Legal Ethics and Professionalism in the *Ius commune*

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Scholars who study the societies of the high and later Middle Ages have begun in recent decades to interest themselves increasingly in the appearance during that period of new social and occupational groups that had not been part of the traditional structure of society during the early Middle Ages. The emergence of canon lawyers as a distinct and well-defined professional group was one of the most striking social developments during the hundred years that elapsed between about 1150 and about 1250. The Western Church had canon lawyers, to be sure, in 1150 – more of them that some contemporaries thought desirable. But it would require a considerable stretch of the term to describe the canon lawyers of that period as a 'profession' in anything like the modern meaning of that term. By 1250, however, canon lawyers were all over the place and for most practical purposes they were running the Church. They had also in the interval transformed themselves from isolated practitioners and teachers into a cohesive and well-defined institutional group.[1]

One essential element in the formation of professional identity, then as now, was the development of a common set of ethical standards, to which professionals were expected to conform and by which their peers and superiors judged their fitness. A central element of those ethical standards, but a vital one, was the belief that a professional canon lawyer must be trustworthy. Courts and judges must be able to rely upon him to tell the truth; his clients must be able to rely upon him to represent them faithfully and vigorously.

In this paper I will try to unravel just one strand, although a particularly important one, in the fabric of medieval ideas about

1. An outline of these developments appears in Brundage 1995(b). – In the article, primary sources are referred to by way of the abbreviations listed on pp. 244-47 (adopted from the *Bulletin of Medieval Canon Law*), while secondary works are abbreviated with the name of the author and the year of publication.

the ethics of legal practice. I want to look at the inherent conflict of interest between a lawyer's duty to his client and his duty to the courts in which he practices. Tension between these duties appears quite early in the history of the legal profession and remains with us still.

Oaths of admission

The earliest known texts of oaths of admission for advocates at the bar date from the 1230s. Chronologically, the five earliest examples cluster tightly in the years between 1231 and 1237, although they are spread over a broad geographical range. Three of them occur in the acta of French councils held at Rouen (1231),[2] Château-Gontier (also in 1231),[3] and Tours (1236).[4] These three conciliar enactments dealt, of course, with the duties and obligations of practitioners before ecclesiastical courts. Also in 1231, the very same year as the councils held at Rouen and Château-Gontier, Frederick II (1212-1250) promulgated the Liber Augustalis.[5] In his lawbook the emperor laid down the terms of an admissions oath for advocates who practiced in the royal courts of the Sicilian kingdom. Finally, at the legatine council of London in 1237, Cardinal Otto da Tonengo outlined the elements of an admissions oath for advocates who appeared before the courts Christian in England.[6]

One feature common to all of these texts relates to the problem that I will address here, namely the duties of an advocate toward his clients and toward the courts in which he practiced. All of these texts demanded that the advocate present his client's case 'zealously' and 'faithfully.' He must use 'his utmost power' to represent the client's position. Yet these same texts also admonished the advocate that he must do all these things 'fairly,' 'reasonably,' and 'according to the laws.' The texts of these admissions oaths further warned the advocate that he must not knowingly introduce perjured testimony or spurious documents into evidence. They

2. Council of Rouen (1231) c. 48, in Martène & Durand 4:181.
3. Council of Château-Gontier (1231) c. 36, in Mansi 23:240-41.
4. Council of Tours (1236) c. 2, in Mansi 23:411-12.
5. Liber Augustalis 1.84, p. 258. Citations from medieval legal sources and Latin classics refer to the internal divisions of the text, rather than page numbers.
6. Legatine Council of London (1237) c. 29, in Powicke & Cheney 1:258-59.

warned him not to instruct his clients or witnesses 'to tell falsehoods or conceal the truth.'

Let me add parenthetically that these elements in the admissions oaths that became current in the 1230s have proved remarkably sturdy and adaptable. Virtually identical clauses appeared in admissions oaths throughout the later Middle Ages. They survive to this day in the oaths that American lawyers must take upon their admission to practice.[7] Their ethical precepts remain at the core of numerous controversies about legal ethics.

