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ETHICAL LIMITS ON CIVIL LITIGATION ADVOCACY: A HISTORICAL PERSPECTIVE

Carol Rice Andrews[†]

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INTRODUCTION

What are the ethical limits of a lawyer's advocacy in civil litigation? Lawyers, courts, and scholars struggle with this question,¹

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1. For a sampling of the modern academic debate as to litigation advocacy, see Colloquium, *What Does It Mean to Practice Law "in the Interests of Justice" in the Twenty-First Century?*, 70 *FORDHAM L. REV.* 1543 (2002), with a keynote address by Professor Deborah Rhode and contributions by many of the leading scholars of legal ethics. A key

but the concern is not new. It is centuries old. Most modern studies of historical legal-ethics debate focus on the early twentieth century, when the American Bar Association (ABA) formulated its first set of national model ethical standards.² Some scholars have studied the ethical discourse in the nineteenth century,³ when the likes of Lord Brougham (in 1820),⁴ David Hoffman (in 1836),⁵ David Dudley Field (in 1850),⁶ and George Sharswood (in 1854)⁷ expressed their views of proper litigation advocacy. The concern for proper litigation conduct,

actor in this debate is Professor Monroe Freedman. He is the best-known modern advocate of an ideal of zealous advocacy. See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9–24 (1975); MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 65 (1990) [hereinafter FREEDMAN, *UNDERSTANDING ETHICS*].

2. For a discussion of the 1908 ABA effort, see James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395 (2003), and Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOC. INQUIRY* 1, 6–16 (1999). The first set of ABA standards was the 1908 Canons of Ethics and model oath. See *Final Report of the Committee on Code of Professional Ethics*, 33 *ANN. REP. A.B.A.* 567, 575–84 (1908) [hereinafter *1908 ABA Report*] (reprinting original 1908 ABA Canons of Ethics and model oath). The second set was the ABA's 1969 Model Code of Professional Responsibility. See *Report of the Special Committee on Evaluation of Ethical Standards*, 94 *ANN. REP. A.B.A.* 729, 734–96 (1969) [hereinafter *1969 ABA Report*] (reprinting Model Code as adopted). The third set was the ABA's 1983 Model Rules of Professional Conduct. See *AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005*, at viii–ix (2006) [hereinafter *AM. BAR ASS'N, LEGISLATIVE HISTORY*] (discussing adoption of Model Rules in 1983); see also *MODEL RULES OF PROF'L CONDUCT* (2012) (current Model Rules, as amended). For a discussion on all three sets, see *infra* Part III.
3. See M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 *U. KAN. L. REV.* 793 (1999); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241 (1992); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethics*, 41 *VAND. L. REV.* 697 (1988); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397 (2003); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *GEO. WASH. L. REV.* 1, 35–67 (2005). I discuss the nineteenth-century debate in Part III, *infra*.
4. See *infra* Part III.B.1 (discussing Lord Brougham and the views attributed to him).
5. See *infra* Part III.B.2 (discussing Hoffman's views on litigation advocacy).
6. See *infra* Part III.C (discussing David Dudley Field and the "Field Code" position on litigation advocacy).
7. See *infra* Part III.B.3 (examining Sharswood's position on litigation advocacy).

however, long predated the nineteenth century, perhaps extending back to ancient times. The actual ethical and practical struggles of lawyers in earlier eras are difficult to capture today, but the regulatory standards for their conduct give some insights to the litigation ethos of the period. In this Article, I explore the early history of formalized civil litigation duties and track these standards to the present day.

In a previous article, I explored the general history of legal ethics standards and identified six core ethical principles that have governed lawyer conduct for centuries: litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service.⁸ In the present Article, I look more closely at the core value of litigation fairness in civil cases. Over the centuries, the concept of litigation fairness has included different duties and standards of conduct, including reasonable behavior, truth, just cause, proper motive, and objective merit. When imposed, these duties have been paramount over any conflicting client duties. Indeed, society has consistently limited a lawyer's advocacy in civil litigation, through the duties of reasonable behavior and truth. The variance or evolution has come, in which additional duties—just cause, proper motive, and objective merit—also limit a lawyer's advocacy.

I start, in Part I, by giving definition to the historical account. I identify and describe in general terms the various duties that might apply to a civil litigator. These duties fall in two broad groups: litigation duties to the client (competence, confidentiality, loyalty, and zealous advocacy) and duties to the court and opposing party (reasonable behavior, honesty, objective merit, proper motive, and just cause). The duties overlap somewhat, but each represents distinct values. Some of these litigation duties can be in tension with each other.

In Part II, I examine historical litigation standards in Europe, from ancient times to the colonial era. The thin record of legal ethics duties in this broad time frame provides only a glimpse at the standards of the respective eras. Even these cursory records, however, reveal multiple litigation duties to the court and, importantly, the priority of the duties. The early European advocate's duties to the

8. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1387 (2004) [hereinafter Andrews, *Evolution*]. In other works, I explored other aspects of the history of legal ethics standards. See Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, in GILDED AGE LEGAL ETHICS 7, 7 (2003) [hereinafter GILDED AGE] (discussing the 1887 Code of Ethics of the Alabama State Bar Association); Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 5 (2009) [hereinafter Andrews, *Lawyer's Oath*] (examining both historical and modern lawyer's oaths).

court, which included reasonable behavior, truth, and often just cause, were paramount over duties owed to the client.

In Part III, I discuss litigation-ethics standards in the United States before the twentieth century. Early regulation was modest, but it tended to follow the English model of prioritizing reasonable and truthful litigation conduct. New attention to counsel in criminal cases prompted deeper consideration of all litigation duties. By the mid-nineteenth century, scholars, lawyers, and regulators, such as Brougham, Hoffman, Field, and Sharswood, attempted to detail the ethical limits of litigation advocacy, in a variety of civil and criminal litigation settings. These attempts exposed some uncertainty, especially concerning zealous advocacy, on the one hand, and just cause, on the other. In the second half of the nineteenth century, new ethics regulation addressed litigation conduct in unprecedented detail. The new regulation continued to prioritize truth and reasonable behavior, but it did not conclusively settle the proper balance between zealous advocacy and other court duties. The new regulation experimented with different limits, including just cause, proper motive, and objective merit.

In Part IV, I track the development of civil litigation duties in the twentieth century in the ABA model ethics standards. The initial ABA 1908 standards built upon the works of the late nineteenth century and stated a nuanced, arguably conflicting, set of civil-litigation duties. Over the next century the ABA further refined and revised its model litigation standards, culminating in the current Model Rules of Professional Conduct. Reasonable behavior and truth, as always, remain paramount duties. Zealous advocacy rose and ebbed as an ideal in the model standards and has today become a concept of diligence. Likewise, just cause faded as an affirmative duty and morphed into, first, a proper-motive standard and then, today, a standard of objective merit. Yet, because the ABA standards are merely models, the older standards linger in actual regulatory standards, including many state oaths that impose a just-cause duty.

Despite this evolution, or perhaps because of it, modern observers, particularly those in the academy, are not in agreement as to the proper standards for a civil litigator's conduct.⁹ This debate is not unique to our generation. The debate did not start in 1908 or the nineteenth century. The concern for proper litigation conduct seemingly began with the profession itself. The debate, though centuries old, is fairly narrow. It is not whether a lawyer has a duty of full-out zealous advocacy on behalf of the client. The formal standards never have imposed such an unlimited duty. The question has not been whether a lawyer owes primary duties of truth and reasonable

9. See Colloquium, *supra* note 1 (presenting several academic views on litigation ethics).

behavior. Lawyers always have had those duties. The question is instead which other duties, beyond reasonable behavior and truth, also limit a lawyer's civil litigation advocacy.

I. DEFINING A LAWYER'S BASIC DUTIES IN CIVIL LITIGATION

No one can define or label all of a lawyer's potential litigation duties with precision or with universal acceptance. Indeed, the definition of the lawyer's ethical duties in litigation is at the heart of the debate both today and in preceding centuries. Nevertheless, some description is necessary to distinguish the duties from each other, and labels are useful shorthand references for study of the historical litigation ethics standards.

My description of the duties here is necessarily general. I do not intend to capture every nuance of the duty or anticipate all applications of the duty. My intent is to describe each duty, in broad strokes, in order to contrast each from other litigation duties. I do not mean to suggest that a civil litigator is bound by all of the listed duties. My aim is to identify the duties that have frequently appeared, over time, in standards for litigation conduct.

Further, I limit my description of the duties to civil litigation, as opposed to criminal cases. Many of the core ideals are the same in both contexts, but a lawyer's duties may vary depending on whether the litigation is civil or criminal. In my discussion of the historical standards, I occasionally note the different context of criminal cases where that difference helped define the duty on the civil side.

Finally, in my labelling of duties, I do not mean to suggest that the historical standards use the same terms. It is precisely because the terms vary over time and place that I attempt to provide consistent terminology for my exploration and comparison of the standards of conduct. My aims are to report on the different standards over time and to categorize them. This involves guesswork as to some standards. We cannot know with any certainty what particular terms meant in their respective eras. Even today, we do not have a uniform understanding of proper litigation conduct.

A. *A Civil Litigator's Duties to the Client*

In this study, I consider four client duties in litigation: competence, confidentiality, loyalty, and zealous advocacy. The first three are relatively well understood, perhaps because they apply in all aspects of legal practice, not just civil litigation. Competence as applied to civil litigation requires the advocate to possess the basic skill and knowledge to litigate and to take steps to ensure such skill and knowledge. Confidentiality means both voluntary preservation of the client's private information and proper assertion of privilege during discovery and trial. Loyalty requires that the lawyer not have a conflict between the client's interests and those of the lawyer or other parties represented by the lawyer.

The most difficult client litigation duty to define is zealous advocacy. Zealous advocacy requires competence, confidentiality, and loyalty, but to most observers, it means something more. Zealous advocacy suggests a push for excellence. Zealous advocacy, to some observers, requires a strong desire to win and a willingness to “do all” to accomplish the client’s goals. It suggests a primacy of the client’s interests, perhaps above all others.

The first three duties—competence, confidentiality and loyalty—are not the focus of this historical analysis. I note them as they appear in the historical works, but I do not detail their content or development over time. My aim in noting these duties is both to distinguish them from zeal and to demonstrate their position relative to the duties that the lawyer owed to the court. Zealous advocacy, on the other hand, is a primary focus of my review of the historical ethics standards, for it is the duty most at odds with the lawyer’s duties to the court.

B. A Civil Litigator’s Duties to the Court

A lawyer in civil litigation also owes duties to the court and to the opposing party. I use the shorthand “duties to the court” to encompass both, because, in a broad sense, the judicial system benefits when a lawyer acts appropriately with regard to both the court and opposing party.¹⁰ For this study, I identify five court duties: reasonable behavior, truth, objective merit, proper motive, and just cause.

One duty is reasonable behavior. The broad concept of reasonableness could describe all of the court-oriented duties. My description of this reasonableness duty here focuses on the lawyer’s behavior, rather than the litigation positions that the lawyer asserts or the objectives that the lawyer seeks on behalf of the client. It is a duty directed more toward means than ends. Reasonable behavior includes acting with respect to the court and civility to the opposing side.

Another duty to the court is one of truth, as to both law and fact. This duty usually turns on subjective knowledge and requires a lawyer not to knowingly misstate law or fact in civil pleadings and other filings. It extends to evidence, barring a civil lawyer from knowingly offering any form of false evidence, including testimony of witnesses and sometimes the client. The truth duty also may require a lawyer to affirmatively remedy any falsehoods of which the lawyer later gains knowledge.

A third court duty is objective merit, which, like truth, extends to both law and fact. This standard looks to the objective reasonableness of the position, apart from its literal truth. A knowingly false claim

10. I use the phrasing “duty to court,” in lieu of “officer of court,” because duty to court encompasses the duties that may attach to a lawyer, regardless of any formal relationship with the court. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 39 (1989) (criticizing the term “officer of court”).

cannot have objective merit, but a position can lack objective merit even if it does not include known falsehoods. Likewise, in contrast to reasonable behavior, the focus of this duty is the merit of the legal and factual positions that the lawyer asserts on behalf of the client, not the tactics.

A fourth duty that might arise in civil litigation is one of proper motive. This duty might extend to the motives of both client and lawyer or it might be limited to either the client or the lawyer. It is a duty distinct from truth or objective merit. Under some versions of this duty as applied to civil pleadings, a lawyer cannot present even a truthful and colorable claim or defense if his or the client's motive is improper. More typically, a motive duty applies to civil papers after the initial pleadings, and it therefore overlaps with the duty of reasonable behavior, in that an improperly motivated tactic is not reasonable. Yet a duty of proper motive has distinct application. The duty of reasonable behavior looks more at effect than motive. An evidentiary objection in a civil trial, for example, might be reasonably stated and presented but improperly motivated, or it might be properly motivated but unreasonably disruptive.

A final duty that a civil litigator may owe to the court is one of just cause. This duty is difficult to define. It arguably encompasses all of the foregoing duties to the court. In other words, a cause (or tactic) is not just if it is not reasonable, honest, objectively meritorious, and properly motivated. Yet the concept of just cause may mean more. For example, a cause might be unjust—from a social, religious, or moral perspective—even if it has objective merit and does not involve falsehoods. I do not attempt here to define the proper criterion for just cause because that issue is a principal question in the history and development of litigation advocacy ethics.

The lawyer's court duties all tend to limit the lawyer's client duties, particularly zealous advocacy, in different degrees. If a lawyer has a duty to independently assess the justness of a client's cause from the lawyer's own sense of moral justice, that duty impedes the lawyer's ability to zealously advocate the client's cause. If the lawyer is bound by only a duty of objective merit, rather than moral justice, the lawyer has greater leeway for advocacy. If the lawyer is bound only by a duty of technical truth or reasonable tactics, the lawyer has even more leeway. A duty of proper motive puts a slightly different limit on the lawyer's zealous advocacy. All of these duties act as a limit on zealous advocacy, and, at one time or another, formal regulatory standards have used each of these court duties to limit advocacy.

II. EARLY LITIGATION ETHICS STANDARDS IN EUROPE

Regulatory standards for lawyers began with the profession itself. Some isolated accounts report that ancient advocates took oaths of truth and reasonable behavior. The historical record becomes fuller in the thirteenth century in England and France. The early English and

French standards, usually stated in the form of a litigation oath (in essence, “a condensed code of legal ethics”),¹¹ reflected a reasonably sophisticated array of litigation duties. These standards in turn significantly influenced the development of litigation ethics standards in the United States. Some of the English standards came to America with the English colonists,¹² and the French standards became law in the nineteenth century as many states adopted the Field Code.¹³

Only a few of the early litigation standards spoke directly of duties to the client. This lack of attention to client concerns may reflect society’s conception that clients did not merit or need protection, but the focus on court, rather than client, also may be because the primary source of the standards was the litigation oath, mandated and administered by the courts. For whatever reason, in the formal regulatory standards, duties to the court were far more prominent and complex than duties to the client.

The early European standards most commonly demanded truth and reasonable behavior, but some, particularly those in France, also required the lawyer to assess whether the client’s cause was just. The precise meaning of this just-cause standard is not known. In most oaths, the just-cause standard suggested something more than mere truth. In some oaths, the term might have connoted objective merit, but often the phrase suggested a broader sense of justness.

