

The Legal Profession in Medieval England: Its Origins and Its Initial Regulation

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Understanding the origins of the English legal profession in medieval England provides valuable insights into the development of lawyers in the Anglo-American legal world. In addition, the initial regulation of lawyers in this era created the foundation from which ethical norms and rules that govern the profession today evolved. During this period, professional judges emerged and the early notions of judicial ethics evolved.

I. The Origins of the Legal Profession

A. The Medieval Legal Profession

1. The Initial Lawyers. Beginning in the reign of Henry II (1154-89) and continuing through that of Edward I (1272-1307), major changes in the legal system occurred. These changes were probably the fundamental influence on the emergence of professional serjeants and attorneys. The changes were the nature of litigation with original writs, counts, defenses and pleading; change from local to national royal courts and the use of legal French language; the increased amount of litigation and its concentration in the royal courts; and the changes in the rules allowing representation. The General Eyre, the itinerant judges, and central royal courts at Westminster were initiated. Moreover, litigation grew and gravitated to the Court of Common Pleas, known as the Common Bench and to a lesser extent to the King's Bench; and new royal courts were created. The effect of national courts and the diminished importance of other courts as well as the expert judges, who emerged, created and concentrated a demand for assistance by experts familiar with the rules and procedures of these courts. A second change involved the process of litigation. Already somewhat complex, it became even more so. There was an increase

in the number of the writs; and it became more difficult to select the correct one. Increased, complex procedural rules were another important factor. More complex pleading counts and the use of exceptions added further technicalities.

The Anglo-Norman period reflected little or sporadic use of “professionals” or experts performing these “legal” functions. There is no doubt, however, that during the 12th century and more regularly by the 13th century, attorneys appeared on behalf of litigants. Whether pleaders also appeared during the 12th century is the subject of some uncertainty. Although the development of pleaders is somewhat murky, they clearly began to appear in the early 13th century, with professional pleaders first appearing in the Common Bench by 1239. Initially, both the pleaders and attorneys assisting the litigants were ‘nonlawyer’ amateurs. To assist them, litigants began by asking friends, relatives, and neighbors to perform these tasks. Over time, some of these individuals began to appear repeatedly to assist litigants. In the process, these individuals developed expertise as a result of their experience. They were sought out by litigants and charged for their services. With some, it became a way in which they earned a living or supplemented their other income. There is also considerable evidence that court clerks rendered legal assistance to litigants, using their knowledge of the legal system to supplement their income. Thus, in the early 13th century, identifiable precursors of professional lawyers were functioning as pleaders and attorneys in the Court of Common Pleas and other royal courts.

A second development, the official authorization of these individuals to appear to assist litigants, facilitated the development of the legal profession. Initially it occurred in each case. Glanvill described the appointment of an attorney (“*responsalis*”) and the writ for an attorney to act in court in place of his principal to gain or to lose (“*ad lucrandum vel perdendum*”). By the

reign of Henry III (1216-1272), individual attorneys obtained the right to appear in court, either with regard to a particular matter, a special attorney, or on behalf of a client for numerous matters over a period of time, a general attorney. In the case of the former, the court recorded the litigant's authorization of an attorney on the plea roll; and with the latter, a royal or judicial writ authorized the use of an attorney. Again the procedure for appearances by serjeant-pleaders is less clear, but it also seemed to involve some form of judicial permission or royal sanction and may have initially grown out of an ancient practice permitting litigants to bring persons to court to counsel them and subsequently out of the judicial control over practice before the Court of Common Pleas.

By the end of the 13th century, litigants commonly used professional serjeants to plead their causes. Similarly, the use of professional attorneys became more widespread. Thus, as result of these developments, a professional class of pleaders and attorneys evolved. In the words of Paul Brand, 'by the last quarter of the thirteenth century,' legal experts 'whom we may reasonably call professional lawyers' were engaging in representational activities on 'a full-time basis,' evidencing the existence of a 'nascent English legal profession.'

2. Types of Lawyers

a. Serjeants. Serjeants were the aristocrats of medieval lawyers. Appointment as a serjeant was a significant honor attendant with considerable ceremony and expense that resulted in membership in the prestigious Order of the Coif. Serjeants functioned as pleaders, speaking in court on behalf of litigants. As a result of this function, they were initially known as countors or narratores, the official Latin term. By the end of the 13th century, serjeants were the sole pleaders in the Common Bench, and to a lesser extent in the other royal courts. They retained their

monopoly in the Common Bench until 1846.