These ethical criteria rest upon an oxymoron. The lawyer must use his skills, his learning, and his experience aggressively to persuade the court to agree to his client's wishes. That is what 'zealous advocacy' is all about. But at the same time the court expects the lawyer to function as one of its officers. His obligations to the court rest upon his duty not to lie to the judge and not to permit others to tell lies when he presents their evidence for the court's consideration.[8]

The lawyer's role as an officer of the court thus requires him to subordinate partisan interests to the demands of public duty. At the same time, his obligation to zealous advocacy of his client's cause may in many situations conflict with his obligations to the court.

The conventional history current among English and American writers on legal ethics traces the tension between a lawyer's duties to the court and to his client back to the medieval English courts of common law, or, some would say, to the courts of equity.[9] I shall argue, however, that it is considerably more ancient and is not peculiar to the English common law tradition. Instead the evidence shows, quite plainly I think, first of all that legal writers in late antiquity recognized the advocate's dual allegiance, and second that the particular form in which lawyers still grapple with the problem today dates from the thirteenth-century *ius commune*.[10]

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7. ABA Code (1969) c. 4, 15.
8. Federal Rules (1984) Rule 11 (b); Model Code (1983) EC 7-1, 7-4, 7.19, 7.26-28; Model Rules (1996) 1.3 and 3.1, 3.3-4; Gaetke 1989.
9. Baker 1990, p. 179; Brand 1992, pp. 128-36; Wolfram 1986, p. 17, n. 11; Holdsworth 1922-26, 2:486-87, 510-11; Pollock and Maitland 1968, 1:215-16.
10. On the medieval *ius commune* see esp. Calasso 1954, pp. 605-29; Koschaker 1947, pp. 164-212; Bellomo 1995, pp. 55-77; Ascheri 2000, pp. 255-328; and Helmholz 2001, pp. 3-15, 240-48.

The development of the calumny oath

Deceptive clients who tried to use their advocates to manipulate the judicial system were certainly familiar figures during the Roman principate. In his book of advice for fellow-practitioners at Rome, Quintilian (ca. 35-ca. 100 C.E.) cautioned his readers to deal cautiously with clients. 'A great many of them lie,' he said, 'and they talk to you, not in order to let you know what went on, but as if they were themselves arguing before the judge.'[11] Quintilian cautioned advocates, moreover, that clients, whatever they may profess, and contrary to what they want their lawyer to say for them, are often out for vengeance rather than justice.[12] Clients will say anything, he warned, and the best lawyer is a skeptical one.[13]

Public officials also warned lawyers not to believe everything their clients told them, because public policy discouraged vexatious litigation.[14] The emperor Constantine (311-337 C.E.) admonished advocates to be wary in accepting clients, especially female ones, who, he asserted, were peculiarly prone to rush into unwarranted litigation.[15] The emperor Justinian (527-565 C.E.) went further. He demanded that litigants, male or female, plaintiff or defendant, take an oath (*iuramentum de calumnia vitanda*) in which they solemnly swore that their case was meritorious, that it was grounded on fact, and that they had not come to court in order to harass or victimize their opponent.[16] Justinian also required advocates to swear that they believed that their client's case was well-founded, that it was supported by credible evidence, and that they would strive to the utmost to secure their client's goal. In addition, advocates must promise that should they discover in the course

11. Quintilian 12.8.9: *Plurimi enim mentiuntur et, tanquam non doceant causam, sed agant, non ut cum patrono sed ut cum iudice loquuntur.*
12. Quintilian 12.9.10: *Turpis voluptas et inhumana et nulli audientium bona gratia a litigatoribus quidem frequenter exigitur, qui ultionem malunt quam defensionem.*
13. Quintilian 12.8.11: *In summa optimus est in discendo patronus incredulus. Promittit enim litigator omnia, testem populum, paratissimas consignationes, ipsum denique adversarium quaedam non negaturum.*
14. CICiv (1872-95) Dig. 50.16.233 pr. (Gaius, XII Tables). For the system of citation to Roman and canon law texts see Brundage 1995(a), pp. 190-205.
15. C Th 9.1.3 (9 Feb. 322).
16. CICiv (1872-95) Cod. 2.58(59).1-2 (529 C.E.). Justinian, in turn, was codifying older practice, which went back to the classical period; Gaius 4.171, 174. See also Moriarty 1937, pp. 9-10.

