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ARTICLES

THE AMBIDEXTROUS LAWYER: CONFLICT OF INTEREST AND THE MEDIEVAL AND EARLY MODERN LEGAL PROFESSION

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I. INTRODUCTION

Conflict of interest is one of the most common, important, and complex forms of modern lawyer misconduct, producing a substantial amount of litigation¹ and scholarly comment.² A series of well-defined conflict of interest

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1. See, for example, *SWS Financial Fund A v Salomon Bros, Inc.*, 790 F Supp 1392 (N D Ill 1992); *Gould, Inc. v Mitsui Mining & Smelting Co.*, 738 F Supp 1121 (N D Ohio 1990); *Pennwalt Corp. v Plough, Inc.*, 85 FRD 264 (D Del 1980); *Zuck v Alabama*, 588 F2d 1311 (5th Cir 1979); *IBM v Levin*, 579 F2d 271 (3d Cir 1978); *Westinghouse Co. v Kerr-McGee Corp.*, 580 F2d 1311 (7th Cir 1978); *Cinema 5, Ltd. v Cinerama, Inc.*, 528 F2d 1384 (2d Cir 1976); *Chugach Elec. Assn. v US District Court*, 370 F2d 441 (9th Cir 1966); *Grievance Comm. v Rottner*, 152 Conn 59, 203 A2d 82 (1964); *T.C. Theatre Corp. v Warner Bros. Pictures, Inc.*, 113 F Supp 265 (SDNY 1953). For an identification of numerous conflict of interest cases, see Geoffrey Hazard and Susan Koniak *The Law and Ethics of Lawyering* 580-728 and notes (Foundation 1990).

2. See, for example, 1 Geoffrey C. Hazard and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 221-382.1 (2d ed 1990); Robert Aronson, *Conflict of Interest*, 52 Wash L Rev 807 (1977); John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U Ill L Rev 741; Jonathan R. Macey and Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 Iowa L Rev 965 (1997); Nancy Moore, *Restating the Law of Lawyer Conflicts*, 10 Georgetown J Legal Ethics 541 (1997); Nancy Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients*, 61 Tex L Rev 211 (1982); Thomas D. Morgan, *Suing a Current Client*, 9 Georgetown J Legal Ethics 1157 (1996); Thomas D. Morgan, *Conflicts of Interest and the Former Client in the Model Rules of Professional Conduct*, 1980 Am Bar Found Res J 993; Charles Wolfram, *Former Lawyer Conflicts*, 10 Georgetown J Legal Ethics 677 (1997); Note, *Developments in the Law: Conflicts of Interest*, 94 Harv L Rev 1244 (1981). For a comprehensive list of the conflict of interest literature, see

rules has emerged in both the professional codes of conduct and the judge-made common law.³ The basic conflict of interest rule is that a lawyer may not represent a client “if there is a substantial risk that lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another client, a former client, or a third person” unless the consent of all necessary clients and other persons is obtained.⁴ However, some conflicts are not consentable.⁵ Preserving the confidentiality of client information and promoting a lawyer’s duty of loyalty to the client are the basic policies underlying these rules.⁶ Thus, conflict of interest is an important component of the modern law of lawyering as the current term used to encompass all the common law, statutes, and ethical rules applicable to lawyers.

Interestingly, conflict of interest was also an important aspect of the medieval law of lawyering. Not to be confused with the hitting skills of modern baseball players, medieval conflict of interest was commonly known as “ambidexterity.” Literally, it referred to lawyers, “ambidexters,” who took money with each hand from different parties to a dispute.⁸ There were two

Thomas D. Morgan and Ronald D. Rotunda, *Problems and Materials on Professional Responsibility* 202-06 (Foundation 5th ed 1991).

3. See American Law Institute, *Restatement of the Law Governing Lawyers (Third)*, §§ 201-16 (Proposed Final Draft, March 29, 1996) (“*Restatement*”); American Bar Association, *Model Rules of Professional Conduct*, Rules 1.7-1.12, 2.2 (1995) (“*Model Rules*”).

4. See *Restatement*, § 201 (cited in note 3). The prohibited conflict of an individual lawyer may be imputed to the other lawyers in a firm, who also may be disqualified from representing the client. See, for example, *Restatement* §§ 203-04; *Model Rules* 1.9, 1.10 (cited in note 3).

5. Moreover, the application of the conflict of interest prohibitions is sensitive to context. Conflicts arising in litigation present different problems than those arising in transactional representation and conflicts in criminal litigation raise specific concerns distinct from those in civil litigation. See, for example, *Restatement* §§ 209-12 (cited in note 3).

6. Although conflicts of interest are the subject of several disciplinary rules, enforcement of these norms probably occurs more commonly through motions to disqualify and increasingly in malpractice actions rather than in disciplinary proceedings.

7. See Paul Brand, *The Origins of the English Legal Profession* 122, 139 (Blackwell 1992) (“*Origins*”); Wilfrid R. Prest, *The English Bar, 1550-1700*, in Wilfrid R. Prest, ed, *Lawyers in Early Modern Europe and America* 65, 74 (Croom Helm 1981).

8. See *Black’s Law Dictionary* 79 (West 6th ed 1990); 1 Frederick Pollock and Frederic William Maitland, *The History of English Law* 216 (Cambridge 2d ed 1898). The terms “ambidexterity” and “ambidexter” were also used to refer to jurors and public officials that took bribes from both sides. See, for example, Earl Jowitt and Clifford Walsh, eds, 1 *The Dictionary of English Law* 110 (Sweet & Maxwell 1959); John Cowell, *The Interpreter, or Book Containing the Signification of Words* (Cambridge 1607); Percy Henry Winfield, *The History of Conspiracy and Abuse of Legal Procedure* 164 (Cambridge 1921). Fitzherbert discussed ambidextrous jurors in his renowned 1534 treatise. See Anthony Fitzherbert, *New Natura Brevium* 171H (1534). Professor Cam has identified some colorful examples of accusations of, and some convictions for, ambidexterity by public officials, including the mayor, in the early fourteenth century struggle for political power in London. See Helen M. Cam, ed, 1 *Eyre of London, 14 Edward II, A.D. 1321*, cxiii-cxv, 49, 52-53 (85 Selden Soc’y, 1968). For ambidexterity by a sheriff, who was convicted of the “particular

primary legal arenas in which ambidexterity appeared: lawyer discipline and civil liability to victims.

This article has several interrelated objectives. First, it will discuss these two ways in which conflict of interest manifested itself in legal proceedings. In so doing, the article will identify and analyze numerous specific instances of individual lawyers alleged to have been involved in this type of misconduct. Second, the article will examine the medieval regulation and its application by analyzing the different types of medieval conflicts, the specific conflict rules, the rationales revealed in the regulatory prohibitions and cases, and the discipline and other sanctions applied to this type of lawyer misconduct. This analysis will use the taxonomy of modern conflict of interest regulation to identify both similarities and dissimilarities between medieval conflict of interest regulation and its modern treatment. Such a comparison may provide historical insights for understanding the present.

II. AMBIDEXTERITY: AN OVERVIEW

Ambidexterity was an important and common form of medieval lawyer misconduct. This medieval conflict of interest was apparently sufficiently ubiquitous to prompt significant adverse public reaction. Sayles notes that there was “a monotonous outcry against the practice whereby the pleader insinuated himself into the confidence of one party and afterwards transferred his services to the other.”⁹ Christian stated that serjeants “were often accused of being ‘ambidexters’ and taking fees from both sides.”¹⁰ *The Mirror of Justices*, a late thirteenth century attack on judges and the legal system, said that a lawyer should be “suspended if he is attainted of receiving a fee from both sides in one cause.”¹¹ In 1343, in order to keep the peace and maintain the law, the justices

offence” and “was accustomed to do such things,” see Donald W. Sutherland, ed, 1 *Eyre of Northamptonshire, 3-4 Edward III, A.D. 1329-1330*, 237 (97 Selden Soc’y, 1983). Concern about this type of conduct manifested itself at least by the early thirteenth century. See 2 Henry de Bratton (Bracton), *On the Laws and Customs of England* 332 (Belknap 1968) (Samuel E. Thorne, trans). For some years, it was believed that Bracton was written between 1250 and 1258. More recent scholarship suggests that it was written earlier and by someone other than Henry de Bratton. See Paul Brand, *The Age of Bracton*, in John Hudson, ed, *The History of the English Law: Centenary Essays on “Pollock and Maitland”* 65-89 (Oxford 1996).

9. G.O. Sayles, ed, 1 *Select Cases in the Court of King’s Bench under Edward I* cviii & n 2 (55 Selden Soc’y, 1936).

10. Edmund B.V. Christian, *A Short History of Solicitors* 14 (Reeves & Turner 1896).

11. Andrew Horn, *The Mirror of Justices* 48 (c. 1290) (7 Selden Soc’y 1895) (William J. Whittaker, ed). In all likelihood, the *Mirror* is paraphrasing the London Ordinance of 1280 or interpreting the Statute of Westminster I, chapter 29. See notes 36-50 and accompanying text. Although this statement in the *Mirror* seems non-controversial and accurate, Maitland and others have questioned the accuracy of some of the statements in this controversial volume. See Maitland’s introduction to the *Mirror* at xxvi-xxvii, xxxvii-

were directed to inquire into all felonies and trespasses against the peace, identifying a number of specific offenses including ambidexterity.¹² In the sixteenth century, the most common complaints against barristers included taking money from both sides of a dispute and disclosure of a client's confidential information to opponents,¹³ and ambidexterity was "a fairly common" practice.¹⁴ This medieval image of conflict of interest persisted for hundreds of years as evidenced by an eighteenth century cartoon, "Councillor Double Fee," picturing a lawyer saying "Open to all Parties," and with each hand inscribed "Open to All," one hand extended to the plaintiff and the other to the defendant to receive each of their fees.¹⁵ Thus, conflict of interest was an important issue in the early law of lawyering as the legal profession initially emerged and subsequently developed.

Legal historians have generally concluded that a legal profession emerged during the reign of Edward I (1272-1307) and that this group of professionals included two types of lawyers: serjeants, who functioned as pleaders to appear in court and speak for their clients, and attorneys, who were present in court to handle procedural matters and manage their clients' litigation.¹⁶ During the

xxxviii. Despite some doubt, Andrew Horn has traditionally been considered the author of *The Mirror* (see id. at xiii-xxi, xlix-li), but more recent scholarship has denied Horn's authorship. See David Seipp, *The Mirror of the Justices*, reprinted in *Learning the Law: Teaching and Transmission of English Law 1150-1900* (1999) (Jonathan Bush & Alain Wijffels, eds).

12. See 2 *Rot. Parl.* 137, item 12 (17 Edward III, 1343).

13. See Prest, *English Bar* at 74 (cited in note 7).

14. See James Cockburn, *The Spoils of Law: The Trial of Sir John Hele, 1604* in Delloyd Guth and John McKenna, eds, *Tudor Rule and Revolution* 309, 322 (Cambridge 1982). Charges of deceiving their clients by colluding with their opponents were apparently part of the attack on lawyers during civil strife of the seventeenth century and the associated law reform efforts directed at the legal profession. One lawyer defender of the profession considered such attacks untrue, libelous, and "the inventions of discontented clients." See Donald Veall, *The Popular Movement for Law Reform 1640-1660* 210 (Oxford 1970).

15. See James Oldham, 1 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 72 (North Carolina 1992). The cartoon depicted Fletcher Norton, a prominent barrister and crown lawyer, whose nickname was "Sir Bull Face Doublefee." See id. at 68, 73.