The term serjeant, which was apparently derived from the Latin, *serviens* or *servientes*, and its French equivalent, *serjant*, meaning “one who serves,” replaced these terms. During the last quarter of the 13th century, the number of professional serjeants, although not numerous, expanded. From 1273-1307, 12-35 a year, with an average of 30; in 1356 there were 25 serjeants practicing in the Common Bench and in 1365 there were 12. In 1382, the King took control of admission to the Order of Serjeants. In the 15th and 16th centuries rarely as many as 10 were practicing at any time (1559, only 1) and when the numbers dropped, every ten years or so, 6-8 new serjeants were created. Serjeants were appointed from Inn of Court members, who had given two readings. When a lawyer became a serjeant, he had to leave his Inn. By 1438, a Serjeants Inn existed and another emerged as well and there two until 1730. In functioning as pleaders, it is important to point out that serjeants did not act as agents and, therefore, their pleading did not bind their clients. It was not uncommon for litigants to disavow what their serjeant had said.

b. Apprentices-at-Law. In the late 1280s, a group called “apprentices of the Common Bench” emerged. Initially, apprentices, which derives from the French, *apprendre*, to learn, were individuals studying to become serjeants of the Common Bench. As an early form of law student, they likely functioned under the supervision of serjeants or senior apprentices. By the end of the 13th century, apprentices were also directly representing clients and practicing law. It seems likely, however, that they were practicing as attorneys, not pleaders.

Although they were still learners at the end of the reign of Edward I, during the 14th century apprentices emerged as a group of pleaders who were entitled to appear in courts, other

than in the Common Bench, on their own and plead on behalf of clients. Thus, the more experienced apprentices functioned like serjeants and were ‘clearly men of eminence in their profession.’ Frequently, those called apprentices in the 15th and 16th century were readers in an Inn of Court. Thus, by the earlier 16th century, the senior Inn members, readers and benchers, had a right of audience in the royal courts (other than the Common Bench) and were members of the practicing bar. Those who were skilled and fortunate became serjeants. As the influence of serjeants as professional group declined, apprentices became the more important group of pleaders and are generally seen as the predecessors of today’s barristers.

c. Attorneys. Attorneys represented their clients in court, handling procedural matters and managing the litigation. As Paul Brand stated, ‘the primary function of the attorney was to attend court in place of his clients.’ Their role did not include the pleading function. ‘Attorney’ or *attornare* derived from the French verb, *attorner*, meaning to turn or ‘to assign or depute for a particular purpose,’ and the Latin noun, *attornatus*, describing a similar legal representative. As with serjeants, the terminology signified these representatives’ role. Attorneys functioned as traditional agents for clients, their principals. Thus, unlike serjeants, attorneys bound their clients. This separation of serjeants and attorneys foreshadowed the later formal bifurcation of the English legal profession into barristers and solicitors; and attorneys were the predecessors of solicitors.

Throughout the 13th century, professional attorneys emerged, their use expanded, and their numbers and their caseloads grew. By 1307 about 200 in Common Bench, 26 in the King’s Bench and 10 in the London city courts; 1480 about 180 attorneys: Common Bench 130, King’s Bench 100, of whom 50 also appeared in the Common Bench, 200 CB and KB by 1550s and a

huge increase thereafter: 1580 - 415, 1606 - 1050, 1633- 1730 and 1640 - 1750, the great majority of whom were in the Common Bench.

B. The New Profession

By the 15th century, the legal profession developed in new ways. The two basic branches of the professions, serjeants and attorneys, changed in the Tudor era. First, neither of those branches had the same exclusivity and monopoly as they had enjoyed in medieval times. As litigation increased, so did the lawyers in the Kings Bench, the Chancery and the other conciliar courts. In those courts, serjeants had no monopoly, like in the Common Bench, on the right of audience. Various factors caused serjeants to decline - the lesser importance of the Common Bench, the rise of paper pleadings, and the increasing use of senior apprentices as pleaders outside the Common Bench. As serjeants died out, the senior apprentices became known as barristers.

The Inns of Court, which had existed since the 14th century, facilitated this transformation. When a student went from his learning days at a Inn of Chancery, he entered an Inn as a student, known as an Inner Barrister. After a number of years, he would be called to the bar. He would then be known as Utter Barrister and called a 'barrister at law. By 1598 the justices mandated a uniform rule of 7 years as a inner barrister, student, before being called to the bar, which was increased to 8 years in 1630. Until 1547, an utter barrister did not have a right of audience in the central courts, which required more learning and becoming a reader in the Inn. Thus, although they were lawyers, they could not yet practice in the royal courts and earned a living by soliciting causes, nonlitigation work, or obtaining some official position. In 1547, likely due to the increased volume of litigation, the Chancery issued a proclamation extending

the right of audience in the royal courts, other than the Common Bench, to utter-barristers who had been fellows in an Inn for eight years. In 1558, it was increased to 10 years, but reduced in 1574 to 5 years and in 1614 to 3 years. In 1518, there were 50 barristers and 9 serjeants; in 1550, 80-90 barristers and 10-12 serjeants and in 1638, 440 barristers and 27 serjeants. In 1700, there were 10 times as many serjeants as there had been in 1500 because the ministers sold the position for bribes. The most senior and respected barristers were a type of king's counsel was known as 'extraordinary,' Initiated with Francis Bacon in 1597, they were the professional elite starting in the 17th century. They became known as 'silks' and today are called QCs, Queen's Counsel.