of proceedings that the case they were arguing lacked merit, they would immediately withdraw from it. No other advocate was permitted to take up a case that a colleague had abandoned for lack of merit.[17] Justinian, in other words, required advocates not merely to appraise their client's case soberly and cautiously, as their own self interest demanded in any event, but he also made the advocate responsible for determining whether the client's case merited hearing at all. In brief, it seems reasonable to say that Justinian obliged lawyers to function both as zealous advocates and as officers of the courts.[18]

Justinian's requirement that advocates swear an oath *de calumnia vitanda*, however, failed to find a place in the legal systems of the early Middle Ages. Oath-taking was certainly common in early medieval church courts and civil tribunals, but as a form of proof, not as a warranty against frivolous actions.[19] Nor were trained legal advisers much in evidence either in civil or church courts between the fifth and the eleventh centuries. Men with expert knowledge of learned law were scarce in the West during the early Middle Ages.

The reappearance of substantial civilian learning beginning in late eleventh- and early twelfth-century Italy brought not only a revival, but also a transformation of Roman law notions about legal ethics and in particular about the lawyer-client relationship. Students, teachers, and practitioners of both civil and canon law commenced in that period to re-think and re-define the roles that legal experts and advocates ought to play in litigation, and also in civic, commercial, and administrative life.[20]

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17. CICiv (1872-95) Cod. 3.14.4 (530 C.E.): *Patroni autem causarum, qui utrique parti suum praestantes ingrediuntur auxilium, cum lis fuerit contestata ... sacrosanctis evangeliis tactis iuramentum praestent, quod omni quidem virtute sua omnique ope quod iustum et verum existimaverint clientibus suis inferre procurent, nihil studii relinquentes, quod sibi possibile est, non autem credita sibi causa cognita, quod improba sit vel penitus desperata et ex mendacibus adlegationibus composita, sibi scientes prudentesque mala conscientia liti patrocinantur, sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causa recedent ab huiusmodi communione sese penitus separantes: hocque subsecuto nulla licentia concedatur spreto litigatori ad alterius advocati patrocinium convolare, ne melioribus contemptis improba advocatio subregetur.*
18. Brundage 1994.
19. Hinschius 1869-97, 5:337-41.
20. Radding 1988 maintains that the legal revival of the late eleventh century was anchored in the work of earlier Lombard jurists and asserts that the work

The medieval transformation of Roman legal ethics was closely linked, in turn, to the process of professionalization among the canon lawyers who, as I have argued elsewhere, seem to have been the earliest Western European group to create a profession, in the sense in which that slippery term is commonly understood.[21]

By the end of the eleventh century and the beginning of the twelfth, litigants, together with their legal advisers and representatives, were regularly expected to swear that the case they put forward had merit, that it was grounded on credible evidence,[22] and that it was neither malicious, improvident, nor frivolous.[23]

By the early twelfth century this practice had become sufficiently routine that both popes and emperors found it necessary to rule on the question of whether bishops and other clerics could be compelled to swear the oath *de calumnia* when they came to court – and concluded that the sacred status of the clergy exempted them from what was normally required of others.[24] Indeed, Pope Eugene III (1145-1153) expressly declared that the canons did not demand the oath *de calumnia* at all in cases concerning tithes, church property, and spiritual matters.[25]

Practice apparently changed abruptly during the 1150s. John of Salisbury (ca. 1115-1180), writing in 1159, described the calumny oath as a normal feature of litigation in canonical courts.[26] By 1179 the oath was regularly being used in canonical proceedings in the

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of Irnerius and his students must be understood as a development from their teaching. There is merit in this argument, although Radding rather over-states his claims and sometimes treats his evidence much as Dr. Bentley treated fellows of Trinity College. For a more balanced presentation of much of the same material see Vaccari 1966, which Radding unaccountably neglects to cite.