A. *Ancient Litigation Oaths*

Oaths performed many functions in ancient society.¹⁴ Office holders and professionals took oaths to promise proper future conduct, such as in the Greek physicians’ Hippocratic oath.¹⁵ Ancient citizens also took oaths to swear to the truth of matters, particularly in the ancient forms of litigation. The early legal professionals, who assisted in litigation, almost certainly took both forms of oaths.

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11. This description was coined by Josiah Henry Benton in his seminal 1909 work on lawyer oaths. JOSIAH HENRY BENTON, *THE LAWYER’S OFFICIAL OATH AND OFFICE* 9 (1909).
 12. See *infra* Part III.A (discussing early American regulation).
 13. See *infra* Part III.C (discussing the Field Code).
 14. See generally Andrews, *Lawyer’s Oath*, *supra* note 8, at 7–10 (discussing ancient origins of oath and the oath’s different functions in ancient society).
 15. Most versions of the Hippocratic oath state duties of the physician to do no harm and maintain confidentiality. See, e.g., CHARLES J. MCFADDEN, *MEDICAL ETHICS* 462 (6th ed. 1967) (“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 And whatsoever I shall see or hear in the course of my profession . . . I will never divulge, holding such things to be holy secrets.”).

Some historical accounts report that early Roman advocates swore “to avoid artifice and circumlocution,”¹⁶ to “only speak that which he believed to be true,” not use “injurious language or malicious declamations against his adversary,” and not “to employ any trick to prolong the cause.”¹⁷ Likewise, ancient Greek advocates reportedly swore to “represent the bare truth, without any preface or epilogue, without any ornament or figure of rhetoric, or insinuating means to win the favor or move the affection of the judges.”¹⁸ These oaths stated duties of reasonable behavior and truth that the advocate owed to the system, rather than client. The primacy of these two duties continues today.

An oath reportedly used in the Justinian era suggests further development of the ancient advocate’s oath. The *Justinian Code*, written in the sixth century (AD), purported to codify previous Roman law, and the Justinian oath therefore might provide some insight to older oath practice.¹⁹ The Justinian oath, translated from Latin, is as follows:

[T]hey will undertake with all their power and strength, to carry out for their clients what they consider to be just and true, doing everything which 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 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 that it is of that sort, let them withdraw from the case, utterly separating themselves from any such common cause.²⁰

This litigation oath stated duties to both client and court. First, it stated a fairly recognizable duty of zealous advocacy that went beyond mere competence and loyalty. Lawyers had to swear to “use

16. BENTON, *supra* note 11, at 19 (“In Rome when the advocatus was called upon by the Praetor to aid a client in a cause, he was solemnly exhorted ‘to avoid artifice and circumlocution.’”).

17. Joseph Cox, *Legal Ethics*, 19 WKLY. L. BULL. & OHIO L.J. 47, 49 (1888) (quoting a Roman oath).

18. *Id.* (quoting a Greek oath).

19. For a concise summary of the *Justinian Code*, see O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY 2–3 (3d ed. 2000). The *Justinian Code*, or *Codex*, is one of the four parts of the *Corpus Iuris Civilis*, which is sometimes confusingly referred to in its entirety as the *Code of Justinian* or—even more confusingly—*Justinian’s Code*. *Id.* The other three parts are the *Digest*, the *Institutes*, and the *Novels*. *Id.*

20. JUSTINIAN CODE lib. 3, tit. 1, l. 14 (Paul Krueger ed., Berlin, Weidmann 1877) (ca. 534) (excerpted portion is translated by the author from original Latin).

all their power and strength” to do “everything possible” on behalf of their clients. Yet the duty was limited. The next sentence of the oath expressly conditioned the zeal command with a “however” clause that prioritized truth. Lawyers had to ensure that their causes were “true,” not “dishonest” and not “composed of false allegations.” Moreover, if the lawyers later learned that a case was dishonest, they had to withdraw and “utterly separate themselves” from the case.

Importantly, this oath apparently imposed a just-cause duty. It required a lawyer to not proceed with a “bad conscience,” to consider whether the case was “just and true” and whether it was “utterly hopeless.” It is possible that the terms were simply synonyms for truth, in that a case was just if true, a case was utterly hopeless if not true, and a lawyer could not have a good conscience if he made false statements. Yet the juxtaposition of these terms suggests a duty that went beyond truth. These terms also could have connoted objective merit. A case that lacked objective merit could have been described as utterly hopeless or unjust. Lawyers and courts of the era may have understood this duty and its limits, or perhaps they debated the proper meaning and practical application of their litigation duties, as lawyers do today. In any event, the Justinian oath unquestionably put limits on advocacy, and those limits likely went beyond mere truth.

B. Early English Litigation Conduct Standards

The legal profession faded in Europe during the “dark ages.”²¹ By the early thirteenth century, lawyers began to reemerge in England,²² and when lawyers returned, so did their regulation. The regulation in the early period is most evident in the records of the ecclesiastical courts of England, but English lay courts also regulated litigation conduct. The emphasis of this regulation was truth, but the regulation also varyingly imposed duties of reasonable behavior, proper motive, objective merit, and just cause.

1. The Litigation Oaths of English Ecclesiastical Courts

In England, in 1237, the council in St. Paul’s, London, decreed a litigation oath for ecclesiastical advocates. This decree primarily required litigation honesty: “Let all advocates beware that they do not themselves, or by means of others, suborn witnesses, or instruct

21. See HERMAN COHEN, *A HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450*, at 1–19 (1929) (reviewing the possible role of lawyers in the Anglo-Saxon period and noting the “darkness” of the age).

22. See generally PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 14–49* (1992) (addressing emerging legal profession in England).

the parties to give false evidence, or to suppress the truth.”²³ The advocate also swore that he would “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.”²⁴ The delay phrase reflected a reasonableness duty. The last portion—defense of the client according to “law and reason”—may have reflected a client-oriented competence duty, but its context suggests a duty to the court. The preceding clause—the requirement that the lawyer not “deprive the other party” of “justice”—unquestionably stated a duty to the court that might include a just-cause duty. Indeed, Professor Brand characterized this as requiring advocates to not prevent opponents “from getting justice if they had right on their side.”²⁵

Professor Brand reported that in 1273, Archbishop Kilwardby imposed upon advocates practicing in the Court of Arches in London a “much fuller” oath that consisted of five clauses.²⁶ The first clause, according to Professor Brand, stated duties to the client—“faithful and diligent service to their clients.”²⁷ This suggests duties of competence, loyalty, and perhaps zealous advocacy. A second clause reportedly stated an explicit just-cause duty: advocates reportedly swore “not to knowingly accept unjust causes and to relinquish [sic] such causes if they only discovered this after they had agreed to act.”²⁸ The third clause stated a duty of reasonable behavior and tactics: not to seek unjust delays or unnecessarily protract litigation.²⁹ A fourth clause, unique in English precedent according to Professor Brand, required advocates to not knowingly infringe upon ecclesiastical liberties.³⁰ In the last clause, advocates swore to a client duty regarding fees.³¹ Thus, although this oath had some regard for the client, duties to the court, including truth, reasonable behavior, and just cause, were paramount.

In 1295, the Archbishop of Canterbury imposed an oath that emphasized the lawyer’s duty to conduct a pre-filing inquiry. Under this oath, lawyers swore

23. BENTON, *supra* note 11, at 15 (quoting 1 MATTHEW PARIS, ENGLISH HISTORY 92 (J.A. Giles trans., London, Henry G. Bohn 1852) (ca. 1257)).

24. *Id.*

25. BRAND, *supra* note 22, at 146.

26. *Id.* at 147 (*citing* 2 CONCILIA MAGNAE BRITANNIAE ET HIBERNIAE 27 (David Wilkins ed., Culture et Civilisation 1964) (1737)).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

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 informations 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 as they know, declining to prosecute any further desperate, bad cases; and as soon as the cases or surrounding conditions show themselves to be unjust (dishonest) from the point of view of the law, they shall relinquish them entirely.³²

A duty of pre-filing inquiry can help the client, but the phrasing of this duty suggests it primarily served the court, rather than client. The lawyer had to use “all possible caution” when talking to the client to elicit “the truth of the case” and counsel the client as to “the dangers to which they expose themselves in legal proceedings.”³³

This 1295 oath referred to a duty of both truth and just cause, but the just-cause duty may have been narrow. One translator of the oath—Josiah Benton in 1909—included a parenthetical stating “dishonest” after the word “unjust,” which may or may not have reflected the original understanding of the term in 1295.³⁴ Moreover, this oath expressly linked its just-cause duty to objective merit: the lawyer had to withdraw when the case showed itself as unjust “from the point of view of the law.”³⁵

Although this record of English ecclesiastical oaths is not full, it suggests some important elements of the litigation standards for lawyers practicing in those courts. First, the client was not the primary concern. Only fleeting reference is given to client protection. Second, duties to the court expressly overrode any client concerns. The lawyer at times had to refrain from taking actions that might benefit his client, including withdrawing altogether. Third, the emphasis was truth, with suggestions of just cause, objective merit, and reasonable behavior.

2. The Litigation Standards of the Early English Lay Courts

The English Parliament soon followed with regulation of lawyers practicing in the King’s courts. In 1275, the first Statute of

32. BENTON, *supra* note 11, at 23–24 (translating 24 GIOVANNI DOMENICO MANSI, SACRORUM CONCILIORUM NOVA, ET AMPLISSIMA COLLECTIO col. 1149 (Huberto Welter ed., 1901) (1780) [hereinafter SACRORUM CONCILIORUM]).

33. *Id.* at 23 (translating 24 SACRORUM CONCILIORUM, *supra* note 32, col. 1149).

34. *Id.* at 24 (translating 24 SACRORUM CONCILIORUM, *supra* note 32, col. 1149).

35. *Id.*

Westminster set forth a variety of legal reforms, aimed primarily at regulating “serjeants,” also known as “countors” (early predecessors to modern barristers).³⁶ A few sections dealt with specific issues, such as champerty and court delays. Chapter 29, entitled “Deceits by Pleadors,” more broadly regulated the conduct of lawyers:

That 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 Year and a Day, and from thenceforth shall not be heard to plead in [that] Court for any Man³⁷

This statute’s use of the term “deceit” obviously imposed a duty of truth, but, according to Professors Brand and Rose, English courts applied this provision to develop “detailed norms” of conduct, which included not only duties to the court but also to the client.³⁸

According to Professor Brand, courts used the statute to impose prohibitions against not only “knowingly misleading the court” (a truth duty), but also against “persisting with lines of argument which the court had told them were unacceptable or wasting the time of the court” (a reasonable behavior duty).³⁹ On the client side, Professor Rose reported that courts developed the concept of “ambidexterity,” to connote a loyalty duty similar to modern notions of conflicts of interest.⁴⁰ Ambidexterity in turn included the concept of confidentiality.⁴¹

36. See Andrews, *Evolution*, *supra* note 8, at 1390–92 (discussing the different categories of early English lawyers).

37. The Statutes of Westminster, 1275, 3 Edw., c. 29, *reprinted in* 1 Statutes of the Realm 34 (1810) (alteration in original).

38. BRAND, *supra* note 22, at 127, 135; Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 57 n.253 (1998) (“The intended beneficiaries of the prohibition would include the court, the miscreant lawyer’s client, and the opposing party and its attorney.”).

39. BRAND, *supra* note 22, at 127.

40. See generally Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 138 (2000) (comparing medieval conflict of interest, commonly known as “ambidexterity,” to modern conflict of interest).

41. According to Professor Rose, most cases of ambidexterity involved switching sides, but some involved revealing a client’s information. *Id.* at 195.

This confidentiality principle, although indirectly stated, is one of the earliest formal English recognitions of a client confidentiality duty.⁴²

A 1280 London ordinance supplemented the Statute of Westminster, by setting standards of litigation conduct for lawyers who practiced in the courts of London.⁴³ The ordinance complained of “ignorance” and of “foolish” pleaders who created a “scandal of the Courts,”⁴⁴ and focused primarily on reasonable behavior and tactics. The ordinance, for example, required lawyers “to plead and . . . make proffers (*profres*) at the bar (*la bare*) without baseness (*vileinie*) and without reproach and foul (*lede*) words and without slandering (*mesdire* : reviling?) any man.”⁴⁵

Some informal sources, in the nature of academic discourse, more broadly outlined the lawyer’s litigation duties. One early example is the *Mirroir Des Justice* or *Mirror of Justices*, which is believed to have been written about 1285.⁴⁶ Scholars disagree about the nature of this work, some calling it a treatise and others calling it a critique or parody of lawyers.⁴⁷ In any event, it provided a glimpse into litigation standards of the era. It reported a serjeant’s oath that stated a primary duty of honesty owed to the court: he “will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing.”⁴⁸

The *Mirror of Justices* also listed other litigation duties:

[H]e will never have recourse to false delays or false witnesses, and never allege, proffer, or consent to any corruption, deceit, lie, or falsified law, but loyally will maintain the right of his client, so that he may not fail through his folly, or negligence, nor by default of him, nor by default of any argument that he could urge; and that he will not by blow, contumely, brawl, threat, noise, or villain conduct disturb any judge, party,

42. See Andrews, *Evolution*, *supra* note 8, at 1395, 1405–06 (discussing emergence of confidentiality principle and attorney-client privilege in England).

43. See COHEN, *supra* note 21, at 231–34 (*translating* LIBER CUSTUMARUM, f. 205 b (Henry Thomas Riley ed., London, Longman, Green, Longman & Roberts 1860) (ca. 1300–1350)).

44. *Id.* at 231.

45. *Id.*

46. Frederic William Maitland, *Introduction to THE MIRROR OF JUSTICES*, at xxiv (William Joseph Whittaker ed., London, Bernard Quaritch 1895) (ca. 1285).

47. The introduction to the Selden Society edition discusses these issues in detail. *Id.* at xviii–xlviii.

48. THE MIRROR OF JUSTICES, *supra* note 46, at 48.

serjeant, or other in court, nor impede the hearing or the course of justice.⁴⁹

This listing included duties to the client, including competence (“folly or negligence”) and zealous advocacy (“default of any argument that he could urge”). Its duties to the court included truth (“false delays or witnesses,” “deceit, lie or falsified law”), reasonable behavior (“blow, contumely, brawl,” contemptuous rudeness) and just cause (“the course of justice”).

The bar and inns also informed lawyers of their ethical duties. In 1648, Lord Commissioner Whitelocke lectured new serjeants regarding their three “general” duties—“Secrecy, Diligence, and Fidelity.”⁵⁰ This list of general duties reflected a greater concern for client than the formal standards of this and preceding eras. This concern might be attributable to the nature of Lord Whitelocke’s speech—inspirational training of new serjeants—but it also could have reflected an increasing awareness of client concerns. These duties included the full litany of client duties—competence (“diligence”), loyalty (“fidelity”), and confidentiality (“secrecy”)—and together they hinted at zealous advocacy. Indeed, Lord Whitelocke used the word “zeal,” one of the earliest express references to “zeal” in advocacy in reported ethical statements.⁵¹ But Lord Whitelocke made this reference in the context of limiting the advocate’s zeal: “An Advocate owes to the Court a just and true Information, the zeal of his Clients Cause, as it must not transport him to Irreverence, so it must not mislead him to untruths in his Information of the Court.”⁵² Thus, despite recognition of zeal on behalf of clients, the serjeant had greater duties to the court. These higher duties included duties of truth and just causes (a “just and true Information”) and a duty of reasonable behavior (owing “great Respect and Reverence” to the court).

