s sincerity regarding the oath “might be a frail reed upon which to deny certification”).

323. *Bond v. Floyd*, 385 U.S. 116 (1966).

324. *Id.* at 132.

Island “do no falsehood” oath.³²⁵ The applicant, Roger Roots, had engaged in prior criminal conduct involving falsehoods, and he published a number of articles expressing racial bias and contempt for the federal government.³²⁶ Roots claimed that he could take the oath and abide by its terms.³²⁷ The court noted that it could not deny admission due to unorthodox political beliefs, but that the combination of Roots’ criminal record and his writings “casts such doubt upon the sincerity of Roots’ professed willingness to abide by the terms of the oath that he must take as a member of the bar of this state that his application should be denied at this time.”³²⁸

The most notorious case was that of Matt Hale.³²⁹ Hale was an avowed racist and founder of a white supremacist organization.³³⁰ The Illinois bar denied Hale admission in 1998.³³¹ The Illinois Bar Committee on Character and Fitness refused to certify Hale, in part due to its conclusion that Hale could not abide by an Illinois rule of conduct barring racial discrimination by lawyers.³³² The oath played a part in this process. As in *Roots*, Hale argued that he could take the oath and abide by its terms, but the bar did not accept his argument.³³³

325. *In re Roots*, 762 A.2d 1161, 1168-70 (R.I. 2000).

326. *Id.* at 1164-65, 1168-69.

327. *Id.* at 1170.

328. *Id.*

329. See GEOFFREY HAZARD, ET AL., *THE LAW AND ETHICS OF LAWYERING* 1037 (4th ed. 2005) (reprinting the Opinion of the Inquiry Panel of the Committee on Character and Fitness for the Third Appellate District of the Supreme Court of Illinois) [hereinafter *Hale Opinion*]. The Hale case has been the subject of extensive academic commentary. See Carla D. Pratt, *Should Klansmen be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857 (2003); Wendel, *supra* note 310, at 55; Richard L. Sloane, Note, *Barbarians at the Gates: Revisiting the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists From the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397 (2002).

330. Hale Opinion, *supra* note 329, at 1037-38.

331. The Illinois inquiry panel refused to certify Hale, and the hearing panel affirmed. Hale sought but was denied review in both the Illinois Supreme Court and United States Supreme Court. He failed again in federal district court. *Id.* at 1046-47.

332. *Id.* at 1039 (quoting Rule 8.4(a)(5): “a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin”).

333. The committee reported:

Mr. Hale was asked whether or not he could take the oath to support the United States Constitution and the Constitution of the State of Illinois in good conscience. He unhesitatingly answered that he would have no difficulty even though, based on his beliefs, he obviously would be in substantial disagreement with current interpretations of the constitutions. He likened his situation to that of a judge or jury whose duty it is to follow the law even though they may disagree with it.

Id. at 1038. The majority panel questioned whether it could base denial merely on a finding that Hale was insincere in his statements that he could take and abide by the oath, but it found lack of fitness on more general grounds. *Id.* at 1141-42. A dissenting panelist and academic commentators, however, characterized the majority’s decision as a rejection of the sincerity of Hale’s offer to take the oath. See *id.* at 1045 (dissent); Avi Brisman, Note, *Rethinking the Case of Matthew F. Hale: Fear and Loathing on the Part of the Illinois Bar Commission on Character and Fitness*, 35 CONN. L. REV. 1399 (2003) (arguing that the Hale denial improperly amounted to dual requirements that the applicant take the oath and that the character and fitness committee corroborate the oath).

In *Garland* and *Summers*, the lawyers could not take the oath, and they raised constitutional challenges to the oath. In *Roots* and *Hale*, however, the applicants insisted that they could take and abide by the oath, but the state rejected the offers on the ground that the applicants could not take the oath in good faith. The states in essence found a violation of the oath before the oath was ever taken. *Roots* and *Hale*, however, are rare cases, for the states have limited latitude to anticipate violation of the oath.³³⁴ Nevertheless, the oath can be used to exclude an applicant.