21. Brundage 1988 and 1995(b). More recently I have addressed the relationship between the calumny oath and medieval admissions oaths in Brundage 1997.
22. The practice was commonest in the civil courts of Italian towns; Trifone 1962, pp. 21, 44, 48. By the mid-twelfth century (and perhaps earlier) it was standard practice in southern France as well; Poly 1978, p. 202.
23. On the distinction between a *causa improba* and a *causa desperata* see Accursius, *Glossa ordinaria* to Cod. 3.1.14.4 v. *improba* in CICiv (1584).
24. The emperor Henry II so ruled as early as 1047; Leges Longobardorum, fol. 185ra-va; Quinque compilationes, 1 Comp. 1.35(34).1 (X–). Pope Honorius II repeated Henry's ruling, almost verbatim, in a lawsuit of 1125; Quinque compilationes, 1 Comp. 35(34).2 (= X 2.7.1); Fried 1973, p. 168.
25. Quinque compilationes, 1 Comp. 1.35(34).3 (= X 2.7.2); JL no. 9654.
26. John of Salisbury 1:339-40.

south of France[27] and in 1181 Pope Lucius III (1181-1185) ruled that clerical litigants could be required to take it, contrary custom notwithstanding.[28] By 1190, the oath *de calumnia* seemed to Bernard of Pavia (d. 1213) an important enough feature of procedure that he devoted a whole title of his *Breviarium extravagantium* to the subject.[29] By the time that Johannes Teutonicus (ca. 1170-1245) compiled the *Glossa ordinaria* (completed in 1216) on Gratian's Decretum, the *iuramentum calumniae* had become a standard element of canonical civil procedure, although a few litigants might under special circumstances be excused from taking the oath.[30] Legal counselors (*advocati, iurisperiti*) and representatives (*procuratores*) by this time had to swear the oath *de calumnia* in contested cases at the point where issues were joined and the trial (*litis contestatio*), properly speaking, began.[31]

Lawyers' obligations regarding clients

Introduction of the oath *de calumnia* thus meant that by about 1200 church policy required ecclesiastical lawyers to examine each client's case and to proceed with it only if they found the client's claims supported by just grounds and reliable evidence.[32] The advocate who found his client's claims flimsy or his evidence questionable was ethically bound to reject the case.[33] The client in

27. Poly 1978, p. 195.
28. Quinque compilationes, 1 Comp. 1.35(34).6 (= X 2.7.5); JL no. 14532.
29. Quinque compilationes, 1 Comp. 1.35(34); see also Bernard of Pavia 1.34.5, as well as Moriarty 1937, pp. 28-29.
30. E.g., Johannes Teutonicus, *Glossa ordinaria* to C. 22 q. 5 c. 14 v. *causa* in CICan (1605). The principal exceptions to the general requirement had to do with bishops, monasteries, and other corporate bodies, whose agents (*oeconomii,* syndics, or proctors) might take the oath on behalf of their principals. See generally Budischin 1974, pp. 160-65.
31. Gratian dealt with *litis contestatio* at C. 3 q. 3 and again at C. 3 q. 9 in CICan (1879); see also Paucapalea on C. 2 q. 2 pr. and Stephen of Tournai to C. 3 q. 3 c. 1, as well as X 2.5.un. and 2.6.1-5 in CICan (1879). See further Helmholz 2000.
32. Although the swearing of the oath was required, Boniface VIII held that failure to take it did not invalidate proceedings; CICan (1879), VI° 2.4.1. The oath was also required a second time if the case was appealed; CICan (1879), VI° 2.4.2. See also Steins 1973, pp. 221-22, 227, 249-51.
33. Bernard of Pavia 2.17.4; Summa Coloniensis 6.18; Huguccio, *Summa* to C.

other words must either persuade his legal adviser that his case was well grounded or forfeit any realistic chance of a judicial hearing on the merits of his matter.