16. Paul Brand's recent book is the most significant and comprehensive discussion of the profession's emergence. See Brand, *Origins* (cited in note 7). Other books and articles discussing the development of the English legal profession include John H. Baker, *An Introduction to English Legal History* 177-99 (Butterworths 3d ed 1990) ("Introduction"); John H. Baker, *The Legal Profession and the Common Law: Historical Essays* 75-124 (Hambledon 1986); John H. Baker, *The Order of Serjeants at Law* 8-27 (Selden Soc'y 1984); Michael Birks, *Gentlemen of the Law* 10-67 (Stevens 1960); C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The "Lower Branch" of the Legal Profession in Early Modern England* (Cambridge 1986); Christian, *History of Solicitors* 1-33 (cited in note 10); Herman Cohen, *A History of the English Bar and Attornatus to 1450* 112-223, 277-341 (Sweet & Maxwell 1929); William Holdsworth, 2 *A History of English Law* 226-31, 311-33, 484-512 (Little, Brown 2d ed 1924); 6 id. at 431-99; Eric W. Ives, *The Common Lawyers of Pre-Reformation England* (Cambridge 1983); Harry Kirk, *Portrait of a Profession: A History of the Solicitor's Profession, 1100 to the Present Day* 1-21 (Oyez 1976); S.F.C. Milsom, *Historical Foundations of the Common Law* 37-59 (Butterworths 2d ed 1981); Theodore F.T. Plucknett, *A Concise History of the Common Law* 215-30 (Little, Brown 5th ed 1956); 1 Pollock and Maitland, *History* 211-20

fifteenth, sixteenth, and seventeenth centuries, the legal profession continued to develop. The Inns of Court assumed a central role in legal education.¹⁷ Barristers appeared as a new name or form of pleader.¹⁸ Local practitioners, a distinct component of the profession in the initial period,¹⁹ continued for a period, but then declined in importance.²⁰ Moreover, the significant use of lawyers reflected the increase in litigation.²¹ In addition, the complaints about lawyer misconduct continued.²² As the legal profession emerged at the end of the thirteenth century and during the next centuries, several statutes and ordinances were enacted to regulate lawyer misconduct, including conflict of interest.²³ In addition, judicial and other records reveal the various instances in which the legal system confronted conflict of interest.

(cited in note 8); Paul Brand, *The Origins of the English Legal Profession*, 5 L & Hist Rev 31 (1987). Robert Palmer has asserted a somewhat different theory regarding the origin of the English profession that placed heavy emphasis on the use of lawyers in the county and local courts in the twelfth century. See Robert C. Palmer, *The County Courts of Medieval England 1150-1350* 89-138 (Princeton 1982); Robert C. Palmer, *The Origins of the Legal Profession in England*, 11 Irish Jurist 126 (1976); Robert C. Palmer, *County Year Book Reports: The Professional Lawyer in the Medieval County Court*, 91 English Hist Rev 776 (1976). Brand rejects this theory. See Brand, *Origins* at 83-84 (cited in note 7); Brand, *Origins of the English Legal Profession*, 5 L & Hist Rev 31 at 32-34, 44 (1987). Although these theories are not mutually exclusive and could describe parallel developments, the difference inheres in identifying the primary influence on the emergence of the profession. Brand and others have focused on the royal courts and Palmer has emphasized the county courts. Palmer has also suggested that professional lawyers appeared earlier, perhaps even in the twelfth century.

17. See, for example, Baker, *Introduction* at 182-85 (cited in note 16); Baker, *The Legal Profession and the Common Law* at 7-23 (cited in note 16); Holdsworth, *2 History of English Law* at 493-512 (cited in note 16); Wilfrid R. Prest, *The Inns of Court under Elizabeth and the Early Stuarts 1590-1640* (Rowman & Littlefield 1972).

18. See, for example, Baker, *The Legal Profession and the Common Law* at 75-123 (cited in note 16); C.W. Brooks, *The Common Lawyers in England, c. 1558-1642* in Prest, ed, *Lawyers in Early Modern Europe and America* at 42, 53-55 (cited in note 7); Prest, *The English Bar 1550-1700* in id at 65; Wilfrid R. Prest, *The Rise of Barristers: A Social History of the English Bar 1590-1640* (Clarendon 1986); Veall, *Popular Movement for Law Reform* at 44-51 (cited in note 14).

19. See Palmer, *County Courts of Medieval England* at 89-112 (cited in note 16). See generally Palmer, 11 Irish Jurist 126 (cited in note 16); Palmer, 91 English Hist Rev 776 (cited in note 16).

20. See Brooks, *Common Lawyers* in Prest, ed, *Lawyers in Early Modern Europe and America* at 45-53 (cited in note 7). The local lawyers may or may not have practiced also in the royal courts, may have been less formally divided between the upper and lower branches of the profession, and may have been on the fringes of the profession or sometimes amateurs. See id.

21. See, for example, Brooks, *Pettyfoggers and Vipers of the Commonwealth* at 48-131 (cited in note 16); C.W. Brooks, *Interpersonal Conflict and Social Tension: Civil Litigation in England, 1640-1830* in A.L. Beier, David Cannadine and James M. Rosenheim, eds, *The First Modern Society: Essays in English History in Honour of Lawrence Stone* 357-98 (Cambridge 1989).

22. See, for example, Veall, *Popular Movement for Law Reform* at 200-11 (cited in note 14); Eric Ives, *The Reputation of the Common Lawyers in English Society, 1450-1550*, 7 U Birmingham Hist J 130 (1961).

23. An earlier article examined in comprehensive detail the history of the regulation of the English medieval legal profession. See Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 Syracuse L Rev 1 (1998).

III. AMBIDEXTERITY IN ACTION: THE LEGAL IMPLICATIONS OF CONFLICT OF INTEREST

As indicated, conflict of interest had two implications for the medieval legal system. Most importantly, there were a large number of complaints about ambidextrous lawyers and requests for punishment. In fact, numerous lawyers who engaged in conflicts of interest were disciplined pursuant to statutes or by judges acting upon their inherent power of over lawyers. Although lawyer discipline was the most normal remedy for ambidexterity, the judicial records also reveal attempts, sometimes successful, by victims of ambidexterity to recover damages for their injuries.²⁴

A survey of a large volume of primary and secondary sources sheds light on these two legal implications of medieval conflict of interest. The primary sources include a large volume of published medieval cases and other judicial records,²⁵ and numerous unpublished original texts and translations of thirteenth and fourteenth century Common Bench, King's Bench, Eyre cases, which Dr. Paul Brand made available to me.²⁶ Two types of secondary sources are also important. One type is older works, primarily seventeenth and eighteenth century abridgements and treatises.²⁷ The other type consists of more recent scholarship treating the history of the English legal profession, particularly that of Paul Brand, the noted medieval scholar and expert on the history of legal profession, and John Baker, the prolific and leading legal

24. Another important legal implication of conflict of interest was defamation suits by lawyers accused of being ambidexters. This litigation began in the early sixteenth century and increased in the seventeenth century. This topic will be dealt with in a separate, subsequent article.

25. There are two major sources: the Selden Society materials and two series of the Year Books. I reviewed 80 of the 112 currently available Selden Society volumes. These volumes included primarily King's Bench, Exchequer Chamber, Star Chamber and Chancery cases; Year Books, Eyre proceedings and early reports. One Year Book series, commonly known as the Rolls Series, contains 19 volumes, covering the later years (1292-1307) of Edward I's reign and the second decade (1338-47) of Edward III's reign. The Selden Society volumes contain the Year Books covering the first twelve years (1307-19) of Edward II's reign. The other Year Book series, published by the Ames Foundation, contains eight volumes and covers a good portion of the first twelve years (1378-79, 1382-90) of Richard II's reign. The Year Books both preceded and extended beyond the years covered by these volumes. Many scholars have discussed their origins, functions and nature. See, for example, Baker, *Introduction* at 204-07 (cited in note 16); Percy H. Winfield, *The Chief Sources of English Legal History* 158-83 (Harvard 1925).

26. This voluminous information included conflict of interest cases in addition to those that I had identified through other sources as well as further information on cases already identified. These plea roll transcriptions and research notes were provided to me in three installments, which I have designated PB1, PB2 and PB3, which are on file with the author. I am substantially in his debt for this gracious and extensive assistance.

27. These works included Matthew Bacon, *A New Abridgement of the Law* (A. Strahan 7th ed 1832) (first published 1736-40); John Comyns (died 1740), *A Digest of the Laws of England* (A. Strahan 5th ed 1822); William Sheppard, *Actions upon the Case for Deeds* (1663); Charles Viner, *General Abridgment of Law and Equity* (Robinson et al 2d ed 1791-95); Anonymous, *The Impartial Lawyer* (J. Nutt 1709).

historian.²⁸ In total, this search identified about 80 instances of ambidexterity in action.²⁹

Certain ambiguities arise regarding these cases, at least three of which are important to this article's objectives. First, the outcome of the case is not always evident. In many cases, especially in the more formal proceedings in the Common Bench and King's Bench, there are disputed issues of fact whose resolution is not revealed because it would be subsequently determined by a jury in the appropriate geographical location. Second, it is not always possible to determine what type of lawyer was involved or whether the matter concerned a professional lawyer. Some cases clearly involve either a serjeant-pleader (or in later cases a barrister) or an attorney, the two primary types of professional lawyers.³⁰ Other cases, however, involved local lawyers or counsellors whose specific classification is not known,³¹ and others might have involved amateurs functioning on the fringes of the legal profession. Finally, in cases of lawyer discipline, the basis of the punishment is frequently indeterminable. Lawyers could be punished under several statutes as well as pursuant to inherent judicial power irrespective of a specific statute; and the many decisions do not cite a specific statute as authority for the imposition of sanctions, although the record may offer some evidence for identifying the legal basis for the discipline. More generally, the modern writer must be careful in unduly emphasizing positive sources of law such as statutes and cases as the sole or primary source of doctrine and in underemphasizing commonly held beliefs about the legal system and its operation as an important source.³²

28. See generally the sources cited in note 16.

29. More extensive review of the original plea rolls likely would have produced more cases. Paul Brand's research and the materials that he provided to me (see note 26) certainly would indicate such. Nevertheless, the identified cases are quite sufficiently numerous and varied to provide adequate evidence of medieval conflicts of interest and norms. Moreover, there is sufficient repetition of instances of the conflicts of interest to establish patterns of behavior and their legal treatment. Thus, the 80 or so cases identified establish an appropriate data base for this article's purposes.

30. See note 16 and accompanying text.

31. See Baker, *The Legal Profession and the Common Law* at 108 (cited in note 16); Prest, *The English Bar* in Prest, *Lawyers in Early Modern Europe and America* at 65 (cited in note 7).

32. See John H. Baker, *Why the History of English Law Has Not Been Finished* (Downing Professor Inaugural Lecture, Oct 14, 1998) (Cambridge 1999) ("Lecture"). Professor Baker poses the question of "what is law for the purposes of legal history." After discussing judicial sources such as the plea rolls and reports, he concluded that "it might be better to think of the medieval common law as a body of received wisdom... 'the collective wisdom of the learned,' ... 'common learning.'" See Baker, *Lecture* at 6-8, 23-27. David Millon, *Positivism in the Historiography of the Common Law*, 1989 Wis L Rev 669 ("Positivism"). Although Professor Millon discusses the normative judgments of juries, his comments seem relevant also to judicial decisions. He noted that "[m]uch of the best legal history of premodern England rests on implicit but largely unexamined assumptions about theoretical foundations of the common law." Describing these assumptions as "positivist" in the sense of modern legal theory, he "question[s] the validity of positivist assumptions about the premodern common law...." Although he concludes that "the theoretical

A. LAWYER DISCIPLINE

Although the preferred approach to discussing the discipline of medieval lawyers might be to use the conflict of interest categories employed by medieval texts, such an approach is not possible as there is no real evidence of medieval classification. Yet, the analysis needs some organizing principle. Therefore, this article classifies medieval conflict cases in categories familiar to modern students of legal ethics: simultaneous representation of current clients adverse in the same matter, representation adverse to former client, representation adverse to current client on unrelated matter, representation of potentially adverse multiple plaintiffs and defendants, and conflict between client's interest and the lawyer's personal interest.³³ Although there is some hazard in using a modern taxonomy for discussing medieval problems,³⁴ these categories match to some extent the medieval cases. In addition, these categories are instructive in comparing medieval and modern concerns, norms, and prohibitions.³⁵

foundations of the premodern system were nonpositivist," he identifies the need to "appreciate premodern legal theory" and to understand accurately "the theoretical and ideological context in which [our predecessors] lived and worked." However, he does not specifically delineate an appropriate premodern legal theory. See Millon, *Positivism*, 1989 Wis L Rev at 669-70, 672, 713-14. I am grateful to Professor James Brundage for emphasizing this caveat.

33. Conflicts of interests involving the movement of government attorneys to or from private practice or government, or vice-versa, a familiar modern conflict problem (see *Restatement* § 214; *Model Rules* 1.11), are not pertinent to the medieval period and therefore also will not be discussed. But two related contexts will be noted briefly. One involves private lawyers who are also legislators and the other involves the crown's legal representatives acting adverse to the crown. See notes 63-67, 158-71 and accompanying text.