2. THE OATH AS A BASIS FOR LAWYER DISCIPLINE

In most cases, the licensing jurisdiction does not anticipate breach of the oath before the lawyer takes the oath. Instead, states or courts provide for discipline of lawyers who later violate their oaths. Many states provide by statute for disbarment or other penalty upon violation of the oath.³³⁵ Some states have court or professional conduct rules that declare violation of the oath to be professional misconduct.³³⁶

Not all states have an express provision for discipline upon violation of the oath. Even without such a statute or rule directive, courts likely have inherent powers to punish lawyers who violate their oath. In 1997, in *Dineen*, the Maine Supreme Judicial Court held that Maine's oath (traditional "do no falsehood" oath) was an appropriate basis for discipline.³³⁷ There, the disciplinary charges against lawyer Dineen listed a number of rules of the Maine Bar Association, and Dineen challenged the charges on the ground that the Supreme Judicial Court had not yet adopted the bar rules.³³⁸ The court rejected this challenge, stating that the disciplinary rules were guidelines that may be properly consulted in assessing whether a lawyer had violated the oath.³³⁹ More importantly, the court observed that the presiding justice had "expressly based each finding of misconduct in this case on language contained in the Attorney's Oath, thereby in effect applying . . . the standard appellant had sworn to uphold when he was admitted to practice."³⁴⁰

In most modern disciplinary cases, however, if the oath is used at all, it is used only as an afterthought. The oath itself is not the trigger for punishment or discipline of the attorney. This is in large part due to the fact that modern rules of professional conduct cover most conduct proscribed by the oath and do so in far

334. See *Hale* Opinion, *supra* note 329, at 1041-42 (citing *Bond* and *Wadmond* and questioning whether its doubts as to Hale's sincerity regarding the oath "might be a frail reed upon which to deny certification").

335. See MINN. STAT. § 481.15 (2006); MONT. CODE ANN. § 37-61-3012(b) (2006).

336. See S.C. APP. CT. R. 413,7(a) (6). In 2008, the Arizona Supreme Court amended its rules to define professional misconduct as "substantial or repeated violations" of the oath. ARIZ. R. SUP. CT. 31(a) 2.E.

337. *In re Dineen*, 380 A.2d 603 (Me. 1977).

338. *Id.* at 603-04.

339. *Id.* at 604.

340. *Id.*

more detail. Courts do not need to resort to the oath when the rules more directly address the conduct at issue. To the extent that courts or disciplinary bodies cite the oath as grounds for attorney discipline, the court usually notes the oath generally, as further support for discipline, after it has cited particular conduct rules that the lawyer has violated.

Nevertheless, the oath sometimes imposes a duty distinct from that imposed under the rules of conduct. For example, Wisconsin has held that the “offensive personality” clause of its version of the ABA oath is an appropriate basis for attorney discipline, and it has relied solely on the clause to discipline a lawyer.³⁴¹ South Carolina recently replaced its version of the “offensive personality” clause with a civility duty, and at the same time, it expressly made violation of the revised oath a basis for discipline.³⁴² Moreover, as discussed below, some current oaths retain duties, such as the “just” causes duty, that are not part of the *Model Rules*.³⁴³ In sum, although the oath rarely is used in disciplinary cases, its violation is a possible basis for discipline.

3. THE OATH AS ETHICAL INSPIRATION AND GUIDANCE

The oath can serve non-regulatory functions. Even the simple oath can prompt ethical reflection, as the actual act of taking the oath is a moment of high ethical aspiration. By reciting the oath, the lawyer both is reminded of his or her core ethical duties (in varying degrees of detail, depending on the form of oath), and promises to abide by those principles. The solemnity of the oath ceremony—often a promise made to God, in a courtroom, before a judge, and before one’s peers and family³⁴⁴—underscores the importance of the lawyer’s ethical commitment.

Scholars and bar associations also use the oath to highlight and convey ethical concepts. The oath is a common theme in ethical and political discussions.³⁴⁵ The

341. *In re Beavers*, 510 N.W.2d 129, 133 (Wis. 1994) (collecting cases). In *Beavers*, the Wisconsin Supreme Court upheld discipline against an attorney who threatened to kill an adverse party and struck the man’s car with his own vehicle. The court held that this behavior constituted “offensive personality” in violation of the oath and warranted a 90-day suspension of his license. *Id.* at 131-32, nn.2-3 (noting that finding of misconduct was not based on other rules but instead the oath). See also *Matter of Disciplinary Proceedings Against Blask*, 573 N.W.2d 835 (Wis. 1998) (applying “offensive personality” clause to reprimand a lawyer who attacked a basketball referee, using profane language, and later lied to police).