Attorneys continued to exist, but another kind of lawyer emerged, a solicitor. The solicitor's functions were not all that different from attorneys but initially they were inferior in status. During the early 17th century, they were subjected to a strenuous campaigns by judges and the legal profession to eliminate them. But they not only survived the attack, but emerged victorious and became a separate branch of the profession. In 1729 attorneys and solicitors were subjected to significant professional. By the 19th century, the separate branch and title of attorney had disappeared.

The profession now consisted of two branches again, but now they were barristers and solicitors. Their functions were divided much as serjeants and attorneys had been. Barristers had the right to appear in court and asserted their superior status, excluding attorneys from the Inns of Court. One consequence of their asserted superiority and honor was the notion that they could not sue for their fees nor be sued for malpractice. The former was a formality as they were paid in the form of an 'honorium' They were largely self-regulating, but subject to judicial supervision. They provided the professional education for those wishing to become barristers. Barristers

practice in chambers, but not in law firms.

Solicitors managed litigation, did transactional work, advised clients, prepared briefs for barristers and instructed them. Over time solicitors became as respected and respectable as barristers. They formed a Law Society for regulating this much larger and more popular branch of the profession. They practice in very large law firms in London and in smaller ‘High Street’ offices in other cities and towns. They provide the professional education for law graduates wish to be solicitors. Recently, they have been give the right of audience in many courts.

II. Regulation of the Profession - Lawyer Discipline

This portion of the lecture is divided into two parts. First, it will identify the various statutes, ordinances, and other authority for regulating the legal profession. Then it will turn to a discussion of some actual actions in which lawyers were accused of unethical conduct. The general focus will be on conflict of interest, as it was probably the most common ethical problem in the medieval period as it is also today. In the medieval and early modern era, conflict of interest was known as “ambidexterity,” to indicate that the lawyer took money from both sides in litigation. As I have shown in an article, it was a term commonly know and used, not only among the legal profession, but among the general population. The most serious accusation of a lawyer was to call him an ambidexter. When defamation became actionable in the secular courts, such an accusation was treated as defamatory per se and many lawyers who were called such sued for defamation.

A. The Regulations

Two statutes, two ordinances, and inherent judicial power could have been used to discipline lawyers. The two statutes, the Statute of Westminster I, Chapter 29 (1275) and the

Statute 4 Henry IV, Chapter 18 (1402) did not explicitly prohibit conflicts of interest, but were directed more generally at lawyer misconduct. The London Ordinance of 1280 was directed, *inter alia*, specifically at conflicts of interest.

1. Statute of Westminster I, Chapter 29 (1275)

This statute was one of the numerous significant statutes enacted during the reign of Edward I, 1272-1307. Chapter 29 was one of a series of sections directed at various forms of official misconduct and problems in late 13th century justice system. Chapter 29 targeted lawyers, proscribing “deceit or collusion” in the “King’s court” that deceived the court or beguiled the court or a party. Punishment for a violation by pleaders was imprisonment for a year and a day and a prohibition on further pleading. It also imposed imprisonment on those who were not pleaders and permitted in such cases “greater punishment . . . at the King’s pleasure” if required by the nature of the misconduct. The courts interpreted the prohibition on “deceit and collusion” very broadly. It was applied to conflicts of interest as well as many other forms of lawyer misconduct. This regulation, the first and probably most significant regulation of lawyer conduct, it introduced disbarment and was probably the primary and most important conflict of interest prohibition.

2. The London Ordinance of 1280

This Ordinance was a long, detailed enactment, regulating both admission to practice and lawyer conduct in the City of London courts. The Ordinance prohibited a significant number of specific types of lawyer misconduct, making it perhaps the earliest antecedent of modern lawyer ethics codes. Permanent suspension was the penalty for the most serious violations and imprisonment “according to the statute of the King” was the penalty for losing a client’s case due

to negligence or default.

Among the enumerated prohibitions were two directed specifically at conflicts of interest. First, the Ordinance banned representing both sides of a dispute simultaneously; it stated “no counor is . . . to take money from both parties in any action.” The Ordinance also subjected lawyers to discipline for ceasing to represent one client and undertaking to represent the adverse party and perhaps for representation adverse to a former client; it imposed punishment “where one takes [money], and then leaves his client, and leagues himself with the other party.” The penalty for violating the simultaneous conflict of interest prohibition was suspension for three years; and for abandoning the client and representing the opponent adverse to the former client, the Ordinance provided that the lawyer shall “render double and he shall not be heard in that case.”

It is not clear how often the Ordinance was used to discipline lawyers. Despite the explicit prohibitions on conflict of interest, existing judicial records do not reveal many instances of its application to such misconduct. More generally, very little evidence exists regarding the actual application of the Ordinance to regulate the various forms of misconduct that it enumerated.