The other branch of the early English bar—attorneys (predecessors to modern solicitors)—had similar ethical duties. The best-known source of legal ethics standards for early attorneys is the following “do no falsehood” litigation oath:

You shall doe noe Falshood, 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 know of anie to be done you shall give Knowledge thereof to the Lord Chiefe Baron or other his

49. *Id.*

50. BULSTRODE WHITELOCKE, MEMORIALS 352, 354 (London, J. Tonson 1732) (1682) (“The new Sergeants appeared at the Chancery Bar, and I made the Speech to them . . .”).

51. *Id.*

52. *Id.*

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 your selfe 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.⁵³

English attorneys took a form of this oath for centuries, starting perhaps as early as the thirteenth century.⁵⁴ The language varied, but the English attorney's "do no falsehood" oath typically included a competence duty—"best learning and discretion"—which phrasing also hinted at zealous advocacy. Yet the oath prominently stated a specific duty of truth (a prohibition against false evidence and claims) and a combined duty of reasonable behavior and proper motive (to not delay litigation for "gain" or "malice"). These duties expressly overrode the attorney's duty to his client: the oath required an attorney to report falsehoods to the court. This oath in its original form did not include either a just-cause duty or a duty of objective merit.

This overall history of litigation standards in England, from the Middle Ages until the colonial period, shows a relatively detailed set of ethical standards for lawyers in litigation. These standards usually emphasized the primary duties to the court, rather than the client. The duties to the court were typically truth and reasonable behavior. Objective merit and proper motive also were suggested. Only a very few English statements, primarily the early ecclesiastical oaths, urged a distinct duty of just cause.

C. *French (and later Swiss) Litigation Oaths*

The early history of litigation standards in France paralleled that of England. Litigation oaths were the primary source of ethical standards, and the French oaths reflected the same concerns as the English standards. They included some duties to client, but the emphasis was duties to the court. In comparison to the English standards, the French oaths more prominently stated a just-cause duty.

Two French ecclesiastical oaths, both dictated in 1231, stated relatively sophisticated litigation duties. One required that

53. BENTON, *supra* note 11, at 28; SELECT COMMITTEE APPOINTED TO INQUIRE INTO THE STATE OF THE PUBLIC RECORDS OF THE KINGDOM, FIRST REPORT ON PUBLIC RECORDS 234 (London, Luke Hansard & Sons 1800).

54. Benton reported that the "do no falsehood" oath 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." BENTON, *supra* note 11, at 28.

[e]very 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.⁵⁵

The other, "Oath of the Advocates," provided

[t]hat they shall not favor (take) knowingly cases that are not just; nor shall they bring about, with malice aforethought, undue delay or haste in the conduct of cases by means of false oath, rather than stand by the truth. Nor shall they instruct their client toward malicious answer or statement; nor shall they after the published attestations, or at any stage of the trial, nor even before the oath suborn witnesses, or cause them to be suborned. Nor shall they permit their client to produce false witnesses; and if they should gain knowledge thereof, they shall reveal such to the court. If memorials (briefs) are to be made they shall do so in good faith, and not withdraw from court maliciously, until the memorial be completed and admitted in court. Clients they shall expedite to the best of their ability, and in good faith. Nor shall they bother (literally burden) the Judge with objections, believing that they will give in to them. They shall sustain the honor of the court, nor perpetrate in court a falsehood.⁵⁶

These 1231 oaths stated duties to both client and court. The client duties included forms of competence ("inadequate . . . handling" of cases), loyalty (not "embezzle" client documents) and zealous advocacy ("expedite to the best of their ability"). The duties to the court were

55. BENTON, *supra* note 11, at 21 (translating 23 SACRORUM CONCILIORUM, *supra* note 32, cols. 218–19).

56. *Id.* at 21–22 (translating 23 SACRORUM CONCILIORUM, *supra* note 32, cols. 240–41).

more plentiful. They enumerated multiple aspects of the truth duty: to not use false pleas, to not offer false documents, to not suborn perjury, and to maintain the honor of the court by not perpetrating falsehoods. They stated duties of reasonable behavior and proper motive, including to not burden judges with undue objections and to not use malicious pleas. Both oaths also stated duties to not bring unjust cases (“unjust or militate against his conscience” and “not just”). The several duties to the court were paramount and required affirmative reporting to the court: a lawyer must not “permit [a] client to produce false witnesses” and if he learns later of false evidence, he “[should] reveal such to the court.”

In 1278, an ecclesiastical oath added a more explicit statement of zealous advocacy. It required lawyers to give “their clients as faithful defense as is in their power.”⁵⁷ Once again, this duty was joined with the duty “to not favor cases that are unjust.”⁵⁸

In 1274, King Phillip III enacted an ordinance that regulated lawyers in the general courts. His stated purpose was to give his subjects the “lawful right in cases at law” and “to deter those who . . . offer their professional services, from maliciously protracting legal contests or charging immoderate fees.”⁵⁹ The principal mode of regulation was an oath, by which the lawyer swore every year to abide by duties owed to both the client and the court:

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 bonâ fidê 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.⁶⁰

The duty owed to the client (“[to] diligently and faithfully [act]”) suggested competence, loyalty, and zealous advocacy, but it was expressly subordinate to a duty to the court (“as long as they have reason to believe their case to be just”). The priority of duties to the court also

57. *Id.* at 23 (translating 24 SACRORUM CONCILIORUM, *supra* note 32, col. 216).

58. *Id.*

59. *Id.* at 16 (translating 2 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES no. 247 (François-André Isambert et al. eds., Belin-Le-Prieur ca. 1821–1833) [hereinafter RECUEIL GÉNÉRAL]).

60. BENTON, *supra* note 11, at 16–17 (translating 2 RECUEIL GÉNÉRAL, *supra* note 59, no. 247).

was reflected by the duty to withdraw from a case if the lawyer came to believe that a cause was unjust or “even intrinsically bad.” By distinguishing between these two standards, this oath’s withdrawal duty suggested both a just-cause and an objective-merit standard.

Over the next several centuries, French ordinances supplemented the 1274 oath with additional duties to court and client. In 1344, the oath included prohibitions against “false citations” and postponements “by subterfuge.”⁶¹ In 1536, the oath added provisions against conflicts of interest⁶² and a confidentiality duty.⁶³

Importantly for the development of legal ethics standards in the United States, the medieval French litigation oaths became the basis for an oath imposed by the Canton of Geneva, Switzerland, in 1816.⁶⁴ A few decades later, this Swiss oath in turn became the basis for a common set of statutory duties in the United States, embodied in the Field Code.⁶⁵ The 1816 Swiss oath required the lawyer to swear as follows:

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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. at 14 (quoting ROBERT JONES, A HISTORY OF THE FRENCH BAR, ANCIENT AND MODERN 102–03 (Phila., T. & J. W. Johnson & Co., Law Booksellers and Publishers, 1856); see Edward S. Cox-Sinclair, *The Bar in the United States*, 33 LAW MAG. & REV. QUART. REV. JURISPRUDENCE (5th ser.) 164, 193 (1908) (reporting in French that the 1344 ordinance added: “They will not speak injurious words against adverse parties or others.”).

62. BENTON, *supra* note 11, at 18 (“[A]dvocates must not give advice to both parties under punishment of being heavily fined by financial penalties, suspension or loss of all their property.”) (translating 12 RECUEIL GÉNÉRAL, *supra* note 59, no. 235).
63. Cox-Sinclair, *supra* note 61, at 193 (in French).
64. RAYMOUND PERROT, LE SERMENT DE L’AVOCAT ET LES US ET COUTUME DU BARREAU DE GENÈVE 14–15 (2d ed. 1980) (tracing history of Swiss lawyer regulations and oaths).
65. I discuss the Field Code duties of lawyers in Part III.C.

1. I swear, before God, to be faithful to the Republic and the Canton of Geneva.
2. To never act without the respect due to the Tribunal and the Authority.
3. 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.
4. 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.
5. 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.
6. To not encourage or commence any lawsuit because of any personal interest.
7. To never refuse counsel based on personal considerations, causes of feeble, foreigners, or oppressed.
8. May God punish me if I break these rules.⁶⁶

The Swiss oath only hinted at client concerns, in the sixth and seventh clauses. These clauses to some degree reflected loyalty in that they barred a lawyer from bringing suits for “any personal interest” and from declining cases for “personal considerations.” Both of these also reflected other concerns. The sixth clause arguably sought also to protect the other party from suits motivated by the lawyer’s personal interests. The seventh clause reflected the societal concern of availability of legal services.

The remainder of the Swiss oath focused on the court. It stated multiple duties of reasonable behavior. The second clause demanded respect to the court. The fifth clause required the lawyer to refrain from offensive personality. Interestingly, the fifth clause conditioned a reasonableness duty. It first stated a duty to not use facts to undermine the honor and reputation of the parties, but it concluded with a caveat, “unless . . . necessary for the advancement of [the] cause.” This is a rare example of a client-oriented duty qualifying a court duty.

66. 1 REVUE ÉTRANGÈRE DE LÉGISLATION ET D’ÉCONOMIE POLITIQUE 734–35 (Paris, Gustave Pissin 1834) (translated from the original French).

The fourth clause stated an extensive truth duty. It barred false and misleading “means,” providing that a lawyer may not use “means outside of the truth” to maintain causes and may never “trick Judges by any means.” It also barred “false presentation of facts and laws.”

Finally, the third clause of the Swiss oath stated a just-cause duty. In a distinction that soon would prove important to development of American legal ethics standards, the Swiss oath exempted criminal defense from the just-cause duty. Yet it did not exempt criminal defense lawyers from the other court duties of the second, fourth, and fifth clauses. Thus, the just-cause duty was distinct from and in addition to the reasonable behavior and truth duties.

In sum, the early French standards roughly paralleled the English standards, with the formal standards in France more prominently stating the just-cause duty. Truth and reasonable behavior were paramount duties from the very beginning of the profession in both cultures. The other court duties—objective merit and proper motive—appeared with less frequency. Client concerns were often unstated, and when stated, the client duties, including zealous advocacy, were expressly subordinate to the lawyer’s duties to the court.

III. LITIGATION ETHICS STANDARDS IN THE UNITED STATES THROUGH THE NINETEENTH CENTURY

In America, the colonies and early states minimally regulated legal ethics, and to the extent that the regulation followed a European model, it used the English standards. The early regulation typically imposed only truth and reasonableness duties. In the early and mid-nineteenth century, academics began to discuss more broadly proper litigation advocacy, and, in doing so, they identified areas of uncertainty, particularly with regard to the proper limits on advocacy beyond truth and reasonable behavior. In the second half of the nineteenth century, states began to set regulatory standards of litigation conduct. The new regulation began with the Field Code, which brought the 1816 Swiss oath, including its just-cause standard, to the United States. Bar associations soon followed with new codes of legal ethics that experimented with other litigation standards.

A. *American Litigation Standards Before the Nineteenth Century*

Regulation of lawyers and their conduct was sporadic in early America. Many colonies used the English “do no falsehood” oath.⁶⁷

67. See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 26 (1966) (“[I]n the reign of Henry IV . . . a form of oath was framed, on which most forms of oaths prescribed later in the American colonies were founded.”); see generally Andrews, *Evolution*, *supra* note 8, at 1415–16 (discussing colonial oaths and the “do no falsehood” oath particularly).

Some colonies had unique litigation oaths. A 1705 Rhode Island law, for example, mandated an oath that imposed a form of objective merit standard: “not to Plead for favour nor affection for any Person, but ye meritt of the Case according to Law.”⁶⁸ During and after the revolution, many, but not all, colonies and early states moved to a simple oath that required lawyers only to swear allegiance and to promise to truly and honestly demean themselves.⁶⁹

A few procedural statutes and court rules addressed lawyer behavior in litigation. In Maryland in 1682, the Upper House of the Assembly imposed a reasonable-behavior duty on lawyers arguing an appeal before them by ordering the lawyers to “speak distinctly to one Error first before they proceed to the next without Disturbing each other.”⁷⁰ In 1813, the new federal Congress passed the “vexatious lawyer” statute, which imposed a duty that reflected both reasonable behavior and proper motive: a lawyer could not “multipl[y] the proceedings . . . so as to increase costs unreasonably and vexatiously.”⁷¹ In 1842, the first set of codified federal equity rules required that a lawyer attest that there was “good ground for the suit,” an objective merit standard.⁷²

Most legal ethics guidance in this early era in the United States likely came through informal sources, such as speeches and office training. The record of the content of such discourse in this era is thin. One example is a work by Cotton Mather in 1710.⁷³ He instructed each lawyer to behave reasonably: “keep constantly a Court of Chancery in your own Breast” and “abominate the use of all unfair Arts to Confound Evidence, to Browbeat Testimonies, to Suppress what may give Light in the Case.”⁷⁴ He similarly urged lawyers to think of their broader reputation and duty to society and to refute the “old Complaint, That a Good Lawyer seldom is a Good

68. Benton, *supra* note 11, at 94–95 (quoting AN ACT REQUIREING ALL PROVISIONS TO BE PACT & PACKERS MARKE SETT ON BEFORE SHIPPED OF TO ANY OF YE PLANTATIONS (1705), *reprinted in* LAWS AND ACTS OF HER MAJESTIES COLONY OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS FROM ITS FIRST SETTLEMENT 1636–1705, f. 114–116 (Providence, Sidney S. Rider & Burnett Rider, 1896) (1705)).

69. *See generally* Andrews, *Lawyer’s Oath*, *supra* note 8, at 22–23.

70. JOURNAL OF THE UPPER HOUSE OF ASSEMBLY 1659–1701 f. 456, *reprinted in* 7 ARCHIVES OF MARYLAND 361 (1889).

71. Act of July 22, ch. 14, 3 Stat. 21 (1813). This was the predecessor to current § 1927 “Counsel’s liability for excessive costs.” 28 U.S.C. § 1927 (2006).

72. R. PRAC. CTS. EQUITY 24, 42 U.S. (1 How.) xli, xlvi (1842).

73. COTTON MATHER, BONIFACIUS (1710).

74. MATHER, *supra* note 73, at 161.

Neighbor . . . by making your Skill in the Law a Blessing to your Neighborhood.”⁷⁵

In sum, the nineteenth century began with few formal dictates as to the litigation duties of American lawyers. These few standards tended to follow the English model of requiring honest and reasonable behavior in litigation. Client duties were rare. Some rules imposed objective merit or motive standards, but apparently no formalized early American standard imposed an explicit duty of just cause.

B. Nineteenth-Century Academic Discourse on Litigation Ethics

The nineteenth century was a transformative century for legal ethics in the United States. This transformation began largely with academic discussion of legal ethics. Lawyers and academics began to flesh out, in unprecedented detail, the broad inherited traditions of proper litigation conduct. As lawyers and scholars added detail to the broad standards and applied them in specific situations, they revealed some uncertainty as to the underlying litigation duties.

One area of uncertainty was the proper ethical role of criminal defense lawyers. American lawyers did not have a broad historical basis from which to draw ethical standards for criminal cases. Criminal defense had never been the focus of European litigation oaths. In England, legal representation in criminal cases was not as common as in civil cases. England did not extend a full right of criminal defense counsel until the nineteenth century.⁷⁶ In the United States, lawyers and academics discussed whether federal⁷⁷ and state⁷⁸ constitutional guarantees impacted the ethical standards governing criminal defense lawyers. This discussion typically compared a lawyer’s duties in criminal cases and civil cases, which in turn prompted a reevaluation of the civil duties.

Today, scholars attempt to describe the nineteenth-century ethical discourse as falling into a particular model or view of proper litigation advocacy.⁷⁹ In broad strokes, modern scholars have classified the nineteenth-century discussion into three broad models of litigation

75. *Id.* at 163.