34. See Daniel Boorstin, *Tradition and Method in Legal History*, 54 Harv L Rev 424, 424-28 (1941). More generally, the utility of modern legal conceptions to study the past may implicate more complex questions regarding modern legal scholarship and legal history. See Stuart Banner, *Legal History and Legal Scholarship*, 76 Wash U L Q 37 (1998).

35. Conflict problems arising from imputed disqualification will not be discussed as there is little evidence of the existence of law firms during the medieval period. Serjeants, like modern barristers, generally did not practice in firms. However, Maitland believed that the counters, another name for serjeants, who appeared at the court of the St. Ives Fair in 1275, were practicing in partnership. See 1 Pollock and Maitland, *History of English Law* at 217 (cited in note 8); Frederic W. Maitland, 1 *Select Pleas in Manorial and other Seigneurial Courts* 155, 159-60 & 159 n 1 (2 Selden Soc'y 1889). Whether attorneys practiced in partnerships is unclear, but it seems quite uncommon. Holdsworth noted some evidence of profit sharing by attorneys in the seventeenth century. See Holdsworth, 6 *History of English Law* at 453 (cited in note 16). Solicitors, their successors, apparently did not organize in firms until the eighteenth century, perhaps as attorneys and solicitors were merging as a profession. Early partnerships were very small and based on family relationships; common and larger partnerships did not emerge until the twentieth century. Early attorneys had no permanent physical offices and were mobile. See Kirk, *Portrait of a Profession* at 116-17 (cited in note 16).

1. The Regulations

Two statutes, one ordinance, and inherent judicial power could have been used to discipline lawyers for engaging in conflicts of interest. 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. Before turning to particular instances of conflict based discipline, a brief discussion of these four possible legal authorizations for disciplining ambidextrous lawyers is useful.

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

This statute was one of the numerous significant statutes enacted during the reign of Edward I.³⁶ Chapter 29 was one of a series of sections directed at various forms of official misconduct and problems in the late thirteenth century justice system.³⁷ Chapter 29 targeted lawyers, proscribing “deceit or collusion” in the “king’s court” that deceived the court or beguiled the court or a party.³⁸ 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.³⁹

The courts interpreted the prohibition on “deceit and collusion” very broadly.⁴⁰ It was applied to conflicts of interest as well as many other forms of

36. Other important statutes included the Statutes of Gloucester (1278), the Statute of Mortmain (1279), the Statute of Merchants or Statute Acton Burnell (1283), the Statutes of Wales (1284), the Statutes of Westminster II (1285), the Statute of Winchester (1285), the Statute of Merchants (1285), the Statute Quia Emptores (1289-90), the Statutes Quo Warranto (1289-90), the reenactment (fifth and first public enrolling) of Magna Carta (1297), the Articuli Super Cartas (1300) and the Statute of Carlisle (1306-07). See, for example, Holdsworth, 2 *History of English Law* at 299-304 (cited in note 16); Plucknett, *Concise History of the Common Law* at 27-31 (cited in note 16) (“one of the greatest outbursts of reforming legislation in English history”).

37. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 49-63 (cited in note 23).

38. See Statutes of Westminster I, chapter 29, 1 *Statutes* at 34 (1275). The prohibition was expressly directed at any “serjeant-countor or other” and the latter was interpreted to include attorneys. See Brand, *Origins* at 120, 128-36 (cited in note 7); Sayles, ed, 1 *Select Cases in the Court of King’s Bench* at cvi n 8 (55 Selden Soc’y) (cited in note 9); Edward Coke, 1 *Second Part of the Institutes of the Laws of England* 214 (William S. Hein 1986) (reprint of 1797 ed) (first published 1642); Edward Coke, *Fourth Part of the Institutes of the Laws of England* 100-02 (William S. Hein 1986) (reprint of 1797 ed) (first published 1644).

39. The same penalties were applied to pleaders and attorneys despite the difference in statutory language. See text accompanying note 16.

40. Brand concludes that Chapter 29 enacted “no more than a vague and unspecific obligation,” authorizing the courts to develop more specific behavioral norms and that the courts gave “deception” “a

lawyer misconduct.⁴¹ This regulation, the first and probably most significant regulation of lawyer conduct,⁴² was probably the primary and most important conflict of interest prohibition. Although, as mentioned earlier, it is difficult often to identify the legal basis of the punishment, Chapter 29 was probably applied to lawyer misconduct with relative frequency for a long time.⁴³

b. 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.⁴⁴ 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.⁴⁵

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 countor is . . . to take money from both parties in any action.”⁴⁶ The Ordinance also subjected lawyers to discipline for

fairly broad interpretation.” See Brand, *Origins* at 127, 135 (cited in note 7). In general, medieval judges used considerable discretion in interpreting statutes. See Theodore F.T. Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* 40-163 (Cambridge 1922); G.O. Sayles, ed, 3 *Select Cases in the Court of King’s Bench under Edward I xi-xlii* (58 Selden Soc’y 1939).

41. Other forms of misconduct to which the statute was applied included forgery of writs, altering, damaging or removing official documents; false statements to the court, the client, the opponent, and in pleadings and other documents; acting as an attorney without proper authority, or continuing to act after removal; failure to act or premature termination of representation; antagonizing judges by unconvincing arguments, overzealousness, or not speaking in good faith; defective pleadings and documents; unjustified initiation or continuation of litigation, and repleading issues; and misconduct in the lawyer’s own litigation or business dealings. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 60-61 & n 260, 123-30 (cited in note 23).

42. See id at 62-63.

43. One commentator believed that it was still in force in 1908. See John C. Fox, *The King v. Almon I*, 24 *L Quarterly Rev* 184, 193 n 3 (1908). It was apparently not specifically repealed until 1948. See *Chronological Table of the Statutes: Part 1: Covering the Period from 1235 to the end of 1963* 10 (The Stationery Office Ltd 1997).

44. See Henry T. Riley, ed, 2 *Munimenta Gildhalle Londoniensis: Liber Custumarum, Part 1* 280 (Longman, Green 1860) (compiled early fourteenth century). For an English translation, see Henry T. Riley, ed, 2 *Munimenta Gildhalle Londoniensis: Liber Custumarum, Part 2* 595 (Longman, Green 1860). Like the Statute of Westminster I, Chapter 29, it applied to both pleaders and attorneys.

45. This reference presumably was to Chapter 29 of the Statute of Westminster I. See Brand, *Origins* at 137 (cited in note 7).

46. Riley, ed, 2 *Munimenta Part 1* at 281-82 (Law French) (cited in note 44) and Riley, ed, 2 *Munimenta Part 2* at 596 (English) (cited in note 44). James Brundage believes that the London Ordinance adopted “long-standing disciplinary practices current in the ecclesiastical courts...and well-settled doctrine in canon law ... before 1280.” He believes the London common lawyers would have been aware of these

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.”⁴⁷ 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.”⁴⁸

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.⁴⁹ More generally, very little evidence exists regarding the actual application of the Ordinance to regulate the various forms of misconduct that it enumerated.⁵⁰

c. 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.”⁵¹ In addition, the statute required disbarment from the king’s courts of any attorney “found in any default of record, or otherwise.”⁵²

aspects of canon law because of the ecclesiastical courts in London. See letter from James Brundage to Jonathan Rose (July 14, 1999) (on file with author).

47. Riley, ed, 2 *Munimenta*, Part 1 at 282 (Law French) (cited in note 44) and Riley, ed, 2 *Munimenta*, Part 2 at 597 (English) (cited in note 44). The statute also defined the pleader’s function, banned defamatory pleading, regulated the lawyer’s physical location in court, prohibited misconduct affecting the interests of the lawyer’s clients, such as incompetence and negligence, and generally protected the integrity of the court. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 63-66 (cited in note 23).

48. Riley, ed, 2 *Munimenta*, Part 1 at 282 (Law French) (cited in note 44); Riley, ed, 2 *Munimenta*, Part 2 at 597 (English) (cited in note 44). Although somewhat unclear, this probably meant that the lawyer must pay double damages to the client (twice the client’s advance) and not be heard against the client in that case. Medieval statutes commonly included provisions requiring double or treble damages. See, for example, Statute of Westminster I, Chapters 26 (double damages for extortion of bribes by the king’s officers and sheriffs) and 27 (treble damages for extortion by clerks of court), 1 *Statutes* at 33.

49. In Dr. Brand’s review of the records of the London courts from about 1290-1307, he found at least one instance of disciplining a lawyer for conflict of interest pursuant to the Ordinance. See Brand, *Origins* at 137-38 (cited in note 7).

50. Brand discovered only three cases, two involving serjeants and one an attorney. See *id.* However, the customary law of London and the other boroughs evidenced the concern of local courts with lawyer misconduct. See Mary Bateson, ed, 2 *Borough Customs* 10-16, 43-45 (21 *Selden Soc’y* 1906).

51. 4 Henry IV, ch 18, 2 *Statutes* 138-39 (1402).

52. *Id.* at 139.

It seems unlikely that this statute was a significant regulation of lawyer misconduct. Its primary objective appears to have been to reduce the damage caused by the “great number of attornies, ignorant and not learned in the law.”⁵³ 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.

d. Inherent Judicial Power

There is no doubt that the courts had inherent power to discipline their own officers, including lawyers, and that this power was closely related to their power to punish summarily for contempt.⁵⁴ Prior to the passage of the aforementioned regulatory statutes, judges had fined (“amerced”) lawyers pursuant to their inherent power,⁵⁵ and this form of judicial discipline of lawyers continued after the passage of the statutes.⁵⁶ Brand, Palmer, Sayles, and Bolland have uncovered a number of instances of this type of lawyer discipline in both the royal and local courts.⁵⁷ As the following discussion of the cases indicates, inherent judicial power was used to punish ambidexterity.⁵⁸

53. *Id.* See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 95-99 (cited in note 23).

54. See Holdsworth, 3 *History of English Law* at 391-92 (cited in note 16); John C. Fox, *The Summary Process to Punish Contempt I*, 25 *L Quarterly Rev* 238, 244-45 (1909); John C. Fox, *The Summary Process to Punish Contempt II*, 25 *L Quarterly Rev* 354, 361-62, 366 (1909); Fox, 24 *L Quarterly Rev* at 193-94 (cited in note 43); Fox, *The King v. Almon II*, 24 *L Quarterly Rev* 266, 267, 276-77 (1908). Some historians believe that this power was based on “immemorial” custom or usage. See *id.* at 278; Fox, 24 *L Quarterly Rev* at 193 (cited in note 43).

55. See Brand, *Origins* at 47-48, 55-56 (cited in note 7); Palmer, 11 *Irish Jurist* at 133 (cited in note 16); Baker, *Order of Serjeants at Law* at 9 (cited in note 16); Holdsworth, 2 *History of English Law* at 251 (cited in note 16); Plucknett, *Statutes and Their Interpretation* at 155 (cited in note 40).

56. *Broke v Taylard*, reported in F.W. Maitland and G.J. Turner, eds, 4 *Year Books: 3 & 4 Edward II, 1309-11* 194-95 (22 *Selden Soc’y* 1907), dramatically reveals the exercise of that power. After the attorney told the judge that he had no bill, but wanted a summons, the following colloquy occurred:

[Judge] Stanton [to the attorney]: You wicked rascal, you shall not have it! But because you, to delay the woman from her dower, have vouched and have not sued a writ to summon your warrantor, this Court awards that you go to prison.

Attorney: I pray that I may find mainprise [bail].

Stanton: We will have no mainprise, but stay [in gaol] until you are well chastised.

Turner comments on the case in his introduction. See *id.* at xl-xli.

57. See Brand, *Origins* at 123-36, 138-41 (cited in note 7); Palmer, 11 *Irish Jurist* at 128-29, 137-39 (cited in note 16); G.O. Sayles, ed, 5 *Select Cases in the Court of King’s Bench under Edward III* xii, lxii, cxviii-cxix, cxxv-cxxvi, 45-47, 103-05 (76 *Selden Soc’y* 1958); Sayles, ed, 3 *Select Cases in the Court of King’s Bench* at 57-59 (cited in note 40); G.O. Sayles, ed, 2 *Select Cases in the Court of King’s Bench under Edward I* cliv-clv, 33-34, 40-41 (57 *Selden Soc’y* 1938); Sayles, ed, 1 *Select Cases in the Court of King’s Bench* at cii-ciii & n 6, cvi n 8, 80-81 (cited in note 9); G.J. Turner and W.C. Bolland, eds, 19 *Year Books: 9 Edward II, AD*

e. Other Related Prohibitions

Two other types of lawyer misconduct that might be said to involve conflicts of interest deserve some mention. The first type was lawyers' misuse of their position as members of the House of Commons to advance the private interests of their clients. A 1372 Ordinance was intended to prohibit currently practicing lawyers from serving as members of parliament.⁵⁹ The rationale for the prohibition was a widely held view that lawyers were using the official petitioning machinery of Commons, the "commons petition," to seek solutions for the personal grievances of their clients.⁶⁰ This Ordinance and a Commons Petition of the same year stated that the lawyers "do procure and cause to be brought into Parliament many petitions in the name of Commons, which in no way relate to them, but only the private persons with whom they engage."⁶¹

1313-16 xlvi (45 Selden Soc'y 1929); W.C. Bolland, ed, *Select Bills in Eyre, AD 1292-1333* xliii-xlvi, 3-4, 27-28, 52-53, 59-60, 68-69, 118-19 (30 Selden Soc'y 1914).