3. The Ordinance of 1292. The Ordinance of 1292 was simpler and narrower than the London Ordinance of 1280, dealing solely with the admission of attorneys and apprentices to the Common Bench. Promulgated by Edward I, it directed Chief Justice Mettingham and the other justices to regulate the number of such attorneys admitted to practice before the Common Bench and to establish quotas for each County (‘ordain a certain number of these from each County’). The Ordinance stated that the King and his Council believed that 140 (‘seven times twenty’)

would be sufficient, but left it to the justices' discretion to appoint more or less if appropriate. Only those attorneys admitted pursuant to the judicially determined quota could represent clients. The Ordinance created an admission standard of competency and integrity ('the better and more respectable and more willing to learn,' 'those . . . of greatest value to the court and to the people').

Assessing the Ordinance's effectiveness is somewhat complicated. First, regarding its effect on competency, no evidence of its application in individual cases has been discovered; and determining whether application restricted admission to more qualified attorneys and apprentices is difficult. But lawyer misconduct did not show any decline in instances of misconduct following its adoption. Nor was admission restricted to 140 attorneys. Paul Brand has documented that, at a minimum, 210 attorneys practiced in the Common Bench in 1300.

The Ordinance of 1292 was a significant event in the history of the legal profession's regulation. As Brand said, 'most legal historians have generally taken it to mark a major stage in the development of the profession.' A number of reasons support this conclusion. It formally recognized professional attorneys as a separate and important part of the legal profession and focused on the need to control their competence as the 1275 Statute of Westminster I had done with serjeants. As such, it may have denoted the beginning of the longstanding notion of attorneys as officers of the court.

4. Statute 4 Henry IV, Chapter 18 (1402)

This statute focused chiefly on the admission of attorneys and on insuring their competence and integrity. The statute required the justices to examine all aspiring attorneys as well as those already in practice and to enroll only those ""that be good and virtuous, and of good

fame.” In addition, the statute required disbarment from the king’s courts of any attorney “found in any default of record, or otherwise.”

It seems unlikely that this statute was a significant regulation of lawyer misconduct. Its primary objective seemed to be to reduce the damage caused by the “great number of attorneys, ignorant and not learned in the law.” Its language, “found in default of record or otherwise” might have permitted disciplining lawyers for engaging in conflicts of interest, given the expansive judicial interpretation of medieval statutes. However, no evidence has been uncovered revealing the use of this statute to regulate conflicts of interest or other forms of lawyer misconduct.

5. Inherent Judicial Power

There is no doubt that the courts had inherent power to discipline its own officers, including lawyers and that this power was closely related to its power to punish summarily for contempt. Prior to the passage of the aforementioned regulatory statutes, judges had fined (“amerced”) lawyers pursuant to their inherent power and this form of judicial discipline of lawyers continued after the passage of the statutes. Medieval legal historians have uncovered a number of instances of this type of lawyer discipline in both the royal and local courts.

B. The Actions - Conflict of Interest, “Ambidexterity

1. Switching Sides in the Same Litigation

By far the most numerous medieval conflict of interest cases involved a lawyer switching sides in the same litigation. Many of the cases had a fairly common fact pattern: after being retained and often paid by one client, the lawyer abandoned that client and began to represent the adverse party. In many actions, the first client would lose the case because no lawyer appeared to

represent him.

For example, in the 1286 Norfolk eyre, the jurors charged that Simon of Cley, after being retained by Fulcher of Surrey to act as his attorney in the Common Bench in a land dispute, ceased his representation and “adhered to” his opponent in the dispute. Although Simon denied that he was Fulcher’s attorney and that the latter had been harmed, the jury disagreed. It found that Simon had been Fulcher’s attorney and “had wrongfully adhered to the opposite party to the defrauding and disinheritance of the said Fulcher and had absented himself on purpose, with the result that the said Fulcher lost the said land.” Simon was imprisoned. In the 1292 Shropshire eyre, Robert Dauvil complained to the royal justices that he gave John of Ludlow money to purchase three writs, but “through the procurement and corruption of [Robert’s] opponents,” he failed to purchase the writs, causing the former to lose his right of action during the eyre. John pleaded guilty and was sent to prison. In another case, the Nottingham jurors indicted and fined Walter Golias in 1340 for taking fees from several co-heirs to bring an assize of novel disseisin and subsequently taking a fee from the defendant in the same action.