76. *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).

77. U.S. CONST., amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

78. *See* Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 81 (2003) (surveying state constitutional provisions).

79. *See* sources cited *supra* note 3 (containing modern commentary discussing nineteenth-century legal ethics).

behavior: a client-oriented view, a lawyer morality view, and a middle view. Although a spectrum of views may be a more accurate description of the nineteenth-century discourse, these three categories help identify the issues and the struggle to define the proper limits, if any, on litigation advocacy.

1. The Client-Oriented View

The nineteenth-century client-oriented view typically is associated with English Lord Brougham, who urged that the lawyer knew but one person, his client. Lord Brougham made this statement in 1820 in his defense of Queen Caroline against criminal adultery charges filed by the King. Lord Brougham had learned confidentially that the King was a “bigamist and a perjurer,” which might have defeated the King’s title to the crown.⁸⁰ Supporters of the King supposed that Lord Brougham would not expose the King, but Lord Brougham’s famous statement revealed otherwise:

[L]et no man vainly suppose, that not only I, but that any, the youngest member of the profession would hesitate one moment in the fearless discharge of his paramount duty. I once before took leave to remind your Lordships—which was unnecessary, but there are many whom it may be needful to remind—that an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, *that client and none other*. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client’s protection!⁸¹

Although given in a narrow context (a high-profile criminal case in England) without full explanation, Lord Brougham’s statement became a focal point of legal ethics debate in nineteenth-century America. The idealized (or more often demonized⁸²) characterization

80. GEORGE P. COSTIGAN, JR., *CASES AND OTHER AUTHORITIES ON LEGAL ETHICS* 225 (1917).

81. *1 SPEECHES OF HENRY LORD BROUGHAM* 63 (1841).

82. Professor Hoeflich asserts that “[Lord] Brougham’s statements quickly became well-known, but they were not quickly approved . . . [and] were attacked and viewed by contemporaries and successors as being utterly inappropriate.” Hoeflich, *supra* note 3, at 795; *see also* Altman,

of Lord Brougham's statement was that the lawyer's only duty was to his client and required full zealous advocacy. This characterization may not accurately reflect Lord Brougham's personal views,⁸³ but he nonetheless became the symbol of the client-oriented model of litigation. This model at a minimum put the client in greater prominence than did other views of the nineteenth century and more so than the historical standards from earlier eras. In addition, this model almost certainly rejected the just-cause duty, perhaps in all litigation but particularly in criminal defense.

2. The Lawyer Morality View

The man primarily associated with the lawyer morality view is David Hoffman, a professor of law at the University of Maryland. In 1836, Hoffman, as part of his *Course of Legal Studies*, stated fifty "Resolutions In Regard to Professional Deportment," which he urged each lawyer to regularly repeat.⁸⁴ His first resolution expressly downplayed zeal: "I will never permit professional zeal to carry me beyond the limits of sobriety and decorum."⁸⁵ Several other resolutions demanded reasonable behavior⁸⁶ and truth in litigation.⁸⁷

supra note 2, at 2443–47 (discussing Lord Brougham and scholarly criticism of his position of "absolute loyalty to the client").

83. Scholars debate whether Lord Brougham later repudiated his famous statement. Compare Fred C. Zacharias & Bruce A. Green, "*Anything Rather than a Deliberate and Well-Considered Opinion*"—Henry Lord Brougham, *Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221, 1223 (2006) (arguing that there is insufficient evidence to conclude that he truly believed or endorsed such a view), with Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1213 (2006) (arguing that Brougham never repudiated his statement and supported it throughout his life). See also COSTIGAN, *supra* note 80, at 226 (reporting on dinner remarks in which Lord Brougham supposedly endorsed limitations on advocacy).
84. Hoffman published a plan for legal education, and to the second edition of this work he appended his ethical resolutions, for which he is now best known. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–75 (2d ed., Balt., Joseph Neal 1836) (setting forth "Resolutions In Regard to Deportment"). Hoffman's resolutions are reprinted in HENRY S. DRINKER, LEGAL ETHICS 338–51 (1953) and *Report of the Committee on Code of Professional Ethics*, 31 ANN. REP. A.B.A. 676, 717–35 (1907) [hereinafter *1907 ABA Report*].
85. 2 HOFFMAN, *supra* note 84, at 752 (Resolution 1). Resolution 1 continued: "but bear in mind, with Sir Edward Coke, that 'if a river swell beyond its banks, it loseth its own channel.'" *Id.*
86. Resolutions 3 and 4 urged respect for the courts even if the judges treat the lawyer disrespectfully. *Id.* Resolution 6 required advocates to be "studiously respectful" to "the various officers of the court." *Id.* at 753. Resolution 42 urged advocates resolve to "never esteem it [the advocates'] privilege to disregard [the witnesses'] feelings." *Id.* at 770.

But Hoffman went beyond merely demanding reasonable and truthful litigation conduct. He is most known for his resolution that lawyers must use their own conscience, not the wishes of the client, to guide them in litigation:

My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privileges of solely judging to what extent to go. In *civil* cases, if I am satisfied from the evidence that the *fact* is against my client, he must excuse me if I do not see as he does, and do not press it: and should the *principle* also be wholly at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.⁸⁸

Although framed in terms of the lawyer's own conscience, this statement arguably tied the lawyer's decision to objective merit. Hoffman permitted the lawyer to judge facts or principles in "doubtful cases" that could go either way.⁸⁹ He likewise condemned as "gangrene" and "dishonorable folly" legal arguments that were "wholly at variance with sound law."⁹⁰

Elsewhere, however, Hoffman suggested a distinct just-cause standard, apart from objective merit and truth. In Resolution 11, Hoffman urged that a lawyer must abandon a claim or defense "[i]f, after duly examining a case" he is persuaded that the "client's claim or defence . . . cannot, or rather ought not, to be sustained."⁹¹ The last clause of this Resolution hinted at both an objective merit and a just-cause standard for judging whether the position "ought" to be pressed: "reason to believe" that the position "would be denied . . . both by law and justice."⁹² Hoffman's particular application of these principles to civil defenses exemplified a just-cause duty that turned on morality. Hoffman admonished lawyers in civil cases to intercede

And in Resolution 5 the lawyer promised that "[i]n all intercourse with my professional brethren, I will always be courteous." *Id.* at 752.

87. Resolution 41 demanded that the lawyer "carefully . . . abstain from all false, or deceptive readings; and from all uncandid omissions of any qualifications" of the legal doctrines relied upon. *Id.* at 770

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

89. *Id.*

90. *Id.*

91. *Id.* at 754 (Resolution 11).

92. *Id.*

and not present defenses such as the statute of limitation⁹³ or infancy,⁹⁴ even if otherwise valid, if his client actually owed the debt. Hoffman claimed that a lawyer's assertion of either defense, at least in some cases, would make the lawyer a "partner in [the client's] knavery."⁹⁵ It would not be moral.⁹⁶ He therefore urged the lawyer to be "*the sole judge* (the pleas not being compulsory) of the occasions proper for their use."⁹⁷

Hoffman did not ignore client concerns. Although he did not state a duty of confidentiality, he stated duties of both competence⁹⁸ and loyalty.⁹⁹ Moreover, Hoffman urged "zealous" advocacy: "[t]o my clients I will be faithful; and in their causes, zealous and industrious."¹⁰⁰ The major contrast to the view attributed to Lord Brougham was that Hoffman believed that a lawyer had many limits on his advocacy. Those limits seemingly included the lawyer's own assessment of what was "right," "moral," or just.

93. *Id.* (Resolution 12): "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery."

94. *Id.* (Resolution 13):

I will never plead, or otherwise avail of the bar of the *Infancy* against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defence than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defence.

95. *Id.* (Resolution 12).

96. *See id.* at 765 (Resolution 33): "What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom."

97. *Id.* at 755 (Resolution 13):

And although in [infancy], as well as in that of limitation, the *law* has given the defence, and contemplates, in the one case, to induce claimants to a timely prosecution of their rights, and in the other, designs to protect a class of persons, who by reason of tender age are peculiarly liable to imposed on,—yet, in both cases, *I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions proper for their use.

98. *Id.* at 759 (Resolution 20): "Should I not understand my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case may probably be better than my own."

99. *Id.* at 753 (Resolution 8): "I will never permit myself . . . to be engaged on the side of my former antagonist."

100. *Id.* at 758 (Resolution 18).

3. The Middle View

The man most often cited as advocating a middle view, between that of Lord Brougham and Hoffman, is George Sharswood. Sharswood was a Professor and Dean at the University of Pennsylvania, and he later served as the Chief Justice of the Pennsylvania Supreme Court from 1879 to 1883.¹⁰¹ His 1854 *An Essay on Professional Ethics* was a seminal work.¹⁰²

Sharswood was not the lone voice in the middle. In all likelihood, most nineteenth century lawyers had a form of middle view. For example, Professors Zacharias and Green attribute the middle view to Sharswood's predecessor as Chief Justice of the Pennsylvania Supreme Court, John Gibson.¹⁰³ They place particular reliance on an 1845 opinion by Chief Justice Gibson in *Rush v. Cavanaugh*: in which Chief Justice Gibson stated that

[i]t is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience. He 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 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.¹⁰⁴

Professors Zacharias and Green take from this language, particularly the reference to "an unjust judgment," that Chief Justice Gibson's view of proper advocacy was imbued with a sense of "professional conscience" that derived from norms "not necessarily . . . expressed in the law" and "not explicitly spelled out in the lawyer's oath" but instead transmitted "through professional socialization."¹⁰⁵ In a previous article, I took slight issue with their conclusion, but only to the extent that it overlooked or downplayed the significance of the litigation oaths, particularly the older European oaths that stated a just-cause duty.¹⁰⁶ Regardless of the source of the just-cause duty, Chief Justice Gibson's efforts could be fairly

101. See *Memorial* in GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1884) (discussing Sharswood's life achievements).

102. SHARSWOOD, *supra* note 101; George Sharswood, *An Essay on Professional Ethics*, 32 ANN. REP. A.B.A. 1, 9 (1907) (special reprinting).

103. See Zacharias & Green, *supra* note 3, at 45 (arguing that Justice Gibson's middle ground fits between Broughman and Hoffman).

104. *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

105. Zacharias & Green, *supra* note 3, at 32.

106. Andrews, *Lawyer's Oath*, *supra* note 8, at 26-31.

characterized as attempting to define that duty. Sharswood did the same, and he relied upon the work of Chief Justice Gibson in doing so. In fact, in his essay, Sharswood quoted the above passage from the *Rush* case.¹⁰⁷ Because Sharswood's essay is more developed and well known, I use Sharswood as the model for the middle view.

Sharswood structured his essay around three fundamental obligations: “[f]idelity to the court, fidelity to the client, fidelity to the claims of truth and honor.”¹⁰⁸ This statement conceived of truth as an independent duty (the third on his list), but Sharswood also featured truth prominently in his discussion of the first listed duty, that of fidelity to the court.¹⁰⁹ His discussion of duties to the court also included multiple aspects of reasonable behavior, such as “respect” and equal temper.¹¹⁰

Sharswood's discussion of the second obligation (that to client) was a lengthy exposition in which he attempted to balance client needs against the lawyer's other duties. According to Sharswood, the “topic of fidelity to the client involves the most difficult questions in the consideration of the duty of a lawyer.”¹¹¹ He described competence as only a baseline duty to avoid legal malpractice liability.¹¹² The duty to the client went beyond mere technical competence: it required zeal. “Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of the utmost learning and ability” were, according to Sharswood, the moral responsibility of lawyers.¹¹³

Warm zeal notwithstanding, Sharswood did not endorse the full client-oriented view. To the contrary, Sharswood characterized Lord Brougham's statement as one “led by the excitement of so great an occasion to say what cool reflection and sober reason certainly never can approve.”¹¹⁴ Sharswood believed that there were limits on a lawyer's zeal. He framed the question in terms of what was “just and

107. SHARSWOOD, *supra* note 101, at 96–97.

108. *Id.* at 58.

109. *See id.* at 72 (“It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to use no deceit, imposition, or evasion—to make no statements of facts which he does not know or believe to be true . . .”).

110. *Id.* at 62, 64.

111. *Id.* at 76.

112. *Id.* at 76–78 (“He is legally responsible to his client only for the want of ordinary care and ordinary skill. . . . Though such be the extent of legal liability, that of moral responsibility is wider.”).

113. *Id.* at 78–80.

114. *Id.* at 87.

right”¹¹⁵ (a just-cause duty), but he also acknowledged the difficulty in defining these limits with any specificity. “It may be delicate and dangerous ground to . . . descend to particulars upon such a subject.”¹¹⁶ Despite this danger, Sharswood offered his views, and to do so, he made several distinctions: between criminal and civil cases, between civil plaintiffs and civil defendants, between substantive defenses and defense tactics, and between tactics in defending just and unjust civil claims.¹¹⁷

One of Sharswood’s concerns was reconciling the constitutional rights of criminal defendants with the personal beliefs of the lawyer. He concluded that a lawyer may “exert all of his ability, learning and ingenuity, . . . even if he should be perfectly assured in his own mind of the actual guilt” of the criminal defense client.¹¹⁸ Sharswood continued by imposing a strong just-cause duty on private prosecutors: “It is a different thing to engage as private counsel in a prosecution against a man whom he knows or believes to be innocent. . . . It ought never to be done against the counsel’s own opinions of its merits.”¹¹⁹

On the civil side, Sharswood based much of his discussion on the distinction between just and unjust causes, and in doing so, he seemingly used a moral standard for “just.” As to proper litigation advocacy on behalf of civil plaintiffs, Sharswood’s position was similar to that of Hoffman. Sharswood began by noting that “the claim of a plaintiff stands upon a somewhat different footing” than a civil defendant.¹²⁰ He explained that the “courts are open to the party in person to prosecute his own claim, and plead his own cause,” and a plaintiff chose to go to court, but the defendant did not.¹²¹ Sharswood believed that a lawyer had a duty to decline to represent plaintiffs in prosecuting claims that the lawyer considered unjust. “Counsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right.”¹²²

115. *Id.* at 81 (“[W]hat are the limits of [a lawyer’s] duty when the legal demands or interests of his client conflict with his own sense of what is just and right?”).

116. *Id.* at 89.

117. “There is a distinction to be made between the case of prosecution and defence 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.” *Id.* at 90.

118. *Id.* at 92.

119. *Id.* at 93.

120. *Id.* at 96.

121. *Id.*

122. *Id.*

In contrast to Hoffman, Sharswood believed that a civil defense lawyer properly could assert defenses, such as the statute of limitation: “the legislature has seen fit in certain cases to assign a limit to the period within which actions shall be brought” and the “party has a right to have his cases decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question.”¹²³ According to Sharswood, the client himself perhaps should decide not to plead these defenses in some cases,¹²⁴ but the client, not the lawyer, should make this decision. The lawyer is “not morally responsible” for the client’s decision.¹²⁵ Moreover, to decline to assert the defense would be improper because to refuse “his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.”¹²⁶

Sharswood’s discussion of legal defense tactics, rather than the defense objectives, is subtle and not easy to grasp. He built his discussion on the distinction between modes of defending a just claim and an unjust claim. According to Sharswood, a lawyer defending a just claim should refrain from “insisting upon the slips of the opposite party, by sharp practice, or special pleading.”¹²⁷ By contrast, to defend an unjust claim, “the advocate may justly avail himself of every honorable ground to defeat” the claim.¹²⁸ The distinction between “sharp practice” and “honorable ground” is hard to decipher today, but Sharswood seemingly intended a difference in proper defense tactics, based on whether the defense lawyer perceived the plaintiff’s claim to be just.