342. See *supra* note 272. 23 A.B.A. J. E-REPORT 4 (2005) (reporting modification of South Carolina oath and disciplinary rules). Others have argued against civility oaths. See Atkinson, *supra* note 270.

343. See *infra* notes 352-357.

344. See Martha Sheehy, 23 MONT. LAW. 4 (Nov. 1977) (describing oath ceremony in Montana: 100 lawyers took the oath before the Montana Supreme Court in the state capital, and many practicing lawyers moved for individual admission of their family and friends).

345. See Donald J. Rendall, *The President’s Column*, 29 VT. B. J. 3 (Fall 2003) (noting oath and other distinguishing features of the legal profession); Reginald Turner, “True Justice:” *The Access to Justice 2002 Campaign*, 81 MICH. B. J.11 (Dec. 2002) (citing lawyer’s oath in support of pro bono program); William Melton, *The Oaths of Alabama Attorneys* (May 19, 2005) (on file with author) (speech to Alabama State Bar

president of the Michigan Bar Association recently urged lawyers to more closely follow the vows of their oath in order to avoid further regulation of the profession by the legislature.³⁴⁶ The president of the Alabama Bar Association urged lawyers to remember their (“do no falsehood”) oath and uphold “America’s legal tradition and Rule of Law.”³⁴⁷ Another argued that the oath required lawyers to support an independent judiciary in the face of increasing political attacks on the judiciary.³⁴⁸

A frequent reference in this ethical discourse is to the public service clause of the Swiss oath and ABA model oath. Many have used this clause to encourage lawyers to take on pro bono and other public service work.³⁴⁹ The Idaho State Bar Association, for example, in 1993 adopted a resolution that cited the oath and encouraged all lawyers to donate their services to the Idaho Volunteer Lawyers Program.³⁵⁰ Professor Kuehn in a series of articles has argued that the oath clause reflects and reinforces the lawyer’s duty of public service in a variety of situations, including lawyers’ duties to support law school clinics and law

Association Leadership Forum encouraging lawyers to read and think about their oath: “You will be a better lawyer in the true sense of the word”); Dale Doerhoff, *Dialogue on Justice: “What do Lawyers Do?” (Part II)*, 58 J. Mo. B. 330, 330 (Nov-Dec. 2002) (analyzing Missouri oath and arguing that it distinguishes the legal profession “from all others,” reflects the special status of lawyers as officers of the court and confirms that lawyers practice with a “social conscience”); Wendell K. Smith, *Why We Take An Oath*, 8 Utah B. J. 12 (Jan. 1995) (analyzing the Utah oath line-by-line and concluding: “[T]he practice of law is not just another service industry, it involves the public trust, the preservation of society, and the administration of justice. That is why we took this oath”).

346. See Scott S. Brinkmeyer, *Lest We Forget*, 83 MICH. B. J. 11, 14 (Mar. 2004) (“If each and every lawyer would honor [the] oath, there would not be any need for further lawyer regulation.”).

347. Douglas McElvy, *President’s Page, No Greater Gift*, 66 ALA. LAW. 252, 256 (July 2005).

348. D. Michael Guerin, *Why an Independent Judiciary?*, 78 WIS. LAW. 5 (Oct. 2005) (noting attacks on judiciary and popular criticism after Terri Schiavo case and arguing that the lawyer’s oath clause to “maintain the respect due to the courts of justice and judicial officers” reflects obligation to stand up for the integrity of the judicial system).