In sanctioning ambidexterity, these cases established a norm of loyalty. Numerous cases reflected the objective of prohibiting conduct that was inconsistent with the client’s legitimate expectation of loyalty. This loyalty rationale for medieval conflict of interest regulation is evident not only from the sanctioning of the clear and serious disloyalty in which the lawyers in these cases engaged, but also in the language of cases. For example, in 1305, John of Bradenstoke, a Common Bench serjeant, was fined for agreeing to be counsel in a land plea, but having “acted for his adversaries when the case was pleaded, defrauding and deceiving” his initial client. Also in 1305, the Herefordshire county triers indicted John de la Barwe because he “he later

abandoned the side of his client Roger and joined Robert and supported him against Roger,” apparently because Robert paid him a larger fee. Moreover, some cases involved even more egregious facts. For example, in several cases, the initial client complained that the lawyer failed to appear because the adverse party had bribed him. In 1291, John of Upton was imprisoned for a year and a day and fined for waiving his client’s opponent’s default as a result of the latter’s bribe and request, causing the client to lose the land. To make matters worse, John’s client, William of Brockhall, “asked him to act in this case in whatever way was best and most profitable for William and John had told him that he could safely go home and his affairs would proceed as well as if he were here in court in person.”

In implementing the loyalty duties, the cases also evidenced the sensitivity of medieval conflict of interest norms to the need to protect client confidential information. In 1282, the clients of William of Wells, a serjeant, complained to the King Bench justices that although they had retained and paid William, he failed to assist them. Moreover, “in deception of them, after he understood their counsel (“*consilium*”), he attached himself to the opposite side without their leave, reporting their counsel to the said opposite side.” In the 1292 Shropshire eyre, Robert of Munslow was jailed until he paid a fine because he had “gone over to her [his client’s] adversary and revealed her strategy and had then given counsel to [the adversary] against” the initial client. “*Consilium*” seems to be the word almost always used in the original text. Overall, it seems to be a fairly broad concept of confidential information. As such, it provided another rationale for the medieval prohibition of ambidexterity, reinforcing the basic loyalty norm.

Some of the ambidexterity complaints made in these local settings were part of a larger pattern of misconduct, most often involving allegations of conspiracy, champerty, and

maintenance. For example, in the 1293-94, Yorkshire eyre, the jurors charged Little Michael of Laton, a local serjeant, with ambidexterity. In the 1305 Hereford Trailbaston session, a number of local lawyers - John Lightfoot, Miles Pritchard, John Love, Nicholas of Hagley, John Grant of Marston, and John of Bradfield - were indicted for ambidexterity, which was part of a larger wrongful scheme of conspiracy or maintenance.

Before moving on to the next category of ambidexterity cases, it is probably useful to say a few words about the how these cases arose. There was no single process for involving the judicial system in these matters. Most often client victims brought the misconduct into the legal system either by requesting that the court discipline the lawyer or by seeking to impose civil liability on him for the victim's injury. In some cases, local jurors made a presentment or indictment against the lawyer although they may have been acting on information received from the victim. Occasionally, the conflict of interest surfaced in the context of other litigation such as subsequent litigation to which the client was a party or some phase of the underlying litigation in which the injured client was seeking to avoid the adverse result caused by the lawyer's misconduct. Also, the court, *sua sponte*, might impose discipline after learning of the ambidexterity.

2. Representation Adverse to a Former Client

Although there were relatively few cases involving a lawyer acting adverse to a former client, a sufficient number existed to establish that a medieval lawyer's duty of loyalty extended to former clients. For example, in 1292 John of Mutford, a serjeant, "was challenged" when he began to act for the earl of Norfolk against John Weyland, a former client, whom he had represented in related litigation in the King's Bench two years earlier. The Common Bench

precluded John from representing the earl and ordered him to represent his former client instead. Other ambidexterity cases involving former clients, like John of Mutford's case, required the court to determine the relationship between the earlier and current litigation. In the 1299 Cambridgeshire eyre, Thomas le Moyne, an attorney, acknowledged receiving a fee from a client, but argued that the subsequent litigation was unrelated. The jury agreed, finding Thomas had acted against someone else and not the former client. The court disagreed and determined that subsequent litigation was connected since it believed it was in substance adverse to the former client, stating "we understand this to be acting against one and the same person [the former client]." In extending the loyalty duty to Thomas' former clients, the court imprisoned him pending payment of a fine and suspended him for the remainder of the eyre.

In some cases it is difficult to determine whether the disloyalty is to a current or former client as illustrated by the 1282 case involving William of Wells, which may involve duties to a former client. William's clients claimed that they had retained him as their serjeant, but that after being paid, "in deception of them, after he understood their counsel, he attached himself to the opposite side without their leave, reporting their counsel to the said opposite side." William denied their allegations and claimed that he had agreed to represent the clients in a plea for a fee to paid at three terms. Although he acknowledged representing them in the first term, he claimed that the clients refused to pay him the remainder and said that they no longer needed his services. Thus, he argued that the nonpayment justified his conduct, in effect terminating the relationship; and he also denied representing the clients' opponents in the matter. The matter was submitted to a jury and there is no record of the resolution of the factual dispute. Thus, the courts recognized a loyalty norm arising out the "serjeant-client relationship" that obligated the lawyer not to

terminate representation prior to the conclusion of the litigation unless he was told he was no longer need or was not paid; and more generally not to represent the client's opponents without permission if he did leave the client's service.