In sum, although Sharswood believed that the lawyer should act with zeal on behalf of his client, he also believed, like Hoffman, that zeal had important limits. A lawyer had higher duties, which included reasonable behavior, truth, and just-cause duties. Sharswood was more restrained than Hoffman on the application of the just-cause duty. Sharswood applied this duty fully to plaintiffs but not to civil defendants. A lawyer was duty bound to decline a civil claim that the lawyer believed was unjust, but the lawyer was duty bound to present civil defenses even if the defense violated the lawyer’s sense of justice.

123. *Id.* at 83.

124. *See id.* (“[A] defendant who knows that he honestly owes the debt sued for, and that the delay has been caused by indulgence or confidence on the part of his creditor, ought not to plead the statute.”).

125. *Id.*

126. *Id.* at 84.

127. *Id.* at 99.

128. *Id.* at 98.

The nineteenth-century discourse thus has much richer detail regarding proper litigation advocacy than the formal ethics statements of earlier eras. Much of the discussion involved subtle distinctions. The views of Lord Brougham, Hoffman, and Sharswood are not necessarily three distinct categories, but they are good shorthand references to different positions on the proper balance of zealous advocacy, on the one hand, and just cause, on the other. The view attributed to Lord Brougham symbolized a rejection of the just-cause duty in favor of strong notions of zealous advocacy. The view attributed to Hoffman represented a strong duty of just cause and a limited conception of zealous advocacy. Sharswood symbolized a more nuanced position and a more delicate balance between zealous advocacy and just cause, although one tilted in favor of just cause. All three would influence and inform the next era of legal ethics standards—the regulations of the Field Code and of the bar codes.

C. The Field Code Statutory Duties of Lawyers

A major development in legal ethics in the United States came in the second half of the nineteenth century, when many states adopted the Field Code statement of duties of a lawyer. David Dudley Field drafted the “Field Code” in 1848, and it served as a model code for many states and territories in the second half of the nineteenth century.¹²⁹ The Field Code is famous for its provisions governing civil procedure, but it also regulated attorney admission. Section 511 stated 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 defences, only as appear to him legal and just, except the defence 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

129. The “Field Code” is difficult to identify as a single document. 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. COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK (Weed, Parsons & Co. 1850) [hereinafter FIELD CODE].

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets, of his clients
6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged
- 7[.] Not to encourage either the commencement or the continuance of an action or proceeding, from any motive of passion or interest and
8. Never to reject, for any consideration personal to himself, the cause of the defenceless or the oppressed.¹³⁰

Field based his eight duties directly on the 1816 Swiss oath.¹³¹ The Field Code stated the same truth and reasonableness duties to the court as did the Swiss oath, including the unique “unless” qualification on the reasonableness duty in the sixth clause.¹³² The key difference in content between the Field Code and the Swiss oath was the addition of a client duty—confidentiality—in the fifth clause. The Field Code also converted the oath vows to statutory obligations and provided for disbarment or suspension of a lawyer for the “wilful violation” of any of the duties.¹³³

The Field Code had a significant impact on American legal ethics. Within a few decades, seventeen states adopted the Field Code in some form.¹³⁴ This was at a time of few formal regulatory standards of conduct for lawyers. Moreover, the Field Code added new content to standards of legal ethics in the United States. Its confidentiality duty was one of the earliest formal statements of confidentiality as a professional duty, and the just-cause duty was unique.

The Field Code was the first codification of the just-cause duty in the United States. Justice Story, in 1832, had commended the just-cause duty of the Justinian oath as an ideal,¹³⁵ but the Field Code

130. FIELD CODE, *supra* note 129, § 511, at 204–05.

131. See FIELD CODE, *supra* note 129, § 511 cmt., at 205. (explaining that the Swiss oath “so justly [expresses] the general duties of lawyers, that we cannot do better than take almost the very terms of it”).

132. See *supra* text accompanying note 66 (Swiss oath).

133. See FIELD CODE, *supra* note 129, § 525(4), at 216 (providing for professional discipline for a “wilful violation of any of the provisions of section 511”).

134. See Andrews, *Evolution*, *supra* note 8, at 1426 n.284.

135. Justice Story, in 1832, commended the Justinian oath as “well worthy” of “consideration of Christian lawyers in our day” and endorsed “two maxims” as “essential” of that oath: “never to defend a cause which is unjust” and “not to defend just causes but by way of justice and truth.”

seemingly was the first regulatory statement of the duty. The Field Code just-cause clause also seemingly was the first formal regulatory distinction made for the ethical duties of criminal defense lawyers, as opposed to lawyers in civil litigation. Under the Field Code, as in the Swiss oath, criminal defense lawyers were subject to other court duties, such as truth and reasonable behavior, but they did not have to consider whether their client's cause was just.¹³⁶ This distinction demonstrated not only that litigation standards differed in the civil and criminal context, but also that the just-cause duty was separate from other litigation duties owed to the court.

This leaves the question of the meaning of the just-cause duty in civil litigation under the Field Code, particularly the criterion for determining what was just or unjust. Field's commentary to the Code provides some insight. Field began by rejecting the view, which he attributed to Lord Brougham, that the lawyer must "lose sight of every other consideration than of success" as a doctrine "unsound in theory, and most pernicious in practice."¹³⁷

Field then gave the example of a civil case in which the lawyer's client claims title to land possessed by another. In this example, the lawyer knows, through confidential communications, that his client does not have a "just claim" to the land.¹³⁸ The client and lawyer both know that the possessor owns the land but accidentally lost his proof of title. Field argued that this extreme example—which "[f]ew persons" would argue should be prosecuted—proved the unsoundness of the extreme view of advocacy attributed to Lord Brougham.¹³⁹ "But if the doctrine is a sound one, does not this follow? . . . If the advocate is to overlook the moral aspects of the claim, he must recover this property for his client."¹⁴⁰ Field's use of the terms "just" and "moral aspects" suggested that he was interpreting the Field Code's just cause clause. Yet condemnation of the land title case did not need to rest on notions of justness apart from truth and objective merit. The land title claim was false.

Field also explained that a lawyer could present a statute of limitation defense on behalf of a civil defendant: a lawyer may "in civil cases present defences recognised and provided by law, although

JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 24 (rev. 9th ed., Little, Brown & Co., 1882); see JUSTINIAN CODE, *supra* note 20, lib. 3, tit. 1, l. 14.

136. See FIELD CODE, *supra* note 129, § 511(3), at 204.

137. *Id.* § 511 cmt., at 207.

138. *Id.* at 208.

139. *Id.*

140. *Id.*

he may himself disapprove of the principle and policy of the law.”¹⁴¹ The distinction between the statute of limitation defense, which he permitted, and the land title hypothetical, which he condemned, gives insight to Field’s interpretation of the just-cause duty. In contrast to the land title hypothetical, the statute of limitation defense had factual and legal merit, even if the lawyer considered it morally unjust in a particular setting. The lawyer would not have to lie or misstate the law to present the defense. These examples suggested that Field, despite his use of the word “moral” in the land title discussion, took a restrained view of the just-cause duty, one of objective merit.

Interestingly, Field’s own views may have evolved on the proper balance between zealous advocacy and duties to court. In his commentary to the Field Code, Field condemned the extreme view of advocacy attributed to Lord Brougham, but many modern commentators argue that Field later adopted this view when he defended corporations and railroads in high profile cases.¹⁴² Thus, if anything, Field later took an even more restrained view (or rejection) of the just-cause duty of his Field Code.

Restrained interpretations notwithstanding, the Field Code, as the first regulatory statement of a just-cause duty, arguably was a catalyst for further debate as to the proper limits on litigation advocacy. An important example came from Alabama. Alabama did not include the just-cause duty in its version of the Field Code statement of duties.¹⁴³ The Alabama State Bar Association instead elaborated and set alternative limits on advocacy when it adopted a detailed code of ethics in 1887.

D. The Litigation Standards of the 1887 Alabama Code of Ethics

In 1881, Thomas Goode Jones, who later served as both a federal judge and Alabama governor, proposed that the Alabama bar

141. *Id.* at 209.

142. Professor Hoeflich credited Field with renewing the view of Lord Brougham in the late nineteenth century: “Field responded to his critics and set forth a reinvigorated version of Brougham’s vision of the lawyer-client relationship and of the lawyer’s overwhelming and singular obligation of fidelity to his client.” Hoeflich, *supra* note 3, at 815. Professor Shaffer cited Field as a major contributor to the “unsound” modern “adversary ethic” through his representation of “robber barons” in the late nineteenth century, in which Field “continually frustrated the judicial process” on behalf of these clients. Shaffer, *supra* note 3, at 703–09. *See generally* Hoeflich, *supra* note 3, at 814–16 (discussing Field’s legal work, his critics, and his responses).

143. *See* MEMORANDUM FOR USE OF AMERICAN BAR ASSOCIATION’S COMMITTEE TO DRAFT CANONS OF PROFESSIONAL ETHICS 112 (1908) (on file with Harvard Law School Library) [hereinafter *THE RED BOOK*]. Georgia and Mississippi also did not include the just-cause duty. *Id.*; *see also infra* notes 176–82 (discussing *The Red Book*).

association commission a code of legal ethics.¹⁴⁴ Jones argued that a code of ethics was necessary because, although Sharswood and others had written “standard works of great eminence and authority upon legal ethics,” these works were “not always accessible.”¹⁴⁵ Jones believed that many cases of improper conduct could be avoided if the lawyers had “in easy reach” a “short, concise Code of Legal Ethics, stamped with the approval of the Bar.”¹⁴⁶ In 1887, the Alabama bar membership debated and approved a “Code of Ethics.”¹⁴⁷ It was the first of its kind.¹⁴⁸

The 1887 Alabama Code was far more detailed than any that had come before. The preamble to the code began by reprinting Alabama’s version of the Field Code duties, which the code described as a “comprehensive summary of the duties specifically enjoined by law upon attorneys.”¹⁴⁹ This single page of Field Code duties was followed by fifty-seven rules, spanning thirteen pages.¹⁵⁰

These rules stated many basic duties to the client, including litigation duties. The Alabama Code indirectly addressed competence, by specifying a number of good practices, such as punctuality.¹⁵¹ It also stated duties of loyalty¹⁵² and confidentiality in litigation.¹⁵³

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144. See David I. Durham, *A Call for Regulation of the Profession*, in GILDED AGE, *supra* note 8, at 1–4 (discussing formation of the Alabama Code and Jones’s role as draftsman).
145. Thos. G. Jones, *Report of the Committee on Judicial Administration and Remedial Procedure*, in REPORT OF THE ORGANIZATION AND OF THE FIRST, SECOND AND THIRD ANNUAL MEETINGS OF THE ALABAMA STATE BAR ASSOCIATION 224, 235 (1882), *reprinted in* GILDED AGE, *supra* note 8, at 91.
146. *Id.*
147. PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 8–22 (1888) (reporting the bar debate and approval of code), *reprinted in* GILDED AGE, *supra* note 8, at 93–109.
148. See Andrews, *Evolution*, *supra* note 8, at 1385 (discussing bar association codes of ethics).
149. See ALA. ST. BAR ASS’N CODE OF ETHICS pmb1. (1887), *reprinted in* GILDED AGE, *supra* note 8, at 46, 47.
150. ALA. ST. BAR ASS’N CODE OF ETHICS (1887), *reprinted in* GILDED AGE, *supra* note 8, at 45–59.
151. See ALA. ST. BAR ASS’N CODE OF ETHICS R. 33 (warning against procrastination and urging prompt preparation for trial), *reprinted in* GILDED AGE, *supra* note 8, at 55.
152. See R. 25 (barring conflicts of interests in litigation without informed consent of client and urging lawyers “even then” to avoid such “embarrassing” conflicts), *reprinted in* GILDED AGE, *supra* note 8, at 53.
153. See R. 21, R. 22 (addressing confidentiality concerns of current and former clients), *reprinted in* GILDED AGE, *supra* note 8, at 52.

As to zeal and its limits, the Alabama rules tended to follow the views of Sharswood. Rule 10 of the 1887 Alabama Code followed Sharswood in rejecting the all-out view attributed to Lord Brougham. Rule 10 complained that the “popular prejudice against lawyers” stemmed from the “false claim” that “it is an attorney’s duty to do everything to succeed in his client’s cause.”¹⁵⁴ Yet, like Sharswood, the 1887 Alabama Code did not abandon zeal but rather endorsed zeal with limits. Alabama Rule 10 quoted Sharswood’s “warm zeal” exhortation and immediately stated limits on that zeal:

An attorney “owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,” to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve [the lawyer] from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within, and not without the bounds of the law which creates it . . . and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client’s sake.¹⁵⁵

Many other rules stated duties that limited advocacy. The primary limits were truth and reasonable behavior. Rule 5 stated that “the utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other.”¹⁵⁶ Rule 5 also enumerated several “deceits and evasions unworthy of attorneys,” including “[k]nowingly citing as authority an overruled case, or treating a repealed statute as in existence,” “knowingly misstating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel,” and “offering evidence which it is known the court must reject as illegal, to get it before the jury.”¹⁵⁷

As to reasonable behavior and tactics, the 1887 Alabama Code was filled with rules of decorum, including a warning against a “display [of] temper.”¹⁵⁸ Rule 1 demanded respect for the courts,¹⁵⁹ and Rule 3 urged lawyers to avoid “[m]arked attention and unusual hospitality” to a judge.¹⁶⁰ Rule 5 condemned a number of practices,

154. R. 10, *reprinted in* GILDED AGE, *supra* note 8, at 49–50.

155. *Id.*, *reprinted in* GILDED AGE, *supra* note 8, at 50.

156. R. 5, *reprinted in* GILDED AGE, *supra* note 8, at 48.

157. *Id.*

158. R. 7, *reprinted in* GILDED AGE, *supra* note 8, at 49.

159. R. 1, *reprinted in* GILDED AGE, *supra* note 8, at 47.

160. R. 3, *reprinted in* GILDED AGE, *supra* note 8, at 48.

such as “‘side-bar’ remarks and sparring discourse.”¹⁶¹ Rule 30 provided that the lawyer “must be allowed to judge” matters of means, which the 1887 Alabama Code characterized as “incidental matters . . . not affecting the merits of the cause.”¹⁶²

Like the Alabama version of the Field Code, the 1887 Alabama Code did not state a just-cause duty.¹⁶³ Rule 14 seemingly was the replacement for the just-cause duty, at least as applied to civil plaintiffs.¹⁶⁴ The 1887 Alabama Code did not impose any standard for civil defendants other than the various duties of reasonable and truthful conduct, applicable to all litigation. As to civil plaintiffs, Rule 14 provided that an attorney “must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.”¹⁶⁵ To some extent, the Alabama rule standard—“to work oppression and wrong”—connoted a just-cause duty, but Alabama Rule 14 turned on specific ill motives of the plaintiff, not the lawyer’s sense of justice. Sharswood, by contrast, framed the lawyer’s decision to represent a civil plaintiff as a question of whether the cause “offends [the lawyer’s] sense of what is just and right.”¹⁶⁶

Rule 14 seemingly imposed on the plaintiff’s lawyer both an affirmative duty to decline and a continuing duty to withdraw from improperly motivated causes. This is particularly evident from the drafting history of Rule 14. A proposed version of Rule 14 phrased the initial ability to decline as a matter of discretion (“may” instead of “must”), but the Alabama bar membership made it mandatory.¹⁶⁷ The initial proposal also would have required greater zeal after taking on a plaintiff’s cause. It would have required a lawyer “to avail himself of all lawful advantages” and forbade the lawyer from withdrawing.¹⁶⁸ The bar membership also rejected that proposal.¹⁶⁹

161. R. 5, reprinted in *GILDED AGE*, *supra* note 8, at 49.

162. R. 30 (“No client has a right to demand that his attorney should be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such course is insisted on, the attorney should retire from the cause.”), reprinted in *GILDED AGE*, *supra* note 8, at 54.