349. See Dennis Archer, *Keynote Address: Why is Accountability Important?*, 54 S.C. L. REV. 881, 887 (2002) (ABA President-Elect speech, stating that “outside of those who are in a religious profession . . . we’re the only ones . . . that take an oath to represent the oppressed and the defenseless”); Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 U.M.K.C. L. REV. 337 (2003) (citing state versions of oath and Field Code duties as directives in support of pro bono work in family court); J. Thomas Greene, *Advice to Old and New Lawyers*, 173 F.R.D. 328 (1996) (judge recalling oath that he took in 1955, which “required that the cause of the defenseless and oppressed may not be rejected because of considerations of lucre,” noting that the duty is “unstated in the current oath” and arguing that all law firms should continue encourage and give credit for pro bono work); Thomas Hagerman, *The Staying Power of My Legal Services Experience*, 30 COL. LAW. 29, 30 (Dec. 2001) (quoting oath and stating that lawyers should meet minimum suggested hours of pro bono service and “encourage our colleagues to do the same, as well as acknowledge warmly those who meet or exceed this goal”); Bill Piatt, *One View to Add to the Many*, 34 TOL. L. REV. 143, 144 (2002) (noting that law professors, as lawyers who take oaths, have an obligation to teach “students an appreciation for our laws and our system of justice,” and, as reflected by New Mexico’s oath, an obligation of public service); Carolyn R. Young, *The Karma of Pro Bono*, 29 L.A. LAW. 76, 76 (Aug. 2006) (arguing that “despite that [. . .] obligation, we lawyers overwhelmingly neglect our duties by failing to adequately serve the defenseless and oppressed”).

350. Idaho State Bar Association, *Resolution 91-11, Participation in Pro Bono Activities*, 36 ADVOCATE (Idaho) 13 (Nov. 1993).

professors' duty to speak out.³⁵¹

C. A CRITIQUE OF MODERN OATH PRACTICE

Although oaths can perform both regulatory and ethical functions, they are not used to their full advantage. For too long, the oaths have existed in the shadow of the modern rules of professional conduct. The concept of the oath remains viable, but the oath can better serve its regulatory and ethical functions. To do so, the oath must accurately and clearly state core ethical duties, whether in detailed or simple form. A few oaths fail this aim by stating duties inconsistent with other obligations, by using confusing language or by not stating balanced, core concepts of the profession.

First, some oaths state duties that differ from the standards in the rules of professional conduct. This problem is limited in the sense that only a very few clauses of the oath are inconsistent with other regulatory standards, but pervasive in that many states have such an oath. The best example is the "just" causes duty, which a number of states still retain in various forms.³⁵² The ABA in 1977 deleted this duty from the model oath, in response to criticism that the clause both misstated a lawyer's duty and imposed a higher duty on plaintiffs' lawyers than on civil defense lawyers.³⁵³ The *Model Rules* do not require lawyers to assess the justness of their client's cause. Model Rule 3.1 states an objective standard for all civil papers,³⁵⁴ which tracks the objective standard in Rule 11 of the Federal Rules of Civil Procedure.³⁵⁵ Pleas in criminal cases are given even more leeway.³⁵⁶ Rules ban ill purposes, such as harassment,³⁵⁷ but they do not require

351. Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 2007 (2003) [hereinafter *Ethics Critique*] (citing oath and arguing that lawyers' efforts to interfere with law school clinics "could be viewed at an attempt to induce a violation of a clinic attorney's ethical responsibilities"); Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 *S. C. L. REV.* 253, 274 (2003) (citing oath in support of argument that law professors, as lawyers, have a duty to "speak out" and "lend their time and civil influence to assure the availability of legal services and to advance law reform"). See also Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 *UTAH L. REV.* 1039 (2007).

352. See *supra* notes 273-276 (reporting states).

353. See *supra* notes 251-254 (1977 amendment of model oath).

354. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.1 (2006) [hereinafter MODEL RULES].

355. FED. R. CIV. P. 11(b) (imposing a "reasonable inquiry" standard and requiring that the lawyer certify that the civil paper have "evidentiary support" and be "warranted by existing law or by a nonfrivolous argument" for change in the law).

356. Model Rule 3.1 imposes a "frivolous" standard but adds: "A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established." MODEL RULES, R.3.1.

357. See *supra* note 355 (improper purpose clause of Rule 11). See also Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 *BYU L. REV.* 1, 84-96 (2001) (studying the improper purpose clause of Rule 11(b)(1) and arguing that the clause may violate the

the lawyer to assess the overall justness of the client's cause. Thus, the oath statements of a "just" causes duty are confusing (and perhaps incorrect) statements of the duties of a lawyer in litigation.