Interestingly, in cases of John of Mutford, Thomas le Moyne, and William of Wells, the need to protect the former client's confidential information influenced the court's extension of the duty of loyalty to former clients. In John of Mutford's case, the court noted that John previously "was of counsel with him [the former client] and knows all their secrets." Similarly, in Thomas le Moyne's case, the court stated that "after she had shown you her counsel you left her and took a mark from" her adversary, in concluding that subsequent and prior litigation were connected. In William of Wells' case, the clients emphasized the disclosure of their confidences to their opponent.

In addition to challenging the relationship between the prior and subsequent litigation, another defense asserted by medieval lawyers charged with disloyalty to their former clients regarded the extent of their role in the representation. In 1300, Robert of Kelsey, a serjeant in the London courts, brought a defamation suit against his former client, who had accused him of ambidexterity. The client claimed that Robert knew his counsel, had taken a fee from him for acting in a related case, and should have been acting for him rather than against him in the present case. Although Robert acknowledged receiving money from the client in the prior litigation, he denied agreeing to act on the client's behalf, stating that he had acted only in challenging the jury at the request of the client's serjeant in the matter. Since the matter was settled, the issue regarding the extent of prior involvement necessary to actuate the duty of loyalty to a former client was not resolved. In the 1293 Staffordshire eyre, Richard of Loges's

client complained that Richard had taken a fee from him and then acted for his opponents against him. Richard asserted that he had taken no fee to assist the client, in effect claiming that he had never had an attorney-client relationship with the complainant. The jury agreed with Richard; and the court entered judgment in his favor and fined the complainant for making a false claim.

Finally, it is interesting to compare the remedies used in these former client cases with those imposed in cases of classic ambidexterity. Not surprisingly, given the contrast between the typical conduct in the two categories, the sanctions were less severe in the former client cases although the sample is much smaller. In John of Mutford's case, there is no evidence of any formal sanction; and the court, probably acting pursuant to its inherent power, simply ordered him to cease representing the new client and to represent instead his former client ("It was adjudged that he go to John"). In Robert of Kelsey's case, the parties settled and client withdrew the accusations and agreed not to repeat them. In Thomas le Moyne's case, although the court imposed formal discipline, the fine and brief suspension were less than that authorized by the Statute of Westminster I, chapter 29 and that imposed in most side switching cases. Paul Brand has suggested that the lack of severe sanctions in these cases was due to the newness of the norms regarding former clients. Although judges exercised substantial discretion in interpreting medieval statutes and often interpreted them expansively, the reluctance to impose significant sanctions in these cases may suggest that the duty of loyalty to former clients was not clearly envisioned by the Statute of Westminster I, chapter 29 and the London Ordinance of 1280.

3. Representation Adverse to a Current Client in Different Litigation

These types of cases were the second most numerous category of medieval conflict of interest, constituting about twenty-five per cent of the total and slightly more than half as many

as those involving switching sides in the same litigation. In the basic fact pattern, lawyer sued a client to collect fee arrearages pursuant to a retainer agreement with a client and the client defended the failure to pay was justified by the lawyer's representation of parties adverse to the client. Usually, the lawyer was a serjeant and the retainer a lifetime annuity with annual payments, evidenced by a written deed.

These cases did not involve the imposition of formal discipline, like those discussed above in which a lawyer could be imprisoned, fined, or disbarred for such conduct by the court. On the other hand, some kind of loyalty norm existed with respect to lawyers who entered these retainers. In general, these fee arrearage cases implied that a lawyer forfeited his right to the retainer by suing a client, who had entered such an arrangement with the lawyer, in cases both unrelated to the current representation of the client as well as adversity in a particular case where the client requested representation. This notion would represent a loyalty norm although more limited than the prohibition on classic ambidexterity.

A few cases will suffice to illustrate these general principles. In 1291, Alan Osemund, whom Robert de Say had retained for Alan's life for the annual fee of a robe worth twenty shillings, sued for two years arrearages. Robert acknowledged that the written retainer was his deed, but justified his refusal to pay on the ground that when Robert was sued in the earl of Oxford's court "Alan acted against Robert with his opponent and pleaded against him both there and elsewhere giving advice and assistance to his opponents." Similarly, in 1297, John FitzNeal sued the abbot of Bruern for six years arrearages and the abbot, although admitting the validity of the deed, denied liability, alleging that John had "acted . . . against him in a plea of trespass." Again in 1297, William Pakeman, who had sued numerous clients for arrearages, sued Ellis for

arrears and the latter, acknowledging the deed, defended on the ground that, although he asked William to defend him in a trespass case, “William left the counsel of Ellis and joined the side of his opponent John and pleaded with John against him in the same plea”. These retainer arrears cases indicated that a lawyer who appeared for the opponent of the client was no longer entitled to the annual payment under the annuity. Consequently, the retainers established a duty of loyalty to appear when requested and not to engage in representation adverse to the client even if the client had not requested representation in the matter, i.e. adversity in an unrelated matter or in different litigation.