163. See *supra* text accompanying note 143 (discussing Alabama’s rejection of Field Code just-cause duty).

164. R. 14, reprinted in *GILDED AGE*, *supra* note 8, at 51.

165. *Id.*

166. SHARSWOOD, *supra* note 101, at 96; see *supra* notes 108–26 (discussing Sharswood’s position).

167. PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION, *supra* note 147, at 19.

168. *Id.* The proposed additional clause stated: “but once entering the cause he is bound to avail himself of all lawful advantages in favor of his

In sum, the 1887 Alabama Code required, but limited, zeal by imposing duties of reasonable behavior and truth on all litigation advocacy. The 1887 Alabama Code followed Sharswood's distinctions between civil plaintiffs and defendants and imposed higher standards on plaintiff's lawyers, but Alabama modified the standard. In Alabama, which rejected the Field Code just-cause duty, the lawyer had to assess whether the plaintiff was bringing the claim for improper motives, rather than whether the lawyer believed it to be just. As to the underlying defense objectives, a lawyer, under the 1887 Alabama Code, could assert civil defenses so long as the lawyer complied with the truth and reasonableness standards.

The 1887 Alabama Code thus set a balance of proper litigation advocacy different from that of Lord Brougham, David Hoffman, George Sharswood, and David Dudley Field. Some differences were subtle, but its detail and regulatory effect were important steps in the evolution of ethics standards for proper litigation advocacy. By the beginning of the twentieth century, ten states had adopted codes modeled on the 1887 Alabama Code, and others were considering adopting similar codes.¹⁷⁰ The 1887 Alabama Code soon would become the model for the national standards of the American Bar Association.

IV. MODERN ABA MODEL LITIGATION STANDARDS

In the early twentieth century, the American Bar Association took the lead in developing legal ethics standards for the entire nation. These efforts took three primary forms: the 1908 Canons of Ethics and model oath, the 1969 Model Code of Professional Responsibility, and the 1983 Model Rules of Professional Conduct. Most states have adopted one version of these model standards, as regulatory rules of conduct, most typically the Model Rules.¹⁷¹ The end result today is a detailed set of binding conduct rules that address a full array of lawyer conduct and behavior.

client, and can not, without the consent of the client, afterwards abandon the cause." *Id.*

169. *Id.* ("On motion of Thos. G. Jones, the balance of the rule after the word 'wrong' . . . was stricken out.").
170. See 1907 ABA Report, *supra* note 84, at 685 (explaining that "[t]he Code of the Alabama State Bar Association . . . is the foundation of" ethical codes adopted by the state bar associations of Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, Wisconsin, and West Virginia).
171. See STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS, at xxiv (concise ed. 2011) (providing multiple states' recent changes in professional codes, and specifically noting that California is the final state that "has not yet adopted some form of the ABA model rules").

A recurring and prominent issue in each of the ABA formulations was the limits on proper litigation advocacy. The 1908 standards took a compromise position, and in doing so, it stated standards somewhat at odds with each other, at least as to the proper balance between zealous advocacy and just cause. The Model Code moved more significantly toward zealous advocacy, and the Model Code era was the zenith of a zealous advocacy model in formal ethical standards. The Model Rules soon retreated from this position, but the Model Rules did not resurrect just cause. Today, both zealous advocacy and just cause have ebbed (but not totally disappeared) as concepts, at least as far as their embodiment in regulatory rules. The Model Rules take an intermediate position that prioritizes truth, reasonable behavior and objective merit.

A. *The 1908 ABA National Model Standards*

The ABA's promulgation of national model standards began in 1905.¹⁷² The ABA used the 1887 Alabama Code as a model for its proposed set of Canons of Ethics, and it used the Field Code as the basis for a model oath.¹⁷³ The ABA sent to its entire membership its proposed canons and model oath, along with other ethics works, including the Field Code, the 1816 Swiss oath, a version of the "do no falsehood" oath, Hoffman's Resolutions, and Sharswood's essay.¹⁷⁴

The ABA asked its members for comments on the entire package and, in an "earnest[] request," directed their attention to an issue that it termed "accept[ance of] retainers" and which asked members to comment on the limits of representation with a particular focus on Sharswood's views:

We also earnestly request that . . . you 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

172. See generally Altman, *supra* note 2, at 2402–16 (detailing history of the 1908 model standards).

173. *1907 ABA Report*, *supra* note 84, at 676–90.

174. *Id.* at 676–736 (compilation of ethics materials, including 1887 Alabama Code, Alabama's version of the Field Code, Michigan's "no falsehood" oath, Louisiana Bar Association's Code of Ethics, Washington state oath, the Field Code in oath form, the 1816 Swiss oath, the 1683 oath of Denmark and Norway, David Hoffman's resolutions, and a twentieth-century German lawyer's oath). The ABA distributed a separately bound copy of Sharswood's essay. George Sharswood, *An Essay on Professional Ethics*, 32 ANN. REP. A.B.A. 1, 9 (1907). Sharswood's essay is discussed and quoted *supra* in the text accompanying notes 108–26.

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*.¹⁷⁵

The ABA received more than 1,000 letters in response, reflecting a full range of views as to proper litigation advocacy.¹⁷⁶ Comments regarding the proposed model oath are especially illustrative because the oath stated a just-cause duty. Simeon Baldwin, the founder and former president of the ABA,¹⁷⁷ reported that the oath's just-cause clause was "subject to serious criticism" because the clause required the lawyer to be "satisfied that a suit or defence is just, before he can take the first step in court."¹⁷⁸ For example, one member questioned: "Is it plain, even that [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?"¹⁷⁹ This criticism was not universal.¹⁸⁰ Thomas Hubbard, a prominent legal ethicist and a member of the ABA drafting committee,¹⁸¹ urged the ABA to state a just-cause duty in both the model oath and the Canons of Ethics.¹⁸²

175. THE RED BOOK, *supra* note 143, at 98.

176. 1908 ABA Report, *supra* note 2, at 570–71. The ABA drafting committee compiled the "more important and complete replies" in a memorandum, which became known as *The Red Book*. THE RED BOOK, *supra* note 143, at 3; *see also* Altman, *supra* note 2, at 2416–18 (discussing *The Red Book*).

177. *See* Altman, *supra* note 2, at 2417, n.142 (discussing Baldwin's role in founding the ABA, his political and judicial career in Connecticut, and his professorship at Yale Law School).

178. Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541, 545 (1908). *See generally* Carle, *supra* note 2, at 22–24 (collecting critiques and comments in opposition to just-cause clause of model oath).

179. THE RED BOOK, *supra* note 143, at 113.

180. *Id.* at 108 (stating that the Washington oath, including the Field Code's just-cause duty, was "an excellent form"). Professor Carle reported that "[a] seemingly odd coalition" of members, both within and without the drafting committee, supported the clause. Carle, *supra* note 2, at 18; *see also id.* at 18–21 (collecting commentary).

181. Thomas Hubbard taught legal ethics at the Albany Law School, where he established a foundation for legal ethics. Carle, *supra* note 2, at 18; *see also id.* at 35 (biographical summary of Thomas Hubbard).

182. Hubbard proposed an addition to Canon 15 that would restate the just-cause duty of the Field Code. THE RED BOOK, *supra* note 143, at 107. Hubbard in a speech urged the importance of this duty: "The whole oath puts the responsibility of bringing suit, interposing defense, and of conducting either, exactly where that responsibility should be put, upon

The end result of the ABA debate was a nuanced position that had internal inconsistency, at least between the final versions of the model oath and Canons of Ethics. In the final model oath,¹⁸³ the ABA stated a restrained version of the just-cause duty: “I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law.”¹⁸⁴ The Field Code stated the duty affirmatively and subjected all claims and defenses, except criminal defenses, to the just standard. The ABA oath reversed the standard, from “just” to “unjust”¹⁸⁵ and, like Sharswood, applied it only to civil

the conscience and honor of the lawyer.” Altman, *supra* note 2, at 2450 n.312.

183. The ABA model oath, adopted in 1908, stated:

I DO SOLEMNLY SWEAR:

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

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

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

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;

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, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

1908 ABA Report, *supra* note 2, at 585 (commending the model oath “for adoption by the proper authorities in all the states and territories”).

184. *Id.*; see also Andrews, *Lawyer's Oath*, *supra* note 8, at 38–43 (discussing the differences between the Field Code and the 1908 ABA model oath).

185. Simeon Baldwin described the turn of the phrase from “just” to “unjust” as rendering the duty “much less onerous” because the lawyer no longer

plaintiffs and criminal prosecutors (“suit or proceeding”), not defenses of any kind, civil or criminal.¹⁸⁶ Nevertheless, even with its new phrasing, the model oath “unjust” ban for civil plaintiffs meant something more than lack of objective merit, given that the same clause imposed an objective merit standard (“honestly debatable”) to defenses.¹⁸⁷

As to the final Canons of Ethics, the ABA’s position on litigation advocacy was similar, but not identical, to that of the 1887 Alabama Code. First, the Canons of Ethics stated litigation duties to the client. The Canons of Ethics, like the 1887 Alabama Code, only indirectly spoke to competence by specifying good practices, particularly punctuality.¹⁸⁸ Canon 6 stated a duty of loyalty and addressed confidentiality.¹⁸⁹ The Canons of Ethics also stated the duty of zeal. Canon 15 quoted the portion of the 1887 Alabama Code, including Sharswood’s “warm zeal” exhortation.¹⁹⁰ Yet, like the 1887 Alabama Code and many other voices of the era, the new Canons of Ethics immediately condemned the view that the lawyer must “do whatever may enable him to succeed in winning the client’s cause.”¹⁹¹

The Canons of Ethics stated duties to the court that limited client duties. Canon 22 was a close replica of the truth duties of Rule 5 of the 1887 Alabama Code, condemning several deceits and “unworthy” practices.¹⁹² Several canons imposed obligations of reasonable behavior.¹⁹³

had to affirmatively satisfy himself that the case was just. Baldwin, *supra* note 178, at 545.

186. According to the report of the ABA drafting committee, it “reframed the third paragraph of the recommended form for oath of admission, embodying therein the distinction, indicated 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.’” 1908 ABA Report, *supra* note 2, at 572 (quoting SHARSWOOD, *supra* note 101, at 90).

187. *Id.* at 585.

188. *Id.* at 580 (Canon 21: “Punctuality and Expedition”).

189. *Id.* at 576–77 (Canon 6: “Adverse Influences and Conflicting Interests”).

190. *Id.* at 579 (Canon 15: “How Far a Lawyer May Go in Supporting a Client’s Cause”).

191. *Id.*

192. *Id.* at 581 (Canon 22: “Candor and Fairness”); see GILDED AGE, *supra* note 8, at 114–15 (comparing Rule 5 of the 1887 Alabama Code with final Canons’ text).

193. 1908 ABA Report, *supra* note 2, at 575, (Canon 1: “The Duty of the Lawyer to the Courts”); *id.* at 580 (Canon 17: “Ill Feeling and Personalities Between Advocates”); *id.* (Canon 18: “Treatment of Witnesses and Litigants”); *id.* (Canon 21: “Punctuality and Expedition”).

Both Canon 15 and Canon 30 stated an objective merit standard, at least as to law. Canon 15 referred to remedies and defenses “authorized by the law of the land.”¹⁹⁴ Canon 30 referred to the “legal merits” of the client’s claim, and it concluded by stating that the lawyer’s appearance acted as an assertion that the “client’s case is one proper for judicial determination.”¹⁹⁵ This assertion provision was similar to the affirmation in the federal equity rule, but the equity rule stated a more obvious objective merit standard, “good ground for the suit.”¹⁹⁶

The Canons of Ethics did not impose an affirmative just-cause duty. In civil cases, Canon 31, entitled “Responsibility for Litigation,” gave the lawyer discretion whether to accept a civil client, plaintiff or defendant.¹⁹⁷ Canon 31 cautioned that the responsibility “for bringing questionable suits” and “questionable defenses” was the “lawyer’s responsibility” and that the lawyer could not escape his responsibility by saying that he was “only following his client’s instructions.”¹⁹⁸ This seemingly permitted a lawyer to consider the justness of a client’s civil cause and decline cases that the lawyer considered unjust, but it did not require him to do so.

The only affirmative duty in the Canons of Ethics to decline a civil case was phrased in terms of the client’s motive, similar to Rule 14 of the 1887 Alabama Code, but applicable to both civil plaintiffs and defendants. Interestingly, Canon 30 was entitled “Justifiable and Unjustifiable Litigations” and seemingly was an alternative standard for “just” and “unjust.”¹⁹⁹ Canon 30 began by using a motive standard: a “lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.”²⁰⁰ Canon 30 continued, “[b]ut otherwise it is his right and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client’s claim.”²⁰¹ This imposed a spectrum of duties. First, the lawyer could decline a civil case for any reason, including the justness of the cause, and the lawyer must decline if the cause—claim or defense—was either improperly

194. *Id.* at 579 (Canon 15).

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

196. R. PRAC. CTS. EQUITY 24, 42 U.S. (1 How.) xli, xlvi (1842). Under the Equity Rules, the attorney’s signature acted as an affirmation that the suit had “good ground” to support it. *Id.*

197. 1908 ABA Report, *supra* note 2, at 583.

198. *Id.* at 583–84.

199. *Id.* at 583.

200. *Id.*

201. *Id.*

motivated or lacked objective merit. Then, as to existing civil clients, the lawyer had to affirmatively press claims and defenses that had both objective merit and proper motive.

These portions of the Canons of Ethics were at odds with the model oath on proper civil litigation advocacy in subtle but multiple respects. The just-cause duty of the model oath required a lawyer to neither “counsel [n]or maintain” a civil plaintiff’s cause that appeared to the lawyer to be “unjust.”²⁰² The ABA models thus stated different standards for accepting clients as an initial matter: one a matter of discretion and the other a mandate. While the 1908 Canons of Ethics gave the lawyer discretion to decline a plaintiff’s cause as an initial matter for whatever reason, the model oath required that the lawyer decline an unjust matter for a plaintiff. A more critical difference came in representation of an accepted client. If the lawyer later came to believe that the plaintiff’s cause was unjust, the model oath required withdrawal, but the Canons of Ethics required the opposite. Canon 30 mandated that the lawyer persist in maintaining the claim based on its legal merit, so long as it was not improperly motivated. The lawyer could not withdraw based on his own assessment of the justness of the cause.