58. The use of the inherent judicial power over lawyers was not limited to discipline. Control over admission of serjeants to the Common Bench, perhaps the most important court for civil disputes, was pursuant to this power, not the regulatory statutes and ordinances as was the case with other controls of lawyer admission. See Brand, *Origins* at 106-10, 115-17 (cited in note 7); Baker, *Order of Serjeants at Law* at 8-27 (cited in note 16); Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 63-70, 73-79, 87-90 (cited in note 23). Moreover, by the sixteenth century, courts issued formal orders regarding the admission and conduct of attorneys. See, for example, Brooks, *Pettyfoggers and Vipers of the Commonwealth* at 117, 119, 129, 137-38, 140, 142-45, 152, 188-89 (cited in note 16).

59. See 2 *Rot. Parl.* 310, item 13, (46 Edward III, 1372) and the modern translation in 1 *Statutes of the Realm* at 394. The regulation actually precluded lawyers from being knights of the shire, which had the practical effect of disabling them from being members of parliament. There is a possibility that the statute or ordinance was not in fact enacted, but may have been only a common petition and royal response that was included in the statutory compilation.

60. See H.G. Richardson and G.O. Sayles, eds, *The English Parliament in the Middle Ages XXI* 12, XXIV 34-35 (Hambledon 1981); A.L. Brown, *Parliament, c. 1377-1422* in R.G. Davies and J.H. Denton, eds, *The English Parliament in the Middle Ages* 109, 126-27 (Pennsylvania 1981); Howard L. Gray, *The Influence of the Commons on Early Legislation: A Study of the Fourteenth and Fifteenth Centuries* 445 (Harvard 1932); William Stubbs, 2 *The Constitutional History of England: Its Origin and Development* 445 (Clarendon 4th ed 1896); Doris Rayner, *The Forms and Machinery of the "Common Petition" in the Fourteenth Century, Part I*, 56 *English Hist Rev* 198, 206 (1941); Doris Rayner, *The Forms and Machinery of the "Common Petition" in the Fourteenth Century, Part II*, 56 *English Hist Rev* 549, 569 (1941).

61. See 2 *Rot. Parl.* 310, no 13 (cited in note 59); 1 *Statutes of the Realm* at 394 (cited in note 59). Although lawyer members might have manipulated "commons' petitions for their own advantage and did not always represent the common interest," they were not the only members that had clients. Others included "persistent litigants or maintainers of complaints or those who live by such gains ... paid supporters of other men's quarrels, rogues ... whose practice of maintenance was coming to threaten parliament just as it already threatened the king's other courts." See J.R. Maddicott, *Parliament and the Constituencies, 1272-1377* in Davies and Denton, eds, *The English Parliament in the Middle Ages* at 61, 76-77 (cited in note 60). For similar reasons, attempts to exclude lawyers as members of parliament again appeared as an aspect of the seventeenth century civil strife and law reform movement. See Veall, *Popular Movement for Law Reform* at 105, 203-206 (cited in note 14). In Veall's view, "[t]he great number of lawyers in Parliament prevented law reform measures being enacted" and confirmed the reformers' fears and the rationale of the proposed

This medieval regulation need not be discussed further for several reasons.⁶² First, abuse of the parliamentary process by lawyers does not involve conflicts arising by virtue of representing clients with conflicting interests, but is really part of a broader problem regarding governmental integrity and openness.⁶³ Moreover, this regulation was not a basis for disciplining medieval lawyers. Finally, the 1372 Ordinance seems to have had little effect as not long after its enactment, membership in the House of Commons included a significant number of lawyers.⁶⁴

The second type of related regulation involved the numerous prohibitions on champerty and maintenance that parliament adopted, beginning with the Statute of Westminster I⁶⁵ and continuing during the medieval period.⁶⁶

prohibition. *Id.* at 230. More generally, many lawyers were opponents of the law reform movement. See *id.* at 122-26, 228-32.

62. This form of medieval misconduct certainly anticipates modern concerns with misuse of official influence on executive and legislative entities, although modern prohibitions more commonly focus on abuse of influence by former legislators and other former officials, including government lawyers. See, for example, 18 USCA § 207 (1994 & Supp 1997); *Model Rules* 1.11 (cited in note 3); *Restatement* § 214 (cited in note 3). The 1989 amendments to the federal criminal prohibition extended the prohibition to members of Congress and officers and employees of the legislative branch. See 18 USCA §§ 207 (e), 208 (1994 & Supp 1997). Similar concerns have also been raised about current legislation. See Morgan and Rotunda, *Problems and Materials on Professional Responsibility* at 183-95 (cited in note 2). This type of misconduct should be distinguished from the practice of court officials advising and assisting litigants, which was common in the medieval era. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 11 & n 35 (cited in note 23); e-mail from James Brundage to Jonathan Rose (June 1, 1999) (on file with author).

63. Other medieval statutes were also concerned with other officials misusing their positions. For example, the statute of 4 Henry IV discussed above had a conflict of interest provision, barring certain officials from acting as attorneys in any franchise or bailiwick in which they were an official. See 4 Henry IV, ch 19 (1402), 2 *Statutes* at 139. In addition, some believe that clerks abused their position in aiding private clients. See, for example, Sayles, ed, 1 *Select Cases in the Court of King's Bench* at lxxxvi n 5, lxxxvii-lxxxix, xcvi-c (cited in note 9); Sayles, ed, 5 *Select Cases in the Court of King's Bench* at xii-xiii & n 4 (cited in note 57). Also, a 1393 petition requested that the right of clerks to practice as attorneys be severely restricted as they used their positions to falsify records for their clients. See 3 *Rot. Parl.* 306, item 28 (16 Richard II, 1393).

⁶⁴One commentator concludes that in the 1422 parliament, 20 of 74 knights of the shire were lawyers and 37 burgesses were lawyers. "Lawyers could not be kept out; and in at least one important respect they may have contributed to the growing prestige of the commons." See A.R. Myers, *Parliament, 1422-1509* in Davies and Denton, eds, *The English Parliament in the Middle Ages* at 141, 166 (cited in note 60).

65. The Statutes of Westminster I contained several provisions punishing such conduct. See Statutes of Westminster I, chs 18, 25, 28, 33 (3 Edward I, 1275), 1 *Statutes* at 31-35. Chapter 33 seemed clearly directed at professional lawyers and the other sections may have applied to them. This statute probably marks the inception of institutional efforts to control this type of conduct. See Holdsworth, 3 *History of English Law* at 395-96 (cited in note 16). The concern with this conduct predated the Statutes of Westminster I and Bracton noted it. See Bracton, 2 *On the Laws and Customs of England* at 332 (cited in note 8). For an extensive treatment of the history and development of these offenses, see Baker, *The Legal Profession and the Common Law* at 125-50 (cited in note 16); Percy Winfield, *The History of Maintenance and Champerty*, 35 *L Quarterly Rev* 50 (1919).

66. During the next ten years of Edward I's reign, five further prohibitions were enacted. See Statutes of Westminster II, ch 49 (13 Edward I, 1285), 1 *Statutes* at 95; Statute of Conspirators (20 Edward I, 1292), 1 *Statutes* at 216; Ordinance of Conspirators (21 Edward I, 1293), 1 *Rot. Parl.* at 96; *Articulas Super Cartas*,

Although champerty and maintenance involve a conflict of interest in some sense because of the lawyer's underlying financial interest in the litigation, this type of misconduct is not generally treated as a conflict of interest problem.⁶⁷ The primary objective of these statutes was to reduce excessive litigation. As such, these regulations do not deal with a lawyer's duty of loyalty and the conflict of interest problems that are the focus of this article. Thus, they are not discussed further.

2. The Cases and Rules

a. 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. This type of case accounted for almost half of the disciplinary cases and was almost twice as numerous as the next largest category.⁶⁸ It is not surprising that such cases were the most numerous. First, switching sides in the same litigation is the most serious, harmful, and clearest form of conflict of interest. Second, the two primary regulatory prohibitions seemed to have focused on this classic ambidexterity. The London Ordinance of 1280 expressly prohibited it⁶⁹ and the Statute of Westminster I, chapter 29 treated it as a core form of "deceit or collusion."⁷⁰ Finally, to the extent that the typical medieval remedies for ambidexterity were

ch 11 (28 Edward I, 1300), 1 *Statutes* at 139; Ordinance of Conspirators (33 Edward I, 1305), 1 *Statutes* at 145. The dates and enforcement of these statutes have prompted dispute. See, for example, Brand, *Origins* at 121 (cited in note 7); Sayles, ed, 3 *Select Cases in the Court of King's Bench* at lix (cited in note 40). In the next hundred years at least five more were adopted. Additional prohibitions were enacted in 1327, 1331, 1347, 1377 and 1383. See Holdsworth, 3 *History of English Law* at 397-98 (cited in note 16); 2 *id* at 452 & n 11. Holdsworth says that the repeated attempts at prohibition "illustrate at once the prevalence of the offences and the incapacity of government to enforce the statutes." See 2 *id* at 459.

67. A limited exception would be when the lawyer's interest in the litigation is adverse to that of the client. See *Model Rules* 1.7 (b) (cited in note 3); *Restatement* §§ 201, 206 (cited in note 3). Medieval conflicts of interest involving the lawyer's personal interest and that of the client that resemble the modern counterpart of that type of conflict will be discussed later. See notes 187-214 and accompanying text.

68. A total of 80 cases have been identified. About 76 cases are classified as discipline cases for discussion purposes. Of these cases, 33 involved switching sides in the same case, 5 former client conflicts, 17 adversity to a client on an unrelated matter, 11 simultaneous representation of multiple plaintiffs or defendants, and 5 conflicts with a lawyer's personal interest. It is also interesting to note the chronological dimension of the cases. Slightly more than 60 cases arose between 1278 and 1400, and the great bulk of the cases involving discipline arose during that period. Only 11 of the discipline cases arose after 1400. To some extent, the dates of the cases identified are a function of the primary and secondary sources available to me and of the fact that records made available by Paul Brand focus on discipline cases between 1278 and 1307, with only one case before and one after that period.

69. See notes 44-50 and accompanying text.

70. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 61, 123 (cited in note 23).

imprisonment, fines, and disbarment, the cases would most likely focus on the most serious forms of misconduct, which would merit these severe sanctions.

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. A few cases will suffice to illustrate the general flavor of such cases. In the 1286 Norfolk eyre, the county knights 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 disinheritation of the said Fulcher and had absented himself on purpose, with the result that the said Fulcher lost the said land.” Simon was imprisoned.⁷¹ 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.⁷² 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.⁷³ This classic ambidexterity continued for several hundred years. For example, in 1673, Simon Mason was jailed and disbarred after it was proved that “he had been an ambidexter, viz after he was retained by one side he was retained by the other side.”⁷⁴

Often, as was true with Simon of Cley,⁷⁵ the ambidextrous lawyer failed to appear in court on behalf of the first client, causing a default and resulting judgment against that client. Such an appearance in land litigation was essential for the defendant to avoid a default judgment.⁷⁶ For example, in 1299,

71. See JUST 1/579, m.69d (plea roll of Norfolk eyre of 1286), reprinted in PB1, no 3 (cited in note 26); Brand, *Origins* at 129 (cited in note 7). Although the term of imprisonment is not specifically indicated, it likely was for a year and a day as the conduct was “contrary to the king’s statute,” the Statute of Westminster I, chapter 29. See *id.*

72. See Bolland, ed, *Select Bills in Eyre* at 27-28 (cited in note 57).

73. See JUST 1/691, m.5d (Nottingham indictments, 1340), reprinted in PB3 (xxiv) (cited in note 26).

74. *Simon Mason’s Case*, 1 Freeman’s Cases no 90, 89 Eng Rep 55 (Common Bench, Trinity Term 1673).