Although the duty of loyalty in these cases was probably most often implicit, the annuities occasionally contained explicit language on this matter. Such was the case with Robert of Leicester, a counsellor, who promised in the late 13th century “not to give counsel to any of William’s [his client] adversaries” and to indemnify his client “if William should be undefended in any matter through failure or neglect.” Moreover, the retainer might detail further the specifics of this duty of loyalty. Some of the retainers explicitly created exceptions to this loyalty duty with respect to prior existing clients. For example, John de Lisle’s 1278 bond with William of Swinburne stated that John would faithfully represent William “with advice and assistance to the best of my ability . . . against all men in the world other than my chief lords to whom I am held in just the same way as to William and his heirs and to whom I was obliged before the making of this deed.” Similar language was contained in the 1278 deeds of Gilbert of Thornton and William of Kelloe. Moreover, in 1307, the Gloucester jurors acquitted William of Goldington of charges that he had acted against clients, whom he had agreed to counsel “whenever necessary,” since the agreement “excepted the clients who were already retaining him for a regular fee and that he had

long been in the service of John [the pre-existing client and complainants' opponent], receiving a fee from him." Thus, in general, this loyalty norm arose contractually and consensually and not by regulatory fiat.

4. Simultaneous Representation of Multiple Parties

Medieval norms did not apparently treat simultaneous representation of multiple parties as a conflict of interest. Although it was probably a fairly common practice, in none of the identified cases did the court or the clients charge the lawyers with ambidexterity or related misconduct. These cases cover a variety of fact patterns. Several cases involved simultaneous representation of plaintiffs. The 1282 case involving William Wells involved simultaneous representation of five plaintiffs, perhaps many of the men of manor of South Petherton, who sued the lord of the manor for demanding excessive "customs and other services." In 1340, Thomas of Knaresborough represented two knights in their claim for expenses in attending parliament. In the same year, four co-heirs retained Walter Golias to sue an assize of novel disseisin. In 1470, one attorney represented several plaintiffs who sued a jailer for allowing a judgment debtor to escape. Other cases involved multiple representation of defendants.

In none of these cases was there any indication of any ambidexterity problem because of the potential conflicts that might occur in simultaneously representing multiple parties.

Undoubtedly problems might arise, especially in the cases with criminal overtones. Moreover, in a 1339 case, no charges of ambidexterity arose even though the attorney made incompatible pleas for two defendants, which troubled the court, "That would be for a man to give himself the lie." However, in general, medieval loyalty norms did not treat simultaneous representation of multiple parties as a form of ambidexterity. In all likelihood, this benign treatment was because

the parties were not formally adverse and because the conflict of interest was only potential, not actual.

5. Conflict Between the Client's Interest and the Lawyer's Personal Interest

Although relatively few cases involving this type of conflict of interest problem were discovered, a sufficient number exist to suggest that these problems arose from time to time. Moreover, some of these cases suggest that such a conflict violated medieval loyalty norms although the evidence for this is mixed.

Several mid-15th century cases involved misuse of the client's confidential information for the lawyer's personal benefit. William Jenny's client complained in Chancery that Jenny, a serjeant, promised that he would assist the client in obtaining land that the client had already bought and substantially paid for, but instead, without the client's knowledge, acquired the land himself. The client said that the lawyer's conduct caused "great sorrow that we should be so untruly done to; and it doth us most evil where as we put all our trust, he soon hath deceived us." Similar accusations of personal profiting from knowledge of a client's affairs were made in Chancery against lawyers John Tunstead and Edmund Hasilwode. A 1305 complaint against Walter, son of Reginald Plash of Egerton, accused him of several types of misconduct including conspiracy, which may have involved a conflict between the complainant's (Alice) interest and Walter's personal interest as Walter ended up owning the land that Alice sought in litigation against her sister. Alice alleged that Walter supported the sister-defendant's plea in the matter and that while the plea was pending "enfeoffed" himself and sold the land in separate parcels to several others, depriving Alice of her right to the land. Although the outcome in these cases is not known, they suggest that discipline or some other remedy would be appropriate if the allegations

of misuse of the information were proved.

Overall, conflicts between the lawyer's personal interest and that of a client seem not to have been a significant medieval ethical problem. It is not even clear that medieval loyalty norms condemned such conduct. Although the information misuse cases may point in the direction of such a norm for lawyers, it is also possible, however, that a remedy in these cases might be justified on a broader agency principle, not distinctive to lawyers. Moreover, the fact that the client victims sought relief from Chancery may suggest that the focus was on undoing the consequences of the lawyer misuse of the information, attenuating the connection of these cases to the violation of loyalty norms for lawyers and professional discipline.