The distinction cannot be reconciled by defining the unjust standard in the model oath to mean lack of legal merit. This arguably was the interpretation suggested by Field in his commentary,²⁰³ but the model oath clause did not permit this reading. The just-cause clause of the model oath itself distinguished between an unjust standard, which the model oath applied to plaintiff’s claim, and an objective merit standard (“honestly debatable”), which the model oath applied to civil defendants. To the extent that the Canons of Ethics differed from the model oath, the model oath should have prevailed, at least in theory. The model oath—not the Canons of Ethics—was the regulatory portion of the 1908 ethics compilation; the model oath was intended to “be given operative and binding force.”²⁰⁴

In sum, the ABA 1908 model standards—model oath and Canons of Ethics—represented yet another nuanced, and in some ways confusing, position on the proper limits on litigation advocacy. Professor Susan Carle characterized the “duty to do justice” as a fundamental divide among the participants to the ABA’s 1908 model ethics project and one as to which the drafters “adopted ineffectual compromise language.”²⁰⁵ She argued that the final result was an

202. *Id.* at 585.

203. *See supra* notes 180–86.

204. *1908 ABA Report, supra* note 2, at 570 (quoting SHARSWOOD, *supra* note 101, at 90).

205. Carle, *supra* note 2, at 1.

“ambivalent compromise” that “merely concealed [the ABA’s] internal division and left future generations of lawyers to debate the issue anew.”²⁰⁶ This is undoubtedly true. The inconsistency between Canon 30 and the just-cause duty of the model oath certainly was “ineffectual,” and future generations continued to debate the issue. The division and need for further debate were not surprising. It was part of a much longer debate in the United States, one that arose from a somewhat ill-defined inherited tradition as to the proper limits on litigation advocacy beyond truth and reasonable behavior. It was a debate that would continue well past the ABA’s 1908 project.

B. The ABA Model Code of Professional Responsibility

Over the next few decades, the ABA supplemented the 1908 Canons of Ethics with ethics opinions and additional canons as to many ethical matters, including litigation advocacy, but eventually the ABA recognized the need for more meaningful revision.²⁰⁷ At the same time, court rules governing procedure in civil cases, particularly the rules for federal court, developed and refined standards for litigation filings. In 1912, the federal equity rule was amended to add a motive element to the objective standard. The signature certified not only that there was “good ground” for the pleading but also that it was “not interposed for delay.”²⁰⁸ In 1938, the new Federal Rules of Civil Procedure imposed, in Rule 11, that the attorney certify that civil pleadings have both “good ground to support it” and no motive of “delay.”²⁰⁹

In August 1969, the ABA reformulated the 1908 Canons of Ethics into the Model Code of Professional Responsibility.²¹⁰ The Model Code was longer and more complex than the 1908 Canons of Ethics. The Model Code had three components: canons (nine broadly worded principles), ethical considerations (multiple paragraphs discussing

206. *Id.* at 33.

207. Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1069 (1978) (discussing 1958 study on revision of the Canons).

208. R. PRAC. CTS. EQUITY 24, 42 U.S. (1 How.) xli, xlvi (1842). *See generally* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 692–704 (2000) [hereinafter Andrews, *Motive Restrictions*] (addressing historical evolution of motive standards on filing suit).

209. Federal courts interpreted the certification provision of the 1938 version of Federal Rule 11 as imposing a subjective merit standard that tested whether the lawyer himself knew or believed the pleading to have legal and factual merit. *See* Andrews, *Motive Restrictions*, *supra* note 208, at 706–07.

210. MODEL CODE OF PROF’L RESPONSIBILITY (1969); *see also* 1969 ABA Report, *supra* note 2, at 729–96 (reprinting the Model Code); *id.* at 389 (approving the Model Code).

each Canon), and disciplinary rules (black letter rules tailored to each Canon).

As a general matter, the Model Code put client duties in greater prominence than had the Canons of Ethics or other historical standards. For example, an entire Canon addressed confidentiality, whereas confidentiality often was addressed only cryptically or indirectly in many historical works.²¹¹ Similarly, competence also was the topic of one of the nine canons.²¹²

Most significant was zealous advocacy. The principal canon addressing litigation conduct, Canon 7, broadly stated that “[a] lawyer should represent a client zealously within the bounds of the law.”²¹³ This section on zealous representation was one of the most lengthy in the Model Code. The accompanying ethical considerations consisted of many paragraphs and footnotes explaining the duty of zealous representation. Ethical Consideration 7-19 explained the rationale for zealous advocacy: “the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.”²¹⁴ For this reason, the Model Code explained, the “duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.”²¹⁵

Importantly, the Model Code imposed zealous advocacy as a black-letter rule. Disciplinary Rule 7-101, entitled “Representing a Client Zealously,” imposed an affirmative duty to pursue all legitimate objectives and means of the client.²¹⁶ This disciplinary rule provided that a lawyer “shall not intentionally . . . [f]ail to seek lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules.”²¹⁷ This suggested a preference for zealous advocacy over any duty of just cause. Other parts of the Model Code explained the limited role of the lawyer’s own sense of morality. Ethical Consideration 7-8 stated that a lawyer

211. MODEL CODE OF PROF’L RESPONSIBILITY Canon 4 (1969) (“A Lawyer Should Preserve the Confidences and Secrets of a Client”). The 1908 Canons, for example, addressed confidentiality indirectly, in its discussion of loyalty. *See 1908 ABA Report, supra* note 2, at 576–77 (Canon 6: “Adverse Influences and Conflicting Interests”).

212. MODEL CODE OF PROF’L RESPONSIBILITY Canon 6 (“A Lawyer Should Represent a Client Competently”).

213. Canon 7 (“Zealous Representation”).

214. EC 7-19.

215. *Id.*

216. DR 7-101.

217. *Id.*

may counsel a client on factors that “may lead to a decision that is morally just as well as legally permissible,” but “the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”²¹⁸ Ethical Consideration 7-7 stated that in civil cases, a client, not the lawyer, must decide whether to present affirmative defenses.²¹⁹

Even with this emphasis on zealous advocacy, the Model Code imposed limits on advocacy. Disciplinary Rule 7-101 conditioned its duty of zealous advocacy by stating that a “lawyer does not violate this [duty] . . . by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.”²²⁰ The remaining disciplinary rules under Canon 7 set out a variety of duties owed to the court. Disciplinary Rule 7-102 specified truth duties, barring use of false evidence²²¹ and requiring remedy of false evidence in some circumstances.²²² Disciplinary Rule 7-106 set out numerous duties of reasonable behavior.²²³

The Model Code did not set out a just-cause duty. The Model Code stated its affirmative limits on advocacy either in terms of effect or objective merit. Disciplinary Rule 7-102 barred a lawyer from bringing a claim or defense “when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”²²⁴ This was a subtle evolution of the motive standard, previously used in both the 1887 Alabama Code and the 1908 Canons of Ethics.²²⁵ Disciplinary Rule 7-102 did not turn on subjective intent but instead effect—whether the action “would serve merely to harass.” A second paragraph of the same rule imposed an objective merit standard for legal arguments.²²⁶

218. EC 7-8.

219. EC 7-7.

220. DR 7-101.

221. DR 7-102(A)(3)–(6).

222. DR 7-102(B).

223. DR 7-106 (1969).

224. DR 7-102(A)(1). This Disciplinary Rule was entitled “Representing a Client within the Bounds of the Law.” *Id.*

225. For further discussion of this evolution and DR 7-102, see Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13, 17–28 (2000) [hereinafter Andrews, *First Amendment Problem*].

226. DR 7-102(A)(2) (barring a lawyer from knowingly advancing a claim or defense that is unwarranted by existing law or a good faith argument for change in the law).

In sum, the Model Code era was the heyday of zealous representation in terms of regulatory standards. Zealous advocacy was an affirmative duty and just cause was not. Nevertheless, even with this unprecedented prominence, zealous advocacy had many limits. It was not a paramount duty over the lawyer's many duties to the court. Truth, reasonable behavior, and objective merit remained superior.

C. *The Model Oath and the Just-Cause Duty*

During the reformulation of the Canons of Ethics into the Model Code, the model oath was left alone, but the model oath soon would have its own revision. A lawyer named Murray Seasongood campaigned for two decades to delete the just-cause duty from the model oath.²²⁷ He argued that it unfairly subjected a civil plaintiff to a different standard than a defendant.²²⁸ Seasongood also objected to the "unjust" standard itself, arguing that it improperly required a lawyer to prejudice his client's cause.²²⁹ He eventually succeeded.

In 1977, the ABA deleted the unjust standard from the clause and subjected all litigation proceedings—claims and defenses—to the same objective merit standard.²³⁰ The revised model oath 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."²³¹ This was the lone modification to the ABA model oath after its adoption in 1908.

In theory, this was an important change, representing the ABA's final rejection of any form of a just-cause duty. The change, however, was largely overlooked. First, the model oath itself was largely forgotten. At one time, the ABA prominently featured the model oath alongside the canons,²³² but today, model ethics compilations do not include the model oath. The ABA never formally repealed the model

227. Murray Seasongood, *A Sequel to "What Employments Must a Lawyer Accept,"* 9 PRAC. LAW. 41, 41-42 (1963) [hereinafter Seasongood, *Sequel*]; Murray Seasongood, *What Employments Must a Lawyer Accept*, 1956 PRAC. LAW. 43, 48-49.

228. Seasongood, *Sequel*, *supra* note 227, at 42.

229. *Id.* at 42-43.

230. *Proceedings of the 1977 Midyear Meeting of the House of Delegates*, 102 ANN. REP. A.B.A. 205, 224-25 (1977) (adopting revision of oath).

231. *Report of the Standing Committee on Ethics and Professional Responsibility*, 102 ANN. REP. A.B.A. 25 (recommending change).

232. *See Canons of Professional Ethics*, 62 ANN. REP. A.B.A. 1105 (1937) (reprinting canons and model oath).

oath, and its current status as a model is unknown, even within the ABA.²³³

Ironically, the fading prominence of the model oath resulted in many states keeping the old form of oath that stated a just-cause duty. No state seems to have ever adopted the 1977 revised version of the model oath. Florida,²³⁴ Louisiana,²³⁵ South Dakota,²³⁶ Wisconsin²³⁷ and Washington,²³⁸ for example, use the 1908 ABA model oath language, 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. Others, such as Arizona,²³⁹ California,²⁴⁰ Minnesota,²⁴¹ Michigan,²⁴² and Nebraska,²⁴³ contain a statutory just-cause duty similar to the original Field Code version. Indiana²⁴⁴ and New Mexico²⁴⁵ use both versions of the just-cause duty, one in oath form and the other as a statutory duty. These duties, whether stated in terms of a “just” or “unjust” cause, seem to be more the result of

233. See Andrews, *Lawyer's Oath*, *supra* note 8, at 44 (discussing possible “archive” status of model oath).

234. *Oath of Admission*, FLA. RULES OF CT. 2015 (West 2012).

235. Louisiana's Bar Association's website provides a 1908 ABA form oath. *Lawyer's Oath*, LA. SUP. CT. COMMITTEE ON BAR ADMISSIONS, www.lascba.org/lawyers_oath.asp (last visited Nov. 24, 2012).

236. S.D. CODIFIED LAWS § 16-16-18 (2004).

237. WIS. SUP. CT. R. 40.15 (West 2012).

238. Washington combines the 1908 ABA “unjust” causes with the Field Code exception for criminal cases. WASH. REV. CODE ANN. § 2.48.210 (West 2004) (“I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land, unless it be in defense of a person charged with a public offense . . .”).

239. ARIZ. RULES OF CT. 41 (West 2011).

240. CAL. BUS. & PROF. CODE § 6068 (West 2003).

241. MINN. STAT. ANN. § 358.07(9) (West 2012).

242. MICH. RULES OF PROF'L CONDUCT R. 15 § 3(1) (“I will pursue a claim only if it is just, and will offer a defense only if it may be honestly debatable.”).

243. NEB. REV. STAT. § 7-105 (2007).

244. Indiana updated its oath in 2005. IND. RULES OF CT. 22 (West 2011). As its statutory duties, Indiana uses a modified version of the Field Code list. IND. CODE ANN. § 33-43-1-3 (West 2004).

245. New Mexico uses a version of the 1908 model oath. N.M. ST. CT. R. 15-304 (West 2012). New Mexico also has a statutory statement of duties identical to the Field Code. N.M. STAT. ANN. § 36-2-10 (West 2010).

oversight than of deliberate decision. Disciplinary bodies and courts do not enforce the duty.²⁴⁶

D. The ABA Model Rules of Professional Conduct

In 1983, the ABA adopted the Model Rules of Professional Conduct to replace the Model Code.²⁴⁷ The Model Rules were in a “restatement format” in order to give better guidance and clarity for enforcement “because the only enforceable standards were the black-letter Rules.”²⁴⁸ The Model Rules eliminated the broad canons altogether and reduced the emphasis on the narrative discussion. The Model Rules are the ABA’s current standards for proper litigation conduct of lawyers. Many, but not all states, have adopted some version of the Model Rules as their regulatory standards for lawyers.

The Model Rules have a single chapter governing litigation standards, entitled “Advocate.”²⁴⁹ This chapter has a number of rules imposing duties of reasonable behavior and truth. Rule 3.4 sets out several prohibitions against unreasonable behavior to promote “[f]air competition in the adversary system.”²⁵⁰ Rule 3.3 imposes multiple truth duties. It bars use of false evidence and requires a lawyer to remedy any false evidence, which might include disclosure to the court.²⁵¹

Rule 3.1, entitled “Meritorious Claims and Contentions,” states a duty of objective merit for civil filings.²⁵² It requires that claims and defenses both have legal and factual merit, under an objective “not frivolous” standard.²⁵³ The drafters reported that they used the “not frivolous” standard, “rather than one based upon the concepts ‘harass’ or ‘malicious injure,’” which both the Canons of Ethics and Model

246. See Andrews, *Lawyer’s Oath*, *supra* note 8, at 54–55 (discussing lack of enforcement and regulatory role of modern oaths).

247. See generally AM. BAR ASS’N, LEGISLATIVE HISTORY, *supra* note 2, at ix–xi (reporting on legislative history for each rule from the original 1983 adoption of Model Rules and subsequent amendments through 2005).

248. *Id.* at xii–xiv (discussing the debate at the 1982 ABA Midyear Meeting concerning a format change from a Model Code to the Model Rules).

249. Rules 3.1–3.9, which govern litigation, are part of this Chapter. See ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, at v–vi (7th ed. 2011).

250. MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. (2009).

251. R. 3.3.

252. R. 3.1. Model Rule 3.1 provides that “[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.” *Id.*

253. *Id.*

Code had used in different ways, to more closely track the “prevailing standard in the law of procedure.”²⁵⁴

The reference to procedure likely was to Rule 11 of the Federal Rules of Civil Procedure, which, as of December 1, 1983, imposed an objective merit standard.²⁵⁵ Yet Rule 11 also retained an independent motive standard. Under Rule 11, a party presenting a civil paper certifies both that the paper has factual and legal merit and that the paper is not being presented for an improper purpose.²⁵⁶ The ABA standards, however, moved beyond the procedural rules by eliminating motive as a test for civil filings. In 2001, the ABA removed language in a comment to Model Rule 3.1 that had suggested a claim could be frivolous if the plaintiff had an ill motive in asserting it.²⁵⁷

Overall, the Model Rules downplay zealous advocacy, especially as compared to the Model Code. The strongest statement of this concept is in the Preamble to the Model Rules, which uses zealous advocacy to describe one of the fundamental roles of a lawyer: “As advocate, a lawyer zealously asserts the client’s position under the rules of adversary system.”²⁵⁸ Yet none of the litigation rules in the “Advocate” chapter or their related comments mentions zealous advocacy. The black-letter rules themselves never state a duty of zealous advocacy. Model Rule 1.3 provides that a lawyer “shall act with reasonable diligence and promptness in representing a client.”²⁵⁹ Although the comment to Model Rule 1.3 mentions zealous advocacy

254. AM. BAR ASS’N, LEGISLATIVE HISTORY, *supra* note 2, at 422.

255. FED. R. CIV. P. 11(b) (providing for a reasonable inquiry before certifying the legal and factual merit of the civil paper). There are numerous other rules of court and procedural laws that regulate both the conduct of the client and of the lawyer and which impose a variety of merit and motive standards. For a general review of these standards, see Andrews, *Motive Restrictions*, *supra* note 208, at 691–746.