75. See note 71 and accompanying text. In the 1288 Dorset eyre, Roger of Aumfrey was charged with taking money from both claimants and tenants in land litigation “to the disinheritation of many.” Although Roger denied his guilt, the jury found him guilty in a specific case. He was remanded to custody and subsequently fined. See JUST 1/213, m.31d (1288 Dorset eyre), reprinted in PB3 (v) (cited in note 26).

76. See Brand, *Origins* at 129 (cited in note 7).

John de la Haye's clients, defendants in a dower action, complained to the Common Bench justices that "said attorney by prearranged collusion with [the plaintiff] had maliciously absented himself and made default after appearance in this court so the sheriff had been ordered to take the said tenements into the hands of the lord king." As a result, the sheriff attached the attorney to appear and answer his clients and the king.⁷⁷ In 1287, at the request of the king, Matthew le Chrestien was held in prison, pending further investigation, since he allegedly "made a corrupt default of favour for [the defendant's] opponents."⁷⁸

In some cases, rather than the lawyer abandoning the first client to represent the second one, one of the parties initially hired one lawyer to represent it and the adverse party and the lawyer appeared on behalf of both parties. In 1597, a creditor retained Woolridge, a Common Bench attorney, to represent both the creditor and the debtor, paying fees for both. Woolridge commenced a suit and appeared for the debtor, but did not defend him.⁷⁹ As a result, the creditor obtained judgment and execution against the debtor although the latter had neither notice or service of process, a default for practical purposes. The debtor sued Woolridge and the creditor in the Star Chamber. "For this offence," Woolridge was fined, "hurle over the barre at Westminster, and never to be an attorney, nor to have any office in the law."⁸⁰

77. See CP 40/127, m 81d (Easter Term 1299), reprinted in PB3 (xix) (cited in note 26). The ultimate disposition of the matter is not indicated. In 1300, John of Stamford's clients, also defendants in a dower action, made similar charges to the Common Bench justices, complaining of John's "fraudulent and malicious" default, although there was no specific allegation of collusion with the plaintiff. See CP 40/131, m 62d (Michaelmas Term 1300), reprinted in PB3 (xx) (cited in note 26). The victim estimated the amount of his damages, but the ultimate disposition of the matter is not indicated.

78. See C 47/34/4, no. 51 (royal writ dated March 17, 1287), reprinted in PB3 (iv)(b) (cited in note 26). The ultimate disposition of the matter is not indicated.

79. As a technical matter, the attorney pled *non sum informatus*, meaning that the defendant-debtor had not been informed nor instructed him. See *Black's Law Dictionary* 1058 (West 6th ed 1990).

80. He was also expelled from his Inn. The creditor was fined. See *Aldridge v Woolridge* in John Hawarde, *Les Reportes del Cases in Camera Stellata 1593-1609* 70 (Baillon ed, 1894). According to Baker, in the sixteenth century, "[m]iscreant attorneys were physically tossed over the bar." See John H. Baker, ed, 2 *Spelman's Reports* 85 n 1 (94 Selden Soc'y 1978). During the sixteenth century, there seemed to have been a large number of cases involving lawyer misconduct in the Star Chamber. See, for example, John H. Baker, ed, 1-2 *Dyer's Reports* xxx-xxxii, lxxxix-xc, 67, 187-89, 213-14, 293-94, 309-10, 361-62 (109-110 Selden Soc'y 1994). However, Hawarde's claim of frequent disbarment has been disputed. See Michael Stuckey, *The High Court of Star Chamber* 37 (Gaunt 1998).

A similar, but more complex and serious case, involved the fringes of the legal profession, although practicing attorneys were not in fact involved. A debtor, a former attorney who also owed money to the surety, hired a forger-impostor with the same name as an actual attorney to represent a surety for the debtor. Although the debtor was not sued and the surety paid the underlying debt, the debtor colluded with the impostor-attorney, "the one-eyed man," to sue the surety on that obligation and to appear as the latter's attorney although he was never retained by the latter. He did, plead *non sum informatus* (see note 79), and the debtor had execution against the surety. "For this horrible falseness," which was apparently devised to

In sanctioning ambidexterity, these cases established a norm of loyalty. Numerous cases reflect the objective of prohibiting conduct that was inconsistent with the client's legitimate expectation of loyalty and that clearly eliminated, not merely diminished, the lawyer's vigor of representation on behalf of his initial client. 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 the 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.⁸¹ Also in 1305, the Herefordshire county triers indicted John de la Barwe because "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.⁸² As noted above, in the case involving Simon of Cley, he "adhered to the opposite party"⁸³ and in John of Ludlow's case, his ambidexterity occurred through "the procurement and corruption of his [client's] opponents."⁸⁴

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's 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."⁸⁵ In 1290, King

eliminate the prior debt of the debtor to the surety, the Star Chamber ordered the debtor-former attorney, "a notable trickster," to appear before the Common Bench and to be jailed and fined if wrongdoing was found. The attorney-impostor was imprisoned and threatened to stand on pillory if he did not confess the truth. Judgment against the surety was vacated. See *Grevill v Holcomb* (Star Chamber, Hilary Term 1574) in Baker, ed, 2 *Dyer's Reports* 293-94; Richard Crompton, *Star-Chamber Cases* 52-53 (Theatrum Orbis Terrarum 1975) (first published 1630).

81. See JUST 1/287, m.4d, reprinted in PB3 (xxii) (cited in note 26). Interestingly, John agreed to pay a fine, apparently to the victim, before judgment in order to prevent his misconduct from being included in the "estreats," the fines imposed during the Eyre to be levied by the Exchequer. See *id.* In so doing, he may have avoided imprisonment and disbarment or suspension.

82. See JUST 1/306, m.6, reprinted in PB2, no 21 (cited in note 26); Brand, *Origins* at 140 (cited in note 7). The ultimate disposition of the matter is not indicated.

83. See note 71 and accompanying text.

84. See note 72.

85. See Sayles, ed, 1 *Select Cases in the Court of King's Bench* at 67-68, 80-81 (cited in note 9); Brand, *Origins* at 123-23 (cited in note 7); Palmer, 11 *Irish Jurist* at 128-29 (cited in note 16). No recorded judgment or verdict is indicated. In this case, Brand believes that "*consilium*" probably meant their litigation strategy. Brand, *Origins* at 124 (cited in note 7). Brundage believes that it meant their version of the facts, their theory of the case, and their instructions to the lawyer. See letter from James Brundage to Jonathan Rose (July 14, 1999) (on file with author) (cited in note 46).

Edward I alleged to the Common Bench justices that Edmund of Litlington, after his clients “had fully explained to Edmund his counsel and the cause of the defence,” had “fraudulently gone over to the other side . . . once he learned the counsel.”⁸⁶ 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.⁸⁷ In these cases, it is not always easy to detect the nature of the confidential information that is the object of concern. “Consilium” seems to be the word almost always used in the original text. It seems to include both information communicated by the client as well as the lawyer’s litigation strategy. 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.

The disloyal conduct in these cases was serious and significant. The cases were not ones in which the lawyer could have maintained in good faith that both clients’ interests could have been served. Nor were they cases where the primary adverse effect on the client was merely diminished vigor of representation, a disappointed expectation of loyalty, or a threat to client confidential information. Rather, these cases often involved more contemptible and pernicious lawyer misconduct. The cases commonly characterized the lawyer’s wrongdoing as deceitful, malicious, corrupt, collusive, and fraudulent. Perhaps some of this language resulted from the medieval manner of pleading such matters, as influenced by the form of the writ of deceit or the language of the Statute of Westminster I, chapter 29. On the other hand, in many cases, this strong language was not merely a function of such formal considerations, but was used because it fairly characterized the misconduct involved.

The particular instances of ambidexterity, as described in the above and other cases, certainly can be fairly described as fraudulent, deceitful, and so forth. The common fact pattern, a failure to appear or to defend the initial client resulting in a default against that client in favor of the second client, supports this more malevolent characterization. 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

86. See CP 40/86, m 115 (Michaelmas Term 1290), reprinted in PB3 (viii) (cited in note 26). There is no evidence of any further proceedings in this matter.

87. See *Ancient Correspondence*, vol XXX, no 164, reprinted in Sayles, ed, 5 *Select Cases in the Court of King’s Bench* at cxxvi (cited in note 57). Paul Brand has graciously provided me with a translation of this judicial record. See letter from Paul Brand to Jonathan Rose (August 22, 1997) (on file with author).

and request, causing the client to lose the land.⁸⁸ 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."⁸⁹ In 1287, Matthew le Chrestien was accused of making "corrupt default of favour for [the defendant's] opponents" because they had bribed him.⁹⁰ Similar charges were leveled against Geoffrey Page in 1254.⁹¹ Allegations of this type of conduct apparently continued for some time as John Hiddsley was charged with bribery in the early seventeenth century.⁹² Nor was this fraudulent, corrupt conduct limited to bribery. In 1293 Staffordshire eyre, John of Organ's client alleged that John, his attorney, was paid by the client's adversary in land litigation to forge documents ("charters") regarding the ownership and transfer of the land to defeat the client's claims.⁹³ Finally, in the 1299 case involving John de la Haye, discussed earlier, his client alleged that John, his attorney, "by prearranged collusion with [the plaintiff] had maliciously absented himself and made default."⁹⁴ These cases clearly establish many instances of this classic ambidexterity involved very serious and fraudulent misconduct that exceeded ordinary disloyalty.

Before moving on to the next category of ambidexterity cases, it is probably useful to say a few words about 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.⁹⁵ In some cases, local jurors made a presentment or

88. See CP 40/91, m 191d (Michaelmas Term 1291), reprinted in PB3 (x) (cited in note 26). The language of the case, "a year and a day in accordance with the statute" indicates that this discipline was pursuant to the Statute of Westminster I, chapter 29. Interestingly, three of John's mainpennors were attorneys and another was his brother, all of whom were amerced when John failed to appear in court. His brother also had been involved in previous legal difficulties. See PB3 (x) (cited in note 26).

89. In addition, John and his brother had William execute a deed ratifying John's action. See *id.*

90. See CP 40/67, m 47d (Easter Term 1287), reprinted in PB3 (iv)(a) (cited in note 26). See also note 78.

91. See KB 26/152, m 13 (Hilary Term 1254), reprinted in PB3 (i) (cited in note 26). No ultimate disposition of the charge is indicated, as the document reflected only the initial procedural stage. Brand doubts whether Geoffrey Page was a professional attorney. See *id.*

92. See Brooks, *Pettyfoggers and Vipers of the Commonwealth* at 193 (cited in note 16).

93. See Bolland, ed, *Select Bills in Eyre* at 52-53 (cited in note 57); PB2, no 11 (cited in note 26); Brand, *Origins* at 139 (cited in note 7). There are a number of questions regarding John's status and the details of the litigation. Moreover, there is no confirmation of the truth or falsity or ultimate disposition of this matter, as the client, Lovekyn Semon, failed to prosecute the complaint he made in the eyre. See sources listed in this note.

94. See text accompanying note 77.

95. The cases involving the civil liability of lawyers will be discussed subsequently. See notes 225-317 and accompanying text.

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. In later cases, there is some evidence of a court officer such as a serjeant prosecuting the misconduct.⁹⁶

Two cases are particularly interesting because of Edward I's role in issuing a writ to the Common Bench justices on behalf of the aggrieved parties.⁹⁷ In 1287, the king was concerned that litigation in the Bench threatened to disinherit the earl of Lincoln due to ambidexterity injuring the defendant, his tenant. Thus, the king, who was not in England, stated that he wished to be "more fully informed" and ordered the justices to adjourn and withhold judgment until the king, and the earl who was with him in Gascony, returned.⁹⁸ In addition, the king notified the regent serving during his absence to order the justices to have the "attorney arrested and kept in safe custody" until he returned.⁹⁹ In 1290, the king, acting on information received from the lawyer's aggrieved clients and concerned with "creating a real danger of their disinheritance," told the justices that "since we wish to prevent such collusion and fraud if planned and executed, as indeed we are bound to do, we order you to investigate the truth of the matter and apply such remedy that no further complaint reaches us on the matter."¹⁰⁰ Such royal intervention seems unusual.