Professional literature underscored the law's demands. Bonaguida de Arezzo (fl. 1245~1265), an early writer on lawyerly ethics and conduct, cautioned advocates that they must examine the claims of prospective clients carefully and skeptically.[34] 'It is better to keep silent than to disgrace one's self by speaking,' Bonaguida warned. 'The advocate will do better to reject a weak case than to weary himself with groundless causes.'[35] He should be particularly cautious about accepting a client's version of the facts and should probe his claims diligently, according to Joannes de Deo (1189~1191-1267), another early authority on professional responsibility.[36] The advocate should take pains, Bonaguida advised, to examine any documents in a case with great care, to make sure that no passages had been erased or words interpolated, lest he be deceived by a counterfeit.[37] William Durand (ca. 1237-1296), the leading procedural writer of the thirteenth century,[38] whose Judicial Mirror remained a standard treatise well into the early modern period, cautioned advocates to get their clients to put their stories in writing, 'because of the peril of perjury, since he [the advocate]

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11 q. 3 c. 71 v. *iustum rectum,* quoted in Baldwin 1970, 2:136 n. 153; Hostiensis lib. 1, tit. *De postulatione* §5, and lib. 5, tit. *De penitentiis et remissionibus* §32, no. 2.

34. Geoffrey Barraclough, 'Bonaguida de Aretinis,' in Naz, ed. 1935-65, 2:934-40.

35. Bonaguida, pp. 154-55: *Sit cautus tertio, ut quaerat, utrum possit probare clientulus ille ea, quae dicit, si habet instrumenta vel testes: quia, licet ille habeat bonam causam, succumbet, si non probaverit, et dicetur ei: non deficit tibi ius, sed probatio.... Et melius est tacere quam cum pudore loqui. Unde utilius est advocato, si non patrocinetur ei in hoc casu, et melius faceret, si se inanibus sumptibus non vexaret...* Aegidius repeated this warning verbatim, 3/1:183.

36. Joannes de Deo, fol. 3ra: *In facto aduersarii sui et clientuli hac uia ambulet qui uult uenire ad portum salutis, ut homo qui litigare expectat dicat aduersario seriem facti sui alias exemplum negocii secundum quod est processum in facto, ut C. De transact., Ut responsum* [Cod. 2.4.15], *quia ex facto ius oritur, ut ff. De iureiur., l. Duobus § Si ei, l. ult.* [Dig. 12.2.28, 42] *et ff. De iur. do., l. Quid* [Dig. 23.3.27] *et ff. Ad l. Aquil., Si ex plagis § Diuo* [Dig. 9.2.52.2]. *Item sepe contingit quod ex breuissima mutacione facti mutatur totum ius, ut Extra De excep. l. Si quis* [X 2.25?] *et sic dicit c. De pe. di. i Quamobrem* [D. 1 de pen. c. 68]. On Joannes de Deo see generally Sousa Costa 1957. Similarly William of Drogheda 2/2:56-57.

37. Bonaguida p. 159, repeated verbatim by Aegidius pp. 185-86.

38. L. Falletti, 'Guillaume Durand,' in Naz, ed. 1935-65, 5:1014-75.

nowadays has to take an oath, and so that he can abandon the case without shame and blushes should matters turn out otherwise' than as the client represented them.[39] Durand also suggested an approach that might help persuade clients to impart confidential information:

> [An advocate] who wishes to get along safely should, upon first meeting him who intends to litigate, say to him: 'My dear fellow, there are three persons to whom you must tell the whole truth, from whom you conceal nothing. They are your confessor, your doctor, and your lawyer... For even the wisest counselor may be led astray if he does not know the facts... So, tell me absolutely everything, let me have the whole business in writing; then I will be able to give you true and reliable advice and counsel...'[40]