256. FED. R. CIV. P. 11(b)(1) (providing that signature certifies that the civil paper is “not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”).

257. Comment [2] to Rule 3.1 originally provided that litigation filings were frivolous “if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.” AM. BAR ASS’N, LEGISLATIVE HISTORY, *supra* note 2, at 423; *id* at 424 (dropping the reference to the client’s purpose to harass “because the client’s purpose is not relevant to the objective merits of the client’s claim”); see also Andrews, *First Amendment Problem*, *supra* note 225, at 29–31 (criticizing the comment).

258. MODEL RULES OF PROF’L CONDUCT pmbl. 2 (listing the lawyer’s roles in paragraph [2] of the preamble).

259. MODEL RULES OF PROF’L CONDUCT R. 1.3.

as part of this duty, that statement is immediately qualified.²⁶⁰ During the promulgation of the Model Rules, the American College of Trial Lawyers proposed inserting “zeal” into the text of the black-letter rule, in place of “diligence,” but the proposed amendment was withdrawn.²⁶¹ The Model Rules as adopted by most states do not state zeal as an affirmative duty.²⁶²

The Model Rules do not state a just-cause duty. Although the Model Rules do not require a lawyer to consider the justness of a civil client’s cause, they seemingly permit a lawyer to do so. Any recognition in the Model Rules of zealous advocacy is not so strong that a lawyer is not permitted to consider the justness of a civil client’s cause.²⁶³ Accordingly, the Model Rules seem to take an agnostic position. Rule 1.2 states that a lawyer’s representation of the client “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”²⁶⁴ Thus, unlike the traditional just-cause duty of the Field Code, Model Rule 1.2 purports to give the lawyer the freedom to take a case that the lawyer personally believes is unjust. Yet the Model Rules also permit a lawyer to reject a cause that the lawyer believes to be unjust. The Model Rules do not require any lawyer to take any particular civil matter.²⁶⁵

260. R. 1.3 cmt. (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”). In 2002, the ABA amended the comments to Rule 1.3 to add civility language and move a procrastination and “work load” reference to a separate paragraph. AM. BAR ASS’N, LEGISLATIVE HISTORY, *supra* note 2, at 63.

261. The sponsor of the amendment stated: “Zeal connotes strong motivation and extraordinary effort. This is exactly what an attorney should render to his client. Diligence, on the other hand, connotes merely adequate professionalism and adequate effort.” AM. BAR ASS’N, LEGISLATIVE HISTORY, *supra* note 2, at 62.

262. See GILLERS, SIMON & PERLMAN, *supra* note 171, at 47–48 (listing the diligence requirements as adopted by some states). Massachusetts is an exception and added zeal to its version of Rule 1.3: “The lawyer should represent a client zealously within the bounds of the law.” *Id.* at 48.

263. The Model Rules impose a somewhat greater degree of zealousness on criminal defense lawyers due to concerns as to the constitutional protections afforded criminal defendants. For example, under Model Rule 3.3, a criminal defense lawyer cannot refuse to offer his client’s testimony if the lawyer only believes (but does not know) the testimony is false, but a civil defense lawyer may refuse to offer his client’s testimony based on belief alone. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2009).

264. R. 1.2(b).

265. The only limitations on declining new matters are stated in Model Rule 6.2, which deals with court appointed representations and do not apply to most civil cases. R. 6.2.

It is somewhat more difficult to discern the Model Rule position as to what a lawyer can do when the lawyer has agreed to represent the client and later considers the cause unjust. Under Rule 2.1, the lawyer is free to counsel the client as to “moral, economic, social and political factors.”²⁶⁶ After such counseling, Rule 1.2 requires the lawyer to “abide by the client’s decisions concerning the objectives of representation.”²⁶⁷ If a client insists upon an objective that the lawyer believes to be unjust, the lawyer’s only potential option is withdrawal. The question is whether this belief—that the client’s objective is unjust—is sufficient grounds for seeking withdrawal.

Model Rule 1.16 limits a lawyer’s ability to withdraw from an existing representation in a civil case. First, Model Rule 1.16(b) gives the lawyer complete discretion to withdraw so long as there is no “material adverse effect on the interests of the client.”²⁶⁸ Model Rule 1.16(b) then provides limited circumstances under which a lawyer may withdraw even if the result to the client would be a material adverse effect.²⁶⁹ One such circumstance is a case in which the client’s objective is “repugnant or with which the lawyer has a fundamental disagreement,”²⁷⁰ and another is “other good cause for withdrawal exists.”²⁷¹ To most observers, but perhaps not all, an unjust cause would be both repugnant and fundamentally disagreeable. This broad language thus seemingly permits the lawyer to withdraw in civil cases in which the lawyer comes to believe that the client’s cause is not just.

Finally, Model Rule 1.16(a) affirmatively requires a lawyer to withdraw if the representation would violate “the Rules of Professional Conduct or other law.”²⁷² A violation of the just-cause duties still in force in some states seemingly would require withdrawal under this “other law” language.²⁷³ These clauses may be overlooked, but in the several states in which a just-cause duty is in effect, the duty both provides the lawyer with the discretion to withdraw from a matter that the lawyer believes is unjust and requires the lawyer to do so.

266. R. 2.1.

267. R. 1.2(a).

268. R. 1.16(b)(1).

269. *See* R. 1.16(b)(2)–(7) (listing different reasons for which a lawyer may withdraw).

270. R. 1.16(b)(4).

271. R. 1.16(b)(7).

272. R. 1.16(a).

273. *See supra* text accompanying notes 234–46 (discussing just-cause duties that exist in some states).

Thus, under the current ABA model ethical standards, a lawyer in civil litigation has a duty to be diligent but not necessarily zealous. The lawyer's advocacy is limited by the superior duties of reasonable behavior, truth, and objective merit. The ABA has moved to objective merit, leaving behind just cause and motive as litigation standards. Under the ABA model standards, the lawyer may decline a matter that the lawyer considers unjust and also may withdraw on this ground. All of this is muddled by the fact that the ABA sets only model ethical standards. In practice, the states have a patchwork of litigation standards that may retain the Model Code emphasis on zealous advocacy, the Field Code just-cause duty, or both. Procedural rules, such as Federal Rule of Civil Procedure 11, continue to impose proper motive as an additional limitation.

CONCLUSION

This historical review shows that, despite the many turns of phrases and revision of standards, the substance of the core concepts of proper litigation behavior has remained remarkably constant over the centuries. Society always has put limits on advocacy in civil litigation. Reasonable behavior and truth are core values that consistently have trumped any duties owed to the client. The point of debate has been a narrow, albeit important, point of conflict between a duty of zealous advocacy and a duty of just cause or some alternative limit on advocacy.

Throughout much of the early history, client concerns were not the focus of formal regulatory standards. Beginning in the nineteenth century and more fully emerging in the ABA Model Code, client concerns became more prominent. Scores of professional conduct standards now address client concerns. To many modern practicing lawyers, zealous advocacy is chief among these client duties.²⁷⁴ This is an overstatement, in terms of both the current standards and the historical standards. Today, under most states' legal ethics regimes, zeal is not literally a duty at all, in terms of the black-letter rules that govern lawyers' conduct. Instead, the regulatory duty is one of reasonable diligence, which, as the comments to Model Rule 1.3 suggest, can include "zeal in advocacy," as well as workload

274. *E.g.*, Allen K. Harris, *The Professionalism Crisis—The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. REV. 549, 569, 598 (2002) (claiming that the "phrase 'zealous advocacy' is frequently invoked to defend unprofessional behavior and a 'Rambo' or 'win at all costs,' attitude" and that "[d]ue to Rambo's conduct, there is a growing concern in the judiciary, the bar, and society about the importance of lawyer professionalism and civility"); *see also* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligations*, 37 IND. L. REV. 21, 23 (2003) (surveying "alternative models of legal ethics").

management.²⁷⁵ And, that duty, whether phrased in terms of diligence or zeal, is limited. The comment to Model Rule 1.3 immediately qualifies its requirement of zeal by explaining that the duty does not include an obligation “to press for every advantage.”²⁷⁶

This is not new. Virtually all prominent past statements of zeal have been qualified by higher duties. For example, Lord Whitelocke in 1648 spoke of a lawyer’s “zeal of his client’s cause,”²⁷⁷ and Sharswood in 1854 made “warm zeal” for the client’s cause the “moral responsibility” of the lawyer.²⁷⁸ Yet both expressly conditioned zeal on higher obligations to the court. Even the Model Code, which was the most prominent regulatory statement of zealous representation, qualified the zeal duty with the caveat “within the bounds of the law.”²⁷⁹

The question over time was the nature of the court duties that limited advocacy in civil litigation. The area of uncertainty was not reasonable behavior or truth—those were well-recognized constants—but instead the additional limits beyond reasonable behavior and truth. Model Rule 3.1 represents the end result, or more accurately the current point, of the evolution of this additional limit.

The early European oaths began by stating what today seems to be the broadest limit, a duty to assess the justness of the client’s cause beyond its technical truth. Early American lawyers were not bound by this additional duty until the Field Code. Alabama rejected this clause and substituted a motive limitation for civil plaintiffs. The ABA’s 1908 Canons of Ethics used the Alabama motive standard but broadened the standard to cover civil defenses. The Model Code substituted an effect test for the motive standard and added a test of objective legal merit. The Model Rules eliminated the motive standard. Model Rule 3.1 today states an objective factual and legal merit standard that broadly applies to all aspects of civil litigation.

Although the additional duty to assess the justness of the client’s cause may have been ill-defined, the problem, if any, was the appropriate criterion, not the priority of this additional duty. Today, the just-cause duty largely has transformed into an objective merit standard, but this new standard overrides zealous advocacy, as did the older versions of the just-cause or proper-motive duties. Under current ethical and procedural standards, a lawyer may not file a frivolous paper no matter how helpful it would be to the zealous representation of the client.

275. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt.

276. R. 1.3 cmt.

277. *See supra* text accompanying notes 50–52.

278. *See supra* text accompanying notes 111–17.

279. *See supra* text accompanying notes 213, 215.

Moreover, the history shows that the just-cause standard has faded only with regard to its status as an affirmative duty. Unlike advocates in earlier eras, a lawyer today may represent his client even if the lawyer does not personally believe the cause to be just. The lawyer no longer must decline or withdraw from the matter. On the other hand, zealous advocacy does not now require a lawyer affirmatively to override his personal sense of justice to accept a client in civil litigation. Later, the lawyer likely may withdraw on this basis, and to the extent that the just-cause duty lingers in oath form in some states, the lawyer arguably must withdraw.

Even Professor Freedman, one of the most outspoken supporters of zealous advocacy, has stated that a lawyer should use his own moral discretion to decline a civil client.²⁸⁰ Where Professor Freedman takes issue with modern rules and standards is the lawyer's duties after the lawyer accepts the representation. For this reason, Professor Freedman favors the Model Code over the Model Rules position.²⁸¹ The current Model Rules give the lawyer discretion to decline civil representation, but they apparently give the lawyer more leeway than the Model Code to withdraw from civil cases, likely including a case that the lawyer considers unjust.²⁸²

Nevertheless, it is fair to say that the just-cause duty, as an affirmative duty, essentially is absent from our modern understanding of a civil litigator's ethical duties. Lawyers are not meaningfully instructed to decline or withdraw from civil matters that are otherwise truthful and reasonable solely because the lawyer deems the cause "unjust." Lawyers apparently are not ethically disciplined for failure to do so.

By contrast, a lawyer has no discretion and little uncertainty as to the duties of truth and reasonable behavior. These duties always have trumped conflicting duties to the client. Moreover, these two court duties, for the most part, have been well defined. From the very

280. Professor Freedman frames a lawyer's moral accountability as follows:

Lawyers *are* morally accountable. A lawyer can be "called to account" and is not "beyond reproof" for the decision to accept a particular client or cause. Also, while representing a client, the lawyer should counsel the client regarding the moral aspects of the representation. If a lawyer chooses to represent a client, however, it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights that the client elects to pursue after appropriate counseling.

FREEDMAN, UNDERSTANDING ETHICS, *supra* note 1, at 71.

281. *See id.* at 58–64 (discussing Model Code and Model Rules positions and concluding that "the Model Code is clearly preferable to the Model Rules").

282. *See supra* text accompanying notes 265–71.

beginning, lawyers have known that they must act reasonably in litigation: they may not maliciously delay and burden the other party, and they must not use foul or harassing words or methods. Likewise, lawyers always have known that they must be honest in civil litigation: the lawyer may not offer false evidence, may not misstate the law, and must correct falsehoods when the lawyer learns of any.

This last aspect of the truth duty—the duty to report or correct falsehoods—underscores the primacy of the truth duty. And its persistence over the centuries underscores its near-universal acceptance. The Justinian oath, fifteen centuries ago, required lawyers to refrain from causes that were “dishonest” or “composed of false allegations” and required a lawyer to “utterly separate” himself if he were to learn that the suit was of this sort.²⁸³ The English “do no falsehood” oath required lawyers to report falsehoods to the court.²⁸⁴ Likewise, today, Model Rule 3.3 requires a lawyer to remedy false evidence, including, if necessary, disclosure to the court in civil cases.²⁸⁵ This Model Rule provision is not a new-age limit on advocacy. It is a duty dating back to the beginning of the profession.

In sum, over the centuries, the proper balance of litigation duties has been a fairly narrow issue. The debate rarely has extended to the duties of honest and reasonable behavior. Lawyers personally may struggle in their attempt to live up to those standards in particular situations, and some scholars may question them,²⁸⁶ but the standards themselves have been constant. The effort has been to define how a lawyer must assess the client’s cause beyond its technical truth. That narrow question has been the primary “soft spot” in the evolution of

283. JUSTINIAN CODE, *supra* note 20, lib. 3, tit. 1, l. 14.

284. *See supra* text accompanying notes 53–54.

285. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2009).

286. Professor Freedman acknowledges the primacy of the truth standard but argues that lawyers may ethically breach this standard in some circumstances, even in court:

Three ethical rules that are universally recognized, and that are unquestionably sound and desirable, are that a lawyer shall not make a false statement of fact to a court, that a lawyer shall not make a false statement of material fact to a third person, and that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Yet, there are circumstances in which zealous representation, which embraces the ethical requirements of competence and confidentiality, can require a lawyer to make a false statement to a court or to a third person, or to engage in other conduct involving dishonesty, fraud, deceit, or misrepresentation.

Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 772 (2006). *See generally* FREEDMAN, UNDERSTANDING ETHICS, *supra* note 1.

litigation ethics standards. The question has never been whether such an additional duty exists, but instead the nature of that duty. Over the centuries, this duty has narrowed from a broad notion of just cause to a standard of objective factual and legal merit. Moreover, the question has never been the priority of these duties to the court. Lawyers today, just as centuries ago, owe paramount duties to the court. Litigation fairness is and always has been a core value of the profession.