Another possible deviation is the public service clause of the Swiss and ABA oaths, in which the lawyer swears to "never reject, for any consideration personal to myself, the cause of the defenseless or oppressed." Some academic commentators, such as Professor Kuehn, argue that this oath duty is broader than the public service provisions of the *Model Rules* in that the oath speaks in mandatory, rather than aspirational, terms.³⁵⁸ Courts have not sanctioned attorneys under this provision of the oath,³⁵⁹ and to the extent that the oath's public service clause suggests a different duty than the rules of conduct, that difference may not be deliberate.³⁶⁰ The ABA has long debated the public service obligations of lawyers, and it concluded in Model Rule 6.1 that such work is not mandatory.³⁶¹ Indeed, Professors Gillers and Simon report that "[n]o state yet requires lawyers to perform pro bono work, and no state is actively considering mandatory pro bono."³⁶²

Although courts rarely, if ever, discipline lawyers based on the oath alone, ethics authorities and disciplinary bodies should consider whether they intend the oath to state duties that are different than other standards governing lawyer conduct. Deviation from the ABA *Model Rules* is not the problem. States often amend their versions of ABA model standards, but these variations usually are

plaintiff's right of court access under the First Amendment right to petition); Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13, 64-71 (2000) (arguing that the Model Rules contain motive restrictions, rather than mere objective standards, and that such restrictions, when applied to court access, might violate the plaintiff's First Amendment right to petition).

358. Kuehn & Joy, *Ethics Critique*, *supra* note 351, at 2007 (noting the aspirational "should" character of the duties in the Model Rules and Model Code but arguing that the oath may provide a disciplinary basis regarding public service).

359. *Id.* (stating that "there is no reported case of an attorney being sanctioned for failing to uphold" the public service clause of the oath, but that where "the motive for denying representation is apparent" such conduct may be subject to disciplinary action). *But see* Bradshaw v. U.S. Dist. Court for the S. Dist. of Cal., 742 F.2d 515, 518-19, n.5 (9th Cir. 1984) (questioning whether the reaction of the trial court and local bar to pleas for assistance of counsel violated California's code duty to "never reject" the cause of the defenseless).

360. Some states have given attention to the oath vow, as evidenced by recent amendments. South Carolina's oath states that the lawyer "will assist the defenseless or oppressed by ensuring that justice is available to all citizens . . ." S.C. App. R., Rule 402(k). Alaska's oath states only that the lawyer "will strive to improve both the law and the administration of justice." *See infra* note 372 (reprinting Alaska oath). The Idaho oath adds a vow to "conduct time and resources to public service." *See supra* note 271. Michigan simplifies the wording of the clause: "I will not, for personal reasons, reject the cause of the defenseless or oppressed." *See supra* note 267. *See also* Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33,81, 123 (2000) (noting and criticizing removal of the public service duty from the Louisiana law student oath).

361. MODEL RULES, R. 6.1 ("Voluntary Pro Bono Publico Service") (2008). *See generally* Judith Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91 (2002) (recounting historical pro bono standards and ongoing debate as to modern standards).

362. STEPHEN GILLERS & ROY SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS*, 411 (2008).

deliberate. The jurisdiction intends to impose a standard different than the ABA standard. More importantly, when a jurisdiction modifies the rules of conduct, that modification not only is deliberate, it is consistent within the jurisdiction. It is the statement of ethical policy for that jurisdiction. The problem with the deviations in the oath is that if they are arguably inconsistent with the standards otherwise in effect in the same jurisdictions that require such oaths.

The differences in the oath or Field Code statement of duties seem to be “accidents of history,” since the rules of conduct developed separately and more rapidly than the oath. This is most obvious with regard to the Field Code statutory duties, which statutes seem to have been largely ignored after initial state adoption over a century ago. This is not ideal, but the inconsistencies in the statutory duties present less of an ethical dilemma than those in the oath. A lawyer may never know of the statutes, but the oath is a literal promise spoken by the lawyer. The lawyer may appreciate that a particular vow will not subject him or her to professional discipline, but that undermines the value of the oath as a whole. A lawyer who disregards any portion of his oath may disregard the whole.³⁶³

A second problem is that some oaths use antiquated and confusing language. For example, both the Swiss and ABA model oaths require that lawyers “abstain from all offensive personality.” This is not a well understood concept. The wording is so broad that the Ninth Circuit has declared it to be unconstitutionally vague.³⁶⁴ Wisconsin and perhaps a few other states have narrowed the duty through judicial interpretation, but most states have not done so.³⁶⁵ A similar criticism can be raised against the “lucre” language in both the ABA model oath and most forms of the “do no falsehood” oath. The ban on delays made for lucre is consistent with the prohibition in procedural rules, such as Rule 11, against filing civil papers for “any improper purpose.”³⁶⁶ Yet, the “lucre” language is at least unfamiliar (if not comical) to lawyers when they state it for the first time in the oath ceremony.