The prudent advocate, Durand added, should also seek advice about every case from other, more experienced lawyers and examine the whole matter with them, 'For it is better to talk matters over in private than to stumble over them in public.'[41]

Advocates in civil tribunals by the end of the thirteenth century, also had to take admissions oaths much like those that the

39. Durand 1.4 *De aduocato* §3.3, p. 256: *Expedit enim aduocato habere scripturam super narratione facti, quam clientulus proponit, propter periculum periurii, cum habeat hodie iurare; et ut sine rubore et uerecundia possit, cum aliter inuenerit, causam deserere, ad quod ex forma iuramenti, quod praestat hodie in initio causae, tenetur, et ut possit euadere poenam multiplicem, de qua habes in decretalem Gregorii X De postulatione, Properandum* [2 Lyon (1274) c. 19, in DEC pp. 324-25], *et quia etiam talis scriptura quandoque poterit prodesse, ut patet infra De salariis § Sequitur, ver. Quid si reus* [Durand 1.4 *De salariis* § 3.17, p. 342].
40. Durand 1.4 *De aduocato* §3.1, p. 256: *Et quidam si ad portum salutis peruenire desiderat, cum is, qui litigare intendit ad eum primo perueniret, dicat illi: 'Carissime, tres sunt personae, quibus est omnimoda ueritas aperienda, et nihil est illis celandum, videlicet confessor..., medicus..., et iurisperitus, De poen. dist. 6 c. 1 uersi. iudicaria* [D. 6 de pen. c. 1 § 3]. *Quia facti ignorantia saepe peritissimos fallit, ut ff. De iuris et facti ignoran. l. 2* [Dig. 22.6.2]. *Dicas mihi igitur omnimodum ueritatem, et negocii exemplum da mihi scriptum, ut congruum et uerum possim tibi dare consilium seu responsionum, C. De transa., Ut responsum* [Cod. 2.4.15], *et Ext. De spons., De muliere* [X 4.1.6], *quia ex facto ius oritur, ff. Ad legem Aquil., Si ex plagis § in cliuo* [Dig. 9.2.52.2]; *ff. De iureiurando, Duobus § Si enim* [Dig. 12.2.28.2] *et l. final.* [Dig. 12.2.28.42]; *ff. De iure codicill., Quidam* [Dig. 29.7.14].'
41. Durand 1.4 *De aduocato* 3.7-8, p. 257.

church courts imposed.[42] Running through the advocate's multiple swearings – the oath he swore when admitted to practice and renewed every year he practiced, the oath *de calumnia* that he took when a case reached the contested stage – the advocate heard the same message, hammered in again and again, that the advocate must judge his clients. His law teachers, the texts he studied,[43] the handbooks that offered him professional tips,[44] his oath of office, even the dictionaries he consulted[45] and the sermons he heard in church[46] – all agreed: time and again he was told that he must represent his client zealously, but he must not uphold a dishonest cause. He heard that an advocate who successfully defends a guilty client may be guilty of homicide.[47] He was advised that he had a moral duty to test clients repeatedly and to reject any who failed to measure up; otherwise, he sinned.[48] The advocate who neglected to do these things might be suspended from practice,[49] fined,[50] or condemned to bear the costs of any unjust lawsuit in which he appeared.[51] On the other hand, if he refused a case without good reason he was also liable to punishment.[52]

Medieval advocates had no economic disincentive to abandon clients with unfounded cases. The advocate who resigned a case for just cause was entitled to collect the fee that he would have