There were several places where clients could complain. They could pursue their grievances in the Common Bench or King's Bench. Or, they could choose, as many did, to proceed in a more informal local forum such as the

96. See, for example, *Simon Mason's Case* (cited in note 74); *Grevill v. Holcomb* (cited in note 80).

97. See CP 40/67, m 47d (Easter Term 1287), CP 40/86, m 115 (Michaelmas Term 1290), reprinted in PB3 (iv)(a)-(b), (viii) (cited in note 26). These cases were discussed previously in another context. See notes 78, 86 and 90 and accompanying text.

98. The writ stated

the king wishing to ensure that the earl who is staying with us over here by our order suffers no harm and to help him as far as this can be done with justice wishes to be more fully informed on that plea and on the default orders that you have that plea adjourned in its current state before the said justices in our name and the giving of judgment withheld until the king and the earl return to England so that after we are more fully informed we may have done what is just in this matter with the advice of you and other faithful members of our council.

The regent, Edmund, earl of Cornwall, serving during Edward I's long stay in Gascony, actually sent the writ. See CP 40/67, m 47d (Easter Term 1287), reprinted in PB3 (iv)(a)-(b) & comment (cited in note 26).

99. See *id.*

100. See CP 40/86, m 115 (Michaelmas Term 1290), reprinted in PB3 (viii) (cited in note 26).

eyre or traibaston sessions.¹⁰¹ In fact, during the thirteenth and fourteenth century when the eyre and trailbaston sessions were most active, twice as many victims pursued their complaints about ambidexterity in these local settings. The informality of these proceedings, the greater ease of proceeding by bill rather than by writ,¹⁰² and the geographical proximity probably contributed significantly to their popularity. These local proceedings, in addition, were of a somewhat different nature. Often the purpose of the eyre and trailbaston sessions was to conduct general investigations into local complaints and wrongdoing, focusing on conduct that threatened the functioning of the justice system.¹⁰³ This broader function likely also enhanced their attractiveness as a forum in which to pursue complaints about lawyer misconduct.

It also had another consequence. Many 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. Moreover, participation in these broader wrongful schemes was often focused on local lawyers and those on the fringe of the profession as well as nonlawyers and jurors.¹⁰⁴ For example, in the 1292 Herefordshire eyre, the local jurors presented conspiracy charges against 34 individuals, many of whom were probably not lawyers but included a local lawyer, William de la Haye, whom the jurors found guilty of ambidexterity.¹⁰⁵ In the 1293-94 Yorkshire eyre, the jurors charged Little Michael of Laton, a serjeant, with ambidexterity, resulting from “a great complaint . . . that there were so many and so great supporters of false pleas and champertors and conspirators allied with each other to support whatever business etc. in this county that truth and justice were wholly suffocated.”¹⁰⁶ In the 1305 Shropshire and Herefordshire trailbaston sessions,

101. During the fourteenth century, circuit justices embarked on local expeditions to investigate criminal matter and hear private complaints in the counties. These proceedings were known as the trailbaston sessions, apparently named for the “club-wielding gangsters” (*trailbastons*), the objects of their efforts. See Baker, *Introduction* at 46 & n 12 (cited in note 16).

102. See Baker, *Introduction* at 46, 63-74, 112-14 (cited in note 16); Milsom, *Historical Foundations of the Common Law* at 27-36 (cited in note 16). By the end of the fifteenth century, a plaintiff could proceed by bill in the King’s Bench as well. See Baker, *Introduction* at 49-51 (cited in note 16).

103. See Brand, *Origins* at 139-41 (cited in note 7).

104. See, for example, JUST 1/409, m.2 (Lancaster Eyre 1292), reprinted in PB3 (xi) (cited in note 26). In this case, numerous individuals—lawyers, nonlawyers, jurors—were indicted for conspiracy, maintenance, and fee splitting that corrupted the functioning of the jury and mainprise (bail) system. There were no specific allegations of ambidexterity. Interestingly, one conspiracy may have only involved ambidextrous jurors with no lawyer involvement, although it was alleged that they had advised the aggrieved party for a fee and knew her counsel (*consilium*). See Sayles, ed, 3 *Select Cases in the Court of King’s Bench* at lxvi (cited in note 40); KB 27/187, m 4d (Hilary Term 1307), reprinted in PB2, no 28 (cited in note 26).

105. See JUST 1/303, m.67 (Herefordshire Eyre 1292), reprinted in PB2, no 8 (cited in note 26); Brand, *Origins* at 139-40 (cited in note 7).

106. See JUST 1/1095, mm.1 & 2d (Yorkshire Eyre 1293-94), reprinted in PB2, no 14 (cited in note 26); Brand, *Origins* at 140 (cited in note 7).

six local lawyers—Walter, son of Reginald de ‘Playssh’ of Egerton, John Lyghtfor, John Love, Nicholas de Hakeleye, John le Granut of Mershon, and John of Bradfield—were indicted for ambidexterity, which was part of a larger wrongful scheme of conspiracy or maintenance.¹⁰⁷ However, as the cases discussed above indicate, many of the eyre proceedings focused on a single lawyer and his ambidexterity;¹⁰⁸ and occasionally, the trailbaston cases did not involve broader schemes, as was the case with John de la Barwe, a professional serjeant charged in the 1305 Herefordshire trailbaston.¹⁰⁹

Much later, in 1604, ambidexterity may have been a part of a broader case, playing a role in the notorious Star Chamber trial of Sir John Hele, the king’s senior serjeant at law. Although the judges were not unanimous in their view of Hele’s misconduct, the trial resulted in the severe sanctions of a £1,000 fine, suspension from office, and imprisonment.¹¹⁰ Although a majority of the judges “acquitted the serjeant of all note of blemish and infamy,”¹¹¹ the Chancellor, Lord Ellesmere, Hele’s political foe, voted for a £2,000 fine, finding Hele guilty of “corruption and ambition, craft and covetous practises,” which included his belief that Hele was “a notorious ambidexter.”¹¹²

107. See JUST 1/744 (Shropshire Trailbaston 1305), JUST 1/306, mm.5-6, reprinted in PB2, nos 20, 22-26 (cited in note 26); Brand, *Origins* at 140 & n 83 (cited in note 7). Walter, a professional local lawyer, took two oxen to be of counsel to Roger Kalebach’ in a plea against the bishop of Hereford, then abandoned Roger to represent the bishop, causing Roger to lose the litigation. See PB2, no 20 (cited in note 26); Brand, *Origins* at 140 (cited in note 7).

108. See, for example, notes 71, 72, 75, 81, 87, and 90, and accompanying text.

109. See JUST 1/306, m.6, reprinted in PB2, no 21 (cited in note 26); Brand, *Origins* at 140 (cited in note 7). Local lawyers were also disciplined for ambidexterity in the more formal royal courts. In 1344, the King’s Bench imprisoned and disbarred, except with respect to his own litigation, Thomas Southover, a local lawyer, for taking fees from both sides. See e-mail from Paul Brand to Jonathan Rose (June 6, 1998) (on file with author). In 1355, the King’s Bench indicted John Lovel, Nicholas Shoreditch, Thomas of Frodick and John Butterwick, local lawyers, for being “common ambidextors.” Some of the money taken apparently was not only for legal assistance, but to give to jurors. See G.O. Sayles, ed, 6 *Select Cases in the Court of King’s Bench under Edward III* 33-36, 103-04 (82 Selden Soc’y 1965).

110. Although the specific charges involved fraud in Hele’s obtaining land to satisfy a debt, the case involved complexities and political intrigue with overtones of perjury, treason, bribery and other serious crimes surrounding Hele’s desire to be Master of the Rolls. See Cockburn, *Spoils of Law* in Guth and McKenna, eds, *Tudor Rule and Revolution* at 309-43 (cited in note 14); Prest, *Rise of the Barristers* at 294 (cited in note 18); Hawarde, *Les Reportes del Cases in Camera Stellata* at 171-76 (cited in note 80). Cockburn provides a very detailed account of all the events and activities involved in this matter. This matter was not Hele’s first experience with misconduct as a lawyer. In 1579, the Star Chamber censured him for “subtlety in his practice” and imprisoned him. Chief Justice Dyer felt that he should be disbarred for seven years. See Baker, ed, 1 *Dyer’s Reports* at xc & n 48 (cited in note 80). In addition, in 1588, he was indicted for counseling a Chancery suit after a judgment at law. See Baker, *The Legal Profession and the Common Law* at 216 (cited in note 16).

111. See Cockburn, *Spoils of Law* in Guth and McKenna, eds, *Tudor Rule and Revolution* at 336-37 (cited in note 14); Prest, *Rise of the Barristers* at 294 (cited in note 18). Both Cockburn and Prest quote Hawarde’s Report.

112. See Cockburn, *Spoils of Law* in Guth and McKenna, eds, *Tudor Rule and Revolution* at 320, 335-36 (cited in note 14); Prest, *Rise of the Barristers* at 294 (cited in note 18). The Lord Chancellor rejected Hele’s

Although in many of these cases involving broader allegations there was no evidence of the ultimate disposition, and in some cases the complainant failed to prosecute the matter,¹¹³ the accused targeted in these cases were sometimes sanctioned.¹¹⁴ Overall, the availability of these informal, convenient, and investigatory proceedings may have contributed to the number of complaints about ambidexterity, especially those involving switching sides in the same litigation.

b. Representation Adverse to a Former Client

Although there were relatively few cases involving a lawyer acting adversely to a former client,¹¹⁵ 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.¹¹⁶ In discussing this case, Paul Brand notes that "[t]he

efforts to be Master of the Rolls because Hele was a usurer, commonly took excessive fees, was "a notorious ambidexter," was "insolent and outrageous ... offensive and intolerable," and "was a notorious and violent drunkard." Cockburn feels that the evidence supported the charges of ambidexterity, as it was a "fairly common" practice. See Cockburn, *Spoils of Law* in Guth and McKenna, eds, *Tudor Rule and Revolution* at 320-22. Prest thinks it "prudent to suspend judgment" on those charges in the absence of corroborating evidence. See Prest, *Rise of the Barristers* at 294. Although accusations of ambidexterity prompted lawyers to sue for defamation, there is no evidence that Hele brought such a suit as a result of these charges. In 1591, however, he had brought a suit for defamation. See *Hele v Gyddy*, 72 Eng Rep 846 (1591). This case was apparently significant in terms of pleading requirements, being the first one to plead the degree of barrister. See Case CCLXVII, 123 Eng Rep 466, 467; Baker, *The Legal Profession and the Common Law* at 111-12 (cited in note 16).

113. The victims failed to prosecute the charges against Adam de la Rue in the 1292 Shropshire eyre and against John Organ in the 1293 Staffordshire eyre. See Bolland, ed, *Select Bills in Eyre* at 3-4, 52-53 (cited in note 57); Brand, *Origins* at 138-39 (cited in note 7). Moreover, there is no evidence of the disposition of the numerous lawyers charged with ambidexterity in the 1305 Shropshire and Herefordshire trailbaston sessions. See notes 107-09. John Organ apparently had other legal problems. See PB2, no 11 (ii (a)-(b)) (cited in note 26).

114. Richard, forester of Cheswardine, was fined in the 1307 Shropshire trailbaston after the sheriff took him into custody. See JUST 1/746, m.2d (Shropshire Trailbaston, 1307), reprinted in PB3 (xxiii) (cited in note 26). John Geoffrey and John of Potten, who may not have been professional lawyers, were imprisoned until they paid a fine in the 1313-14 Eyre of Kent. See F.W. Maitland, W.V. Harcourt and W.C. Bolland, eds, 1 *Eyre of Kent, 6 & 7 Edward II, A.D. 1313-1314* (24 Selden Soc'y 1910).

115. There were five such cases. See note 68.

116. See LI MS Misc 87, f 80r, reprinted in PB1, no 5 (cited in note 26); Brand, *Origins* at 124-25 (cited in note 7). The underlying litigation involved a very complicated land dispute, arising out of the misconduct of John's father, Thomas Weyland, former chief justice of the Common Bench, who was removed in the 1289 judicial scandal. He took an oath of abjuration to leave England, making his exit barefoot and without any covering for his head. See PB1, no 5 at comments (i), (iv) and (v) (cited in note

serjeant's duty of loyalty subsisted beyond the original plea and obliged him not to appear against that client in any subsequent related litigation."¹¹⁷ Other ambidexterity cases involving former clients, like John of Mutford's case, required the court to determine the relationship between the prior 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]."¹¹⁸ 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.¹¹⁹

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,¹²⁰ which may have involved 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."¹²¹ William denied their allegations and claimed that he had agreed to represent the clients in a plea for a fee to be 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.¹²² Although the matter was submitted to a jury and there is no record of the resolution of the factual dispute, Paul Brand believes that the allegations if true would have constituted deception in

26); T.F. Tout and Hilda Johnstone, *State Trials of the Reign of Edward the First 1289-1293* xiii, xxix-xxx, 49-51 (Royal Historical Soc'y 1906) (Camden Soc'y, 3d series, vol 9); Paul Brand, *Chief Justice and Felon: The Career of Thomas Weyland* in Paul Brand, *The Making of the Common Law* 113-33 (Hambleton 1992).