Finally, many oaths do not capture a fair balance of core ethical ideals. The old oaths have too much litigation focus. The profession has modernized over the centuries, and lawyers are no longer merely litigation advocates. This criticism

363. See Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics That We Can Learn on the Road*, 15 GEO. J. LEGAL ETHICS 95, 107-12 (2001) (arguing that conduct rules that are flawed and ignored by lawyers and disciplinary authorities have negative consequences, particularly as to the underlying non-flawed aspects of the rules).

364. *In re Wunsch*, 84 F.3d 1110, 1119 (9th Cir.1996) (voiding the “offensive personality” proscription in California’s statutory (Field Code) list of duties). California later deleted the clause from its statutory list of attorney duties. CALIFORNIA CODE § 6068.

365. See Janelle S. Mc Eachern, *Engaging in Offensive Personality as Ground for Disciplinary Action Against Attorneys*, 58 A.L.R. 5th 429 (collecting cases).

366. FED. R. CIV. P. 11(b)(1) (requiring the lawyer to certify that he or she has not filed the paper for “any improper purpose”).

can be levied against other standards of conduct, but the *Model Rules* have made some progress and today address a broader range of lawyer activity.³⁶⁷ Even as to generic issues, some oaths speak too narrowly. The ABA model oath, for example, states the duty to “accept no compensation in connection with his business except from him or with his knowledge and approval.” At the time of its adoption, this narrow duty was criticized as addressing an “uncommon” issue, not one of “fundamental importance and general concern.”³⁶⁸ Nothing in the past century has made this vow any more central to the lives of lawyers. The aims of the oath would be better served by a general vow of client loyalty.

The problems of inconsistency, terminology and skewed focus apply largely to the detailed oaths. The simple oath avoids most of these problems by using (relatively) plain language to state a generic vow to either “faithfully discharge the duties of a lawyer” or “truly and honestly demean myself.” Simplicity does not mean a better oath. An itemized oath that restates specific ethical goals better reinforces the core ideals of the profession. Over hundreds of years, society and the legal profession have set six core values of the profession—litigation fairness, competence, loyalty, confidentiality, reasonable fees and public service.³⁶⁹ By not stating these standards, the simple oath misses the opportunity to highlight and remind the lawyer of core ideals at a crucial stage in the lawyer’s career.

States should not abandon altogether the older forms of detailed oaths.³⁷⁰ There is value in continuing the tradition of the old forms of oath. The old forms of oath are “rich” and “poetic,” and the old language is “imbued of a feeling that this has been said by our fathers . . . through the history” of the bar.³⁷¹ The tradition promotes uniformity over time and place and thereby better connects lawyers to their profession.

Yet tradition should not be valued over lawyers’ appreciation of the ethical obligations by which they swear to abide. The duties of the oath can and should be stated in a manner that is meaningful—in both terminology and substance—to the lawyer who takes the vows. Likewise, the oath should state duties that are consistent with the duties elsewhere imposed on the local bar. Both aims can be achieved in a manner that respects tradition. Some key vows in the old oath can and should be retained. The centuries-old vow to “do no falsehood,” for example, is easily understood and has universal application to lawyers in their daily lives.

Some states are moving in the right direction. They have updated the language and the individual elements while keeping the basic tradition of the detailed

367. See Andrews, *supra* note 2, at 1445, n. 457, 1447, n. 473 & 1454-58 (discussing criticisms of litigation focus of ABA model compilations and efforts to address that concern).

368. See *supra* notes 220-221 (Baldwin criticism of narrow conflict duty in ABA model oath).

369. See Andrews, *supra* note 2 at 1387.

370. See George Hathaway, *A Plain English Lawyer’s Oath*, 78 MICH. B.J. 64 (1999) (transcribing debate of Michigan State Bar Assembly as to plain language oath to replace retention of older oath).