42. In addition to earlier references above, see also Frati 3:618; Franceschi pp. 30-31; ordinance of Philip III (1274), renewed by Philip IV (1291), in Isambert 2:653, 690; Beaumanoir 1:89; Dawson 1968, p. 282.
43. Geoffrey of Trani to X 1.37 §8, p. 128; Guido de Baysio to D. 96 c. 11 v. *beneficium*.
44. Bonaguida pp. 154-55, 165; Pierre de Fontaines pp. 63-64; Delachenal 1885, pp. 58-59.
45. Albericus de Rosate s.v. *postulatio*, fol. 182va, repeating Geoffrey of Trani almost verbatim.
46. Guibert of Tournai fol. 106ra-vb. I should like to thank Dr. Penny Cole for calling my attention to these sermons.
47. Gàl pp. 603-04.
48. Baldus fol. 82vb; John of Fribourg 2.5.171, fol. 77rb.
49. Council of Oxford (1222) c. 45, in Powicke & Cheney 1:120. This was one of the counts in disbarment proceedings at York against Master J. de Scarborough in 1288; John le Romeyn 1:25, no. 60,
50. Frati 3:619-20.
51. So taught Peter the Chanter in his *Summa,* par. 309, quoted in Baldwin 1970, 1:136 n. 154; likewise, Aufréri fol. 4ra.
52. Bartolus 7:62v.

earned had he persisted with it,[53] whereas had he gone forward with it despite knowing that it lacked foundation he forfeited his claims to a fee and might be required to refund any sums already received.[54]

Thus from the outset of his involvement in a matter the advocate's own interests required him to make a series of judgments about each potential client. He was responsible for passing preliminary judgment on the merits of the client's claims, on the authenticity of the documents to be produced, and the credibility of the witnesses to be called, as well as on the strategy to be employed in pursuing the matter – provided that he considered it worth pursuing at all. If he seriously doubted the appropriateness of legal action, the advocate was ethically obliged to refuse to act. Robert Chambers (Robertus de Camera), according to Peter the Chanter, bluntly threatened prospective clients: 'You should know that if I discover any injustice in your case, I will reveal it and join the other side.'[55] Joannes de Deo, on the other hand, advised a more tactful refusal, couched in terms of saving the client's money. The advocate, he suggested, might tell the client: 'I don't want to sue, because I don't think I can win, and therefore you shouldn't spend the money.'[56]

If doubt arose after litigation had commenced, the advocate or proctor had to try to persuade his client either to drop the case or to settle it.[57] If he was unsuccessful in doing so, the advocate was obliged both by his oath of admission and by the oath *de calumnia vitanda* to abandon the client and to announce to the court that he could no longer continue because his client's case was unjust. This in effect terminated the client's chances of prevailing in the case,

53. Fasoli & Sella 1:554; Accursius, *Glos. ord.* to Cod. 3.1.14.4 v. *litigatori*, in CICiv (1584).

54. Albericus de Rosate s.v. *postulatio*, fol. 182va.

55. Peter the Chanter, *Verbum abbreviatum*, in PL 105:162; also Baldwin 1970, 1:195 and 2:136 n. 156. Robert's threat to join the other side raised further ethical problems in the lawyer-client relationship that I plan to address elsewhere.

56. Joannes de Deo fol. 3 rb: *Si tamen uiderit aduocatus factum clientuli sui inefficax, uel propter se, uel propter probationes, dicat ei, 'Nolo litigare, quia spem non habeo obtinendi, et ideo sumptus facere non debetis,' ut ff. De inoff. t., l. i* [Dig. 5.2.1], *et dicit canon quod non debemus defendere quod ratione uinci non potest, xxiiii. q. iii. Si habes* [C. 24 q. 3 c. 1] *et xxvi Deinde ponitur* [D. 26 c. 3], *quia quod ratione caret exstirpandum est, ut lxxxiiii. di. Co episcopi* [*fortasse* D. 84 c. 1?].