117. See Brand, *Origins* at 125 (cited in note 7).

118. See BL MS Stowe 386, f 99v, reprinted in PB2, no 17 (cited in note 26); Brand, *Origins* at 130 (cited in note 7). Paul Brand's research notes have reproduced the colloquy on this matter between the complaining client's lawyer and the defendant lawyer's counsel. The latter was, interestingly, John of Mutford. See PB2, no 17 (cited in note 26).

119. See *id.* The underlying litigation was a very complex land dispute. See *id.* at comments. In the 1300 case involving Robert of Kelsey, discussed below, the subsequent matter involved the same parties and the same property. See note 128 and accompanying text.

120. See note 85 and accompanying text.

121. See Sayles, ed, 1 *Select Cases in the Court of King's Bench* at 67-68, 80-81 (cited in note 9).

122. See *id.* at 80-81.

violation of the Statute of Westminster I, chapter 29.¹²³ Thus, he concluded that the court recognized a loyalty norm arising out of 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 needed or was not paid; and more generally, the lawyer was obligated not to represent the client’s opponents without permission if he did leave the client’s service.¹²⁴

Interestingly, in the 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.”¹²⁵ 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.¹²⁶ In William of Wells’ case, the clients emphasized the disclosure of their confidences to their opponent.¹²⁷

In addition to challenging the relationship between the prior and subsequent litigation, another defense that medieval lawyers asserted when 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.¹²⁸ Since the matter was settled, the issue regarding the extent of prior involvement

123. See Brand, *Origins* at 124 (cited in note 7).

124. See *id.* There is some ambiguity regarding the broader duty. In all likelihood, the loyalty extended only to clients who would have been current clients but for the lawyer’s improper termination of service or, if termination were appropriate, on those matters that were related to the prior representation of the former client.

125. See LI MS Misc 87, f 80r, reprinted in PB1, no 5 (cited in note 26); Brand, *Origins* at 125 (cited in note 7). In this case, Paul Brand believes that this meant the “strengths and weaknesses of his case.” See *id.* The original report is in Anglo-Norman, not Latin, and therefore used the words “tout leur privetez” rather than “consilium.”

126. See BL MS Stowe 386, f 99v, reprinted in PB2, no 17 (cited in note 26); Brand, *Origins* at 130 (cited in note 7). In the 1300 case involving Robert of Kelsey, discussed below, the client alleged that Robert knew his counsel and then acted against him. See note 129 and accompanying text.

127. See notes 85, 121-124 and accompanying text.

128. See Brand, *Origins* at 137-38 (cited in note 7); Calendar of City of London Letter-Book C 185-87, reprinted in PB2, no 18 (cited in note 26). Robert was apparently involved in other misconduct as a lawyer. See *id.* at Comments.

necessary to actuate the duty of loyalty to a former client was not resolved.¹²⁹ 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.¹³⁰

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; 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").¹³¹ In Robert of Kelsey's case, the parties settled and the client withdrew the accusations and agreed not to repeat them.¹³² In Thomas le Moynes's case, although the court imposed formal discipline, the fine and brief suspension were less than those authorized by the Statute of Westminster I, chapter 29 and those imposed in most side switching cases.¹³³ Paul Brand suggests that the lack of severe sanctions in these cases was due to the newness of the norms regarding former clients.¹³⁴ Although judges exercised substantial discretion in interpreting medieval statutes and often interpreted them expansively,¹³⁵ 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 1280.¹³⁶

129. See Brand, *Origins* at 138 (cited in note 7); Brand also notes that this case extended the duty of loyalty toward former clients to the London courts. See *id.*

130. See Bolland, ed, *Select Bills in Eyre* at xlv, 59-60 (cited in note 57).

131. See LI MS Misc 87, f 80r, reprinted in PB1, no 5 (cited in note 26); Brand, *Origins* at 125 (cited in note 7).

132. See Brand, *Origins* at 138 (cited in note 7).

133. See note 39 and accompanying text

134. See Brand, *Origins* at 125, 130 (cited in note 7).

135. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 47-48 (cited in note 23).

136. Such a conclusion would mean that the prohibition in the London Ordinance of 1280 on "leaving his client and leaguering himself with the other party" was probably directed at switching sides in the same case and not representation adverse to a former client. The Ordinance did, however, have another prohibition on taking "pay from both parties in any action." See notes 44-48 and accompanying text.

*c. Representation Adverse to a Current Client
in Different Litigation*

Cases in which a lawyer engaged in representation adverse to a current client in different litigation comprised the second most numerous category of medieval conflict of interest cases, constituting about twenty-five per cent of the total and numbering slightly more than half as many as those involving switching sides in the same litigation.¹³⁷ In the basic fact pattern, a lawyer sued a client to collect fee arrearages pursuant to a retainer agreement with the client, and the client argued that 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.¹³⁸

These cases did not involve the imposition of formal discipline as did the cases discussed above. Thus, the medieval norms in these cases do not include a regulatory prohibition in the sense that a lawyer could be imprisoned, fined, or disbarred for such conduct by the court pursuant to statutory or judicial authority. Nonetheless, 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 of 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

137. There were 18 cases. In modern parlance such a conflict of interest is often denominated adversity to a current client on an unrelated matter. See note 68.

138. During this period, contracts between a serjeant and his client were enforceable and there was no bar to a serjeant's suit for his fees. It was not until 1629 that the law prohibited a barrister, unlike an attorney, from suing for fees. See 2 Holdsworth, *History of English Law* at 491 (cited in note 16); 6 *id* at 440. In tracing this history, one writer sees the change as a substitution of a principle of Roman law and attributed the rationale to "a compound of undue deference to Davys and Blackstone, the high prestige of the civil law, a desire to add distinction to the Bar, and public interest, and is an important illustration of judge-made law in England." See Ronald Roxburgh, *Rondel v. Worsley: The Historical Background*, 84 *L Quarterly Rev* 178, 184 (1968).

there and elsewhere giving advice and assistance to his opponents.¹³⁹ 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.”¹⁴⁰ Again in 1297, William Pakeman, who had sued numerous clients for arrearages, sued Ellis for arrearages; and the latter, acknowledging the deed, defended himself 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.”¹⁴¹

In all of these cases and in other similar cases,¹⁴² the plaintiff-lawyer denied the client’s allegations, which the latter offered to prove; and both parties asked for a jury, which the court usually ordered the sheriff to impanel. Thus, there is no evidence of the ultimate disposition in many of these cases, although in some of them the lawyer was successful in collecting a fee from the client.¹⁴³ It

139. See CP 40/100, m 98d (Easter Term 1293), reprinted in PB3 (xii) (cited in note 26). Alan Osemund was apparently a figure of some notoriety. He was one of the accusers in the 1289 judicial scandal, a party to extensive litigation both as a plaintiff and as a defendant, and involved in a 1292 murder. In the murder case, the victim’s wife, who had appealed Alan, complained that he had escaped from custody and was seen “hearing his mass . . . as if he were someone accused of no crime” and “rambling and wandering about the streets, squares and inns of London without irons . . .” His custodians were punished for their lax behavior despite their explanation that Alan “was not able to walk properly with irons.” Alan was imprisoned, dying there before the jury determined his guilt. See PB3 (xii) at Comment (cited in note 26); G.O. Sayles, ed, 2 *Select Cases in the Court of King’s Bench under Edward I* 149-51, 169-70. Paul Brand has compiled extensive information on Alan’s life and career as a professional serjeant in the local courts and as a steward for local landowners. See e-mail from Paul Brand to Jonathan Rose (July 28, 1998) (on file with author).

140. See CP 40/118, m 59d (Trinity Term 1297), reprinted in PB3 (xvii) (cited in note 26).

141. See LI MS Hale 188, f 13v, reprinted in PB2, no 15 (cited in note 26); Palmer, *County Courts of Medieval England* at 95 (cited in note 16). Paul Brand’s notes contain some of the argument before the court. John of Mutford represented William. See PB2, no 15 (cited in note 26). In a somewhat different conflict of interest context, in 1279, William of Watergate justified his refusal to pay the fee of his attorney, Henry de Burne, on the grounds that Henry had revealed his counsel to his adversary, had failed to assist William, and refused to appear on loveday, when William settled the land dispute with his adversary. See JUST 1/915, m.39 (Sussex Eyre 1279), reprinted in PB3 (iii) (cited in note 26).

142. Very similar cases included Stephen Angot’s 1299 arrearage suit against the prior of Broomhill—see CP 40/129, m 120 (Norfolk), reprinted in PB2, no 16 (cited in note 26); Palmer, *County Courts of Medieval England* at 95-96 (cited in note 16)—the 1302 arrearage suit brought by John de la Chapele’s executors against the abbot of Shap—see CP 40/143, m 113 (Trinity Term 1302), reprinted in PB2, no 19 (cited in note 26); Palmer, *County Courts of Medieval England* at 96 (cited in note 16)—and John of Finchingfeld’s 1316 arrearage suit against the vicar of Finchingfeld—see CP 40/179, m 549 (Essex), reprinted in PB2, no 27 (cited in note 26); Palmer, *County Courts of Medieval England* at 96 (cited in note 16). It is interesting that in these arrearage cases, the plaintiff-lawyer normally used another lawyer to pursue the claim and did not act *pro se*.

143. See, for example, Adam of Kersey’s 1303 suit against Lucy, widow of Thomas of Lewknor, JUST 1/1328, m.2d (Oxford Assize 1303), reprinted in PB3 (xxi) (cited in note 26); Simon of Kinsham’s 1297 suit against William Andrew, CP 40/118, m 34 (Easter Term 1297), reprinted in PB3 (xvi) (cited in note 26); Hugh of Lowther’s 1294 suit against three clients, CP 40/104, m 102d (Easter Term 1294), reprinted in PB3 (xiv) (cited in note 26); Robert del Duffhuss’s 1291 suit against William Deneys, CP 40/90, m 107,

should be noted, however, that when lawyers were unsuccessful they risked being amerced (fined) for bringing a false claim.¹⁴⁴

These retainer arrearage cases indicate 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.¹⁴⁵ Robert Palmer suggests that the loyalty ethic embodied in these annuities was derived from the grant for knight service and was associated with the lifetime annuities and annual payments used in that context.¹⁴⁶ The use of the word “lord” in the retainer to describe the lawyer’s client supports that conclusion.¹⁴⁷

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 thirteenth 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 his [i.e., Robert’s] failure or neglect.”¹⁴⁸ Moreover, the

reprinted in PB1, no 4 (cited in note 26). See Palmer, *County Courts of Medieval England* at 95 (cited in note 16); Palmer, *Origins of the Legal Profession*, 11 *Irish Jurist* at 129 (cited in note 16).

144. The court amerced Robert de Duffhus in his 1291 arrearage suit against Maud de Merk because the jury found that he failed to defend her pursuant to the retainer in eyre proceedings against her for the death of a man. See CP 40/90, m 107, reprinted in PB1, no 4 (cited in note 26). Although Adam of Kersey was successful in his 1303 arrearage suit against his client, he was amerced for filing a false claim against a co-defendant. The court also fined the losing client and another co-defendant. See JUST 1/1328, m.2d (Oxford Assize 1303), reprinted in PB3 (xxi) (cited in note 26). In Hugh of Lowther’s 1294 suit against three clients (see note 142), all three clients were amerced for their “unjust detention” of Hugh’s fees. See CP 40/104, m 102d (Easter Term 1294), reprinted in PB3 (xiv) (cited in note 26).

145. In some of the cases, it is difficult to know whether the lawyer had simply refused to appear, had appeared for the opponent and refused to appear for the client pursuant to the annuity, or had actually undertaken to represent the client and then switched to the representation of the opponent. Thus, some of the cases may have involved adversity in the same, not an unrelated, matter, or in both the same case and an unrelated matter. See, for example, John FitzNeal’s case (note 139 and accompanying text) and John of Finchingfeld’s case (note 141).