III. The Judiciary

A. Selection

The development of professional judges was one of the characteristics of the birth of the Common Law under Henry II. Initially, the royal judges were those who had been the king's councillors or other important advisors and not practicing lawyers. Although the first practicing lawyer to become a judge did so in early 13th century, it was not routine until the end of the century. At that time, the common practice was to select the King's Bench and Common Bench judges in almost all cases from those who had been serjeants at law. By the 14th century, it was not just a practice but a requirement that only serjeants could become King's Bench, Common Bench or assize judges. In the Exchequer, the Chief Baron was traditionally a serjeant, but not until the 16th century did it become a requirement for all the Barons. The requirement that judges be serjeants was not formally repealed until 1875.

The king appointed the judges and they served at his pleasure. They received salaries and

robes from the Crown although the most significant portion of their income came from court fees. In theory they were the king's servants and not independent of him, but in practice they were independent.

B. Judicial Ethics

There was no specific code of judicial ethics in medieval England or for that matter in any of the following centuries. There were, however, several notions of norms of judicial behavior and several instances of judicial discipline. One important source of judicial ethics was the oath of office. These oaths appeared in the 13th century and required the eyre justices to do justice, not discriminate between rich and poor and generally to judge to the best of their ability. A more detailed oath for royal justices in general appeared in 1290 as a result of the 1289 judicial scandal. In 1346 a statute, 20 Edw. III required that the justices obey an oath to equal law and execution of right to all subjects rich and poor, prohibited taking fees, robes or gifts from anyone other than the King other than food or drink of not great value, and prohibited giving counsel when King was a party. The oath was separately enacted as well. In 1384, another statute, 8 Rich. II, repeated the 1346 statute and specifically outlawed taking fees, gifts, etc and giving counsel when the King was a party. It also penalized false entries by judges.

Bracton believed judges should be disqualified on such grounds as kinship, enmity or friendship with a party or because he was in a subordinate status to a party or had acted as his advocate. However, he probably borrowed these notions from Roman law and there is no evidence of the application of such a broad rule in medieval sources. There was also a notion that one should not be a judge in his own cause. Its meaning and application to judges are unclear. Coke cited it for the notion that the King couldn't judge a dispute between the sovereign

and one of his subjects. It was most commonly applied with regard to grants of private franchise jurisdiction.

In the 13th and 14th century, royal justices were retained by private parties for legal advice and paid fees for their work. It may have continued into the 15th century altho the evidence of payment is less clear. But royal justices did give advice to private parties on legal matters, including cases that would come before such judges. In addition *ex parte* communications with judges were not uncommon.

There is evidence of judicial discipline as early as 1251, when Henry of Bath, formerly senior justice KB was the subject of a private appeal, charging him with a false judgment. The case involved giving a corrupt judgment in return for a grant of land in the 1248 Sussex Eyre. He entered a concord with the King for 2,000 marks. By 1253 Henry was back in service as justice and restored to his position on the KB. Three Justices of the Jews were convicted of misconduct in the late 13th century. In the 14th century, there were also a number of instances of judicial misconduct. In 1317, William Inge was dismissed as CJKB after being convicted of tampering with a writ regarding property in which he acquired an interest while the litigation was pending. In 1350, William Thorp, CJKB was convicted of taking bribes. Although sentenced to death, he obtained a reprieve and was appointed a Baron of the Exchequer in 1352. In 1341, Richard Willoughby, CJKB and 12 other judges were charged with acting fraudulently and unfaithfully in office. Willoughby was accused of ‘pervert[ing] and sell[ing] laws as if they were oxen or cows.’ The King indicted him and brought a civil case against him. Willoughby denied the charges and threw himself on the King’s mercy. He was pardoned in return for a fine of 1,200 marks. He never returned to the KB, but served as an assize and eyre judge and in 1343 was appointed as a

Common Bench justice and served until 1357.

Perhaps, the most celebrated occurrence of discipline was the judicial scandal of 1289, which provoked a major inquest, resulting in accusations of bribery and similar crimes. Consequently, all the King's Bench justices and all but one (4/5) of the Common Bench justices were removed. Most were imprisoned and paid fines. Several were rehabilitated and pardoned. Ralph de Hengham CJKB was one of the accused judges. Evaluating the seriousness of Hengham's offenses has engendered much discussion, particularly since one of his offenses may have been reducing a poor man's fine. Hengham was fined for these technical irregularities . . . in showing mercy to the poor. Brand has reviewed the evidence, concluding that Hengham's fine, the largest, was 10,000 marks and that he was convicted of actual misconduct, not reducing a poor man's fine -- 'a later myth.' After this scandal, the new judges were required to swear 'that they would take no bribe, nor money, nor gift of any kind from such persons as had suits depending before them,--except a breakfast, which they might accept provided there was no excess.' Hengham's independent attitude also may have influenced his dismissal. Edward I appointed him CJCB in 1301. Thomas Weyland, CJCB, was also removed in the 1289 judicial scandal after being indicted for harboring two murders. He pleaded guilty and took an oath of abjuration to leave England, making his exit barefoot and without any covering for his head.