57. Ambrosius Catherinus Politus, *De advocati officio* in TUI 3/1:363ra.

for no other proctor or advocate could take up litigation abandoned in this way. But abandonment by the lawyer by no means ended the matter: for not only was the lawyer entitled to his fee, as previously mentioned, even when he abandoned the case,[58] but in addition the client might also be punished for bringing a frivolous action.[59] And the advocate who appeared too often in court with groundless cases might be fined or suspended from practice on that account.[60]

Preachers and moralists nevertheless repeatedly complained that practicing lawyers would take any case, no matter how bad, and that no case was so dishonest and desperate that some advocate could not be persuaded to argue it.[61]

How realistic were these complaints? Did advocates and proctors in fact ever reject cases that they considered unworthy, or, having taken them, abandon them when they discovered that they lacked foundation? Refusals prior to the commencement of litigation predictably leave no records. But proctors in English courts Christian, as Helmholz has shown, did indeed abandon hopeless cases with considerable frequency.[62]

The ethics of the medieval bar thus obliged lawyers to pass preliminary judgment on potential litigants. The lawyer became in effect the court's admissions officer: he screened those who sought redress of grievances and those against whom redress was sought; he determined which cases were worth the court's time and trouble; and he also made a judgment about whether the case and the client were worth the investment of his own time and effort. He was in addition supposed to be the fearless champion of the clients he deemed worthy.

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58. Accursius, *Glos. ord.* to Cod. 3.1.14.4 v. *litigatori* in CICiv (1584).
59. C. 2 q. 3 c. 2-3 in CICan (1879) and references in n. 50 above.
60. Benedict XII, *Decens et necessarium* (1340) §§ 29-30, in Tangl p. 124. Bonaguida p. 140, however, suggested that an advocate might try to insinuate that his opponent was presenting a groundless case but nonetheless should be held blameless for doing so: *Verum tamen sibi non imputetur sed causae, sicut non imputatur magistro, sed materiae, si gemma sit fracta, quae in annulo includenda fuerat, ff. Locati 29, 2 Idem queritur 13 § Si gemma* [Dig. 19.2.13.5].
61. Peter the Chanter, *Verbum abbreviatum* 51, in PL 205:160; Ralph Niger pp. 242-43; Bromyard fol. 10va, 16ra.
62. Helmholz 1974, pp. 153-54, and Helmholz 1976, pp. 295-97.

Conclusion

The roles of gatekeeper and champion were in theory supposed to be compatible. In practice they never were (and still are not) easy to harmonize.[63] Conflict of interest is inherent in the lawyer-client relationship. The lawyer's personal interest demands that he be a vigilant gatekeeper, for if he succeeds in choosing only cases that he has a good chance of winning, he will be able to make the most efficient use of his time and energy, while simultaneously enhancing his professional reputation. Professional manuals told lawyers this, and experience no doubt reinforced that advice.

This approach relegated the client to a secondary position. Unless his situation served the interests of court and lawyers, the client might find no one to deal with his grievances or to defend him from those whom he had offended. Where the interests of the client seemed to conflict with the interests of the judicial organization, moreover, the lawyer had strong incentives to resolve the discord in favor of the organization. The lawyer, after all, had to work with judges and their staffs regularly over the long-term; with luck he might even become a judge someday himself. The pressure to be seen as helpful and competent, as a man of high standards with a keen appreciation of the value of the court's time and convenience was very great indeed. Clients, on the other hand, come and go. A handful of substantial clients – typically institutions, such as monasteries in the Middle Ages or major corporations in modern practice, together with a few individuals who combined power, wealth, and prominence – might retain the lawyer more-or-less permanently and furnish him with business repeatedly, but these were exceptions, not the rule. The general run of clients might need a lawyer's services just once or twice in a lifetime – while most of those who were good for repeat business were good for little else.

Lawyers, especially advocates, furthermore, usually had more in common intellectually, socially, and economically with judges and their staffs than they did with most clients. Lawyers formed part of a legal community, a community defined by shared interests and values, common experiences and training, and long-term association among its members. Clients, on the other hand, were stran-

63. Hazard 1978, p. 131; Blumberg 1969, p. 322.

gers to that community. They shared few of the experiences that united the community's members and came into its midst only briefly, often involuntarily, as transients.

Under these circumstances it is no surprise that conflicts between the client's interests and those of the legal community tended, as they still do, to be resolved in favor of the community.[64]

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64. Blumberg 1969, p. 324.

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