371. *Id.* at 65-66 (quoting comments as to traditional form of oath).

oaths. This does not mean a rejection of the traditions of the profession. To the contrary, such refinement reinvigorates the oath and reaffirms its traditional place in the lives of lawyers.

A good example is the lawyers' oath in Alaska:

I will support the Constitution of the United States and the Constitution of the State of Alaska;

I will adhere to the Rules of Professional Conduct in my dealings with clients, judicial officers, attorneys, and all other persons;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any proceedings and I believe are taken in bad faith or any defense that I do not believe is honestly debatable under the law of the land;

I will be truthful and honorable in the causes entrusted to me, and will never seek to mislead the judge or jury by an artifice or false statement of fact or law;

I will maintain the confidences and preserve inviolate the secrets of my client, and will not accept compensation in connection with my client's business except from my client or with my client's knowledge or approval;

I will be candid, fair, and courteous before the court and with other attorneys, and will advance no fact prejudicial to the honor or reputation of a party or witness, unless I am required to do so in order to obtain justice for my client;

I will uphold the honor and maintain the dignity of the profession, and will strive to improve both the law and the administration of justice.³⁷²

The Alaska oath could be further improved—it still retains the overly narrow fee conflict duty and a litigation focus—but it is a step in the right direction.

Each jurisdiction should follow this example and examine its own oath. The aim is not simply to improve language. The more important aim is internal consistency. Each jurisdiction's oath must coincide with the standards of that jurisdiction.

Given this need for internal consistency, the ABA must proceed cautiously with the model oath, lest jurisdictions adopt the model without regard to their own rules of conduct. The ABA, however, could lead state reform efforts. The ABA should modify the current model oath to better state and reflect the current standards in the *Model Rules*. The ABA should not then mothball the model oath but instead should periodically review the oath to verify that it is consistent with the developing standards of the *Model Rules*.

Finally, courts and bar associations should consider revising the methodology of taking the oath. An oath might better serve its function if it is renewed. Some Medieval laws required that lawyers renew their oath every year.³⁷³ Today, other

372. Alaska Court Rules, Rule 5.

373. See *supra* notes 30 (Frederic II 1221 oath) and 58 (1274 French oath).

licensed activity, such as driving, requires periodic renewal. Other persons, such as witnesses and jurors, must take an oath every time they serve. Elected and appointed public officials usually must take the oath upon each election or appointment. Most states already require continuing legal education after becoming a member of the bar. They should consider whether renewal of the oath also may serve their aims of enhanced professionalism. This could be done in a variety of ways. One might be a periodic renewal of the oath ceremony, as a condition on the right to practice. Another may be a more informal statement of the oath, by participating lawyers at state bar meetings or continuing legal education sessions.

V. CONCLUSION

The lawyer's oath is as old as the legal profession itself. The current oaths reflect that tradition. Every jurisdiction uses an oath modeled on one of the basic historic forms—the English “do no falsehood” oath, the English simple oath or the Swiss detailed oath. Indeed, most lawyers today utter substantially the same vows sworn by lawyers hundreds of years ago.

The oath always has served as a basis for ethical guidance and regulation. For many generations, it was the principal source of ethical guidance and debate. Even in the relatively recent past—late nineteenth century and early twentieth century America—the oath, particularly its “just” causes clause, served as a catalyst for ethical debate and development. In today's regulatory state, in which lawyers have scores of specific rules and statutes governing their conduct, the oath no longer is the focal point of ethical regulation and debate. Yet, the oath continues to serve some regulatory and ethical functions. The oath is regulatory in that it is a prerequisite to the practice of law, it can act to exclude persons from the profession, and it can serve as the basis for attorney discipline. The oath also can serve important ethical functions. The very solemnity of the oath can both inspire the lawyer and remind the lawyer of the central ethical precepts of his or her profession.

A few forms of oaths, however, undermine the oath's functions by clinging too much to the past. Tradition is both a virtue and a problem with current oath practice. Some of the old forms of oath state duties that are otherwise inconsistent with modern standards of conduct, many oaths state duties in antiquated language, and most detailed oaths are unduly skewed toward litigation. These problems cause oaths to be overlooked and underused as an ethical and regulatory tool. That is a lost opportunity. The oath can and should inspire lawyers as to both their essential ethical duties and their higher calling in their centuries-old profession.