146. See Palmer, *County Courts of Medieval England* at 94-95 (cited in note 16).

147. Brundage is “not persuaded.” He notes that “*dominus* is used with a wide range of meanings in different contexts.” He believes that in this context lord does not imply any feudal relationship. See letter from James Brundage to Jonathan Rose (July 14, 1999) (cited in note 46).

148. See Baker, *The Legal Profession and the Common Law* at 104 (cited in note 16). Robert was a *juris professor* (a practicing lawyer) and Baker identified him as a royal clerk and keeper of the rolls of the Surrey Eyre. See *id* at 104 & n 31. Brand thinks it highly likely that Robert is a canon, not common, lawyer. See Letter from Paul Brand to Jonathan Rose (November 16, 1999) (on file with the author). Baker discusses the formal and parol retainers used with counsellors. See *id* at 102-08. Brand has a detailed discussion of the methods of retaining attorneys and serjeants. See Brand, *Origins* at 91-94, 100-05 (cited in note 7). This duty of loyalty extended only to those clients that could be considered current, not former, clients of the serjeant. See note 124.

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."¹⁴⁹ Similar language was contained in the 1278 deeds of Gilbert of Thornton and William of Kelloe.¹⁵⁰ 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."¹⁵¹

Thus, in general, this loyalty norm arose contractually and consensually and not by regulatory fiat. However, discipline was not completely out of the question and apparently could be imposed in particularly egregious cases. For example, in 1340, Ralph of Buslingthorpe paid Walter of Golias to be counsel in an undesignated matter although there was no evidence of the typical annuity. Nevertheless, Walter, in unrelated matter, "procured Cecily . . . to falsely and maliciously appeal Ralph of the death of her late husband John and took half a mark from her and for fear that she would appeal him of the said death Ralph made an agreement to pay her four pounds and sixteen shillings to

149. See PB1, no 1 (cited in note 26); Brand, *Origins* at 101-02 (cited in note 7); Paul Brand, ed, 2 *The Earliest English Law Reports* lxxviii, cxxxvi (112 Selden Soc'y 1996); Michael Jones and Simon Walker, eds, *Private Indentures for Life Service in Peace and War 1278-1476* in *Camden Miscellany XXXII* 36 (Camden Soc'y, ser 5, vol 3) (Royal Historical Soc'y 1994). Paul Brand concludes that John's bond was "quite clearly" a retainer for a serjeant's services. See PB1, no 1 (cited in note 26). Other scholars suggest that it was a military retainer. See, for example, J.M.W. Bean, *From Lord to Patron: Lordship in Late Medieval England* 42 (Pennsylvania 1989).

150. See Brand, *Origins* at 101-02 (cited in note 7); Brand, 2 *Earliest English Law Reports* at cviii-cxvii (cited in note 147). Paul Brand believes that these exceptions made explicit what was implicit in these retainers. See Brand, *Origins* at 124 (cited in note 7); e-mail from Paul Brand to Jonathan Rose (June 25, 1998) (on file with author). Some of the retainers appear to have had geographical limitations as well. Both John of Lisle and William Kelloe's deeds stated that they would give advice and assistance "wherever I may be or can reach when I am forewarned." See *id.*

151. See JUST 1/287, m.4d (1307), reprinted in PB3 (xxii) (cited in note 26). The men of Gloucester retained William "to be of counsel to them and the whole community of Gloucester . . . in all pleas before them against all others and also to seek and claim the franchise of the town whenever necessary." The clients charged that "after William knew the counsel of the community of the said town in a plea between John de Ferrars and the men of the town he revealed their counsel and acted for John in the said plea against the said men; and also failed to claim their franchise . . . and refused to claim it to the loss and deception of the whole community of that town." See *id.*

have peace and paid this and thus Walter received money from both parties.”¹⁵² Walter was indicted and fined.¹⁵³ The conduct and procedural context of this case, however, are quite different from the conduct and procedural context of the typical arrearage cases that are discussed above.

One final matter regarding this category of medieval conflict of interest cases requires further comment. It is possible that the crown’s legal representatives, particularly the king’s serjeants, were held to a more demanding duty of loyalty than were ordinary lawyers.¹⁵⁴ Although the crown’s lawyers were not precluded from engaging simultaneously in private practice,¹⁵⁵ they may have been precluded from appearing against the crown at all and denied the right available to private lawyers to except prior existing clients from the duty of loyalty. Sayles suggests that initially private representation by the king’s serjeants that conflicted with their royal obligations “did not offend the contemporary standard of official rectitude.”¹⁵⁶ However, this potential conflict prompted Britton to call for an investigation into the matter.¹⁵⁷ Moreover, Sayles suggests that the king’s intent in paying his serjeants an annual fee, despite its inadequacy, was “to prevent them from speaking against him.”¹⁵⁸ Blackstone implies that salaried and sworn legal representatives of the crown, in

152. See JUST 1/691, m.5d (Nottingham indictments 1340), reprinted in PB3 (xxiv) (cited in note 26).

153. See *id.*

154. The emergence and development of the crown’s legal representatives and the formal positions of attorney-general and solicitor-general have been the subject of substantial scholarship. See, for example, Holdsworth, 6 *History of English Law* at 458-81 (cited in note 16); J.L.J. Edwards, *The Law Officers of the Crown* (Sweet & Maxwell 1964); Sayles, ed, 5 *Select Cases in the Court of King’s Bench* at xxx-li (cited in note 57); Sayles, ed, 6 *Select Cases in the Court of King’s Bench* at xxviii-xxxv (cited in note 109). The King’s Bench cases published by the Selden Society contain Sayles’s early work, on which many other scholars rely for the emergence of these lawyers in the medieval period. Holdsworth says that as these positions developed, the crown’s legal representatives were subject to different rules than ordinary lawyers and not subject to the court’s discipline like the latter. See Holdsworth, 6 *History of English Law* at 468 (cited in note 16).

155. The evidence more clearly supports private practice by the king’s serjeants than by his attorneys. See Brand, *Origins* at 64-65, 103-04 (cited in note 7); Edwards, *Law Officers of the Crown* at 4, 24 (cited in note 152); Sayles, ed, 6 *Select Cases in the Court of King’s Bench* at xxx (cited in note 109); Sayles, ed, 5 *Select Cases in the Court of King’s Bench* at l-li (cited in note 57). On the other hand, Baker suggests that appointment as a king’s serjeant resulted in a restriction on private practice. See Baker, *Order of Serjeants at Law* at 35-36 (cited in note 16). He is not talking about legal restriction, but a practical one, since the king’s serjeant had a chief demanding client. See Letter from John Baker to Jonathan Rose (February 15, 2000) (on file with the author).

156. See Sayles, ed, 5 *Select Cases in the Court of King’s Bench* at l (cited in note 57).

157. See F.M. Nichols, ed and trans, 1 *Britton* *37 (Byrne 1901). *Britton* was written “about 1290” and is characterized as an “epitome” (summary) of Bracton, although it contains additional material. At one time, it was thought to have been written by John le Breton, Bishop of Hereford. That view has been largely rejected, and the author may have been a royal law clerk. It purports to be written under royal authority and was written as if the king were speaking. See Winfield, *Chief Sources of English Legal History* at 263-64 (cited in note 25).

158. See Sayles, ed, 5 *Select Cases in the Court of King’s Bench* at li (cited in note 57).

contrast with distinguished barristers who were only granted patents of precedence, could not be “retained in causes against the crown.”¹⁵⁹ More recently, Baker has stated that the king’s “counsel,” which may have included his serjeants and attorneys, were not permitted to appear against the crown.¹⁶⁰

Some later cases seem to support a stricter rule for the king’s serjeants and attorneys. A 1513 case determined that it was defamatory to accuse a king’s serjeant of taking retainers against the crown.¹⁶¹ In 1540, the Star Chamber imprisoned and fined a king’s serjeant and imprisoned a king’s attorney for “not regarding their oaths and duties, that they ought to have borne to our said sovereign lord . . . [giving] their advice and counsel” to a knight on how to avoid paying revenue.¹⁶² In addition, a 1682 case also seems to articulate this prohibition and may have disqualified the king’s counsel from arguing against the king.¹⁶³ On the other hand, the annuity of Gilbert Thornton, a king’s serjeant, discussed above, not only excepted prior existing private clients, but “the faith and service of the king and his heirs,”¹⁶⁴ which would have been

159. See William Blackstone, 3 *Commentaries on the Laws of England* *28 (1765).

160. See Baker, *Introduction* at 188 (cited in note 16); Baker, *Order of Serjeants at Law* at 61-62 & n 7 (cited in note 16). Brand has concluded that no such procedure existed for “king’s counsel” taken in the broader sense, the legal representatives of the crown such as the king’s serjeants and attorneys. See e-mail from Paul Brand to Jonathan Rose (June 25, 1998) (cited in note 148). On the other hand, in support of his conclusion, Baker also refers to several instances applying the prohibition to the king’s serjeants. See Baker, *Order of Serjeants at Law* at 61-62 n 7 (cited in note 16). Baker, however, refers to a later period than Brand does. With reference to the earlier period, he is not aware of any formal prohibition on appearances by king’s counsel against the crown; he thinks that such action would be strange given the counsel’s oath to serve the king. See Baker February 15, 2000 letter, *supra* note 153.

161. See *Elyot v Toft*, KB 27/1006, m 62 (Hilary Term 1513). Baker cites this case in support of his conclusion. See Baker, *Introduction* at 499, n 18 (cited in note 16); Baker, *Order of Serjeants at Law* at 61 n 7 (cited in note 16).

162. See *In re Sir Humfrey Browne* in Baker, ed, 2 *Spelman’s Reports* at 351-52 (cited in note 80). Although the court characterized the conduct as defrauding the king “by craft and collusion” and contrary to the laws prohibiting “frauds and collusions” (see *id* at 351), Professor Baker states that the advice involved “a perfectly legal method of avoiding revenue.” See Baker, *Order of Serjeants at Law* at 61 n 7 (cited in note 16). In the notorious case involving the king’s senior serjeant, Sir John Hele (see notes 110-12 and accompanying text), one focus of the legal and political attack on him was that his action in obtaining land to satisfy a debt defrauded the crown out of land that otherwise would have escheated to it. See Cockburn, *Spoils of Law* in Guth and McKenna, *Tudor Rule and Revolution* at 312, 324-37 (cited in note 14); Prest, *Rise of the Barristers* at 294 (cited in note 18).

163. See *Smith v Wheeler*, 1 *Modern Reports* 38-39 (Case 90) (Hilary Term 1670). The court’s approach is deferential, “you would do well to be advised, whether or no you, being of the king’s counsel, ought to argue in this case against the king?” and suggestive, “if my lord thinks it not proper, [the lawyer] may give his argument to some gentleman at the bar to deliver it for him.” Baker, however, cites it for the proposition that a king’s serjeant was prohibited from appearing against the crown. See Baker, *Order of Serjeants at Law* at 61-62 n 7 (cited in note 16).

164. See Brand, *Origins* at 101-02 (cited in note 7); Baker, ed, 2 *Earliest English Law Reports* at cxvi (cited in note 147). See also note 148 and accompanying text.

unnecessary if such lawyers were formally prohibited from appearing against the king.¹⁶⁵

Thus, a somewhat mixed picture emerges on this issue. However, two conclusions might be drawn. First, it seems that initially there was no formal prohibition on the crown's legal representatives appearing adverse to the crown although it was a matter of concern. But over time a loyalty norm emerged restricting such conduct as a matter of law or at least as a professional convention.¹⁶⁶ Second, at a minimum the crown was entitled to a priority at all times on the service of its legal representatives, which would preclude them from excepting prior existing clients as medieval lawyers did in the annuities and deeds with private clients.¹⁶⁷ Moreover, the volume of the crown's work, especially in the case of the king's attorneys, probably practically limited their ability to undertake other work.¹⁶⁸ Finally, political sensitivity and prudence would have probably discouraged the crown's lawyers from appearing against it, especially as these positions became more formal and lucrative.

d. Simultaneous Representation of Multiple Parties

Medieval norms apparently did not treat simultaneous representation of multiple parties as a conflict of interest. Although it was probably a fairly common practice,¹⁶⁹ in none of the identified cases did the court or the clients charge the lawyers with ambidexterity or related misconduct. These cases cover

165. Paul Brand finds this reservation by Gilbert in favor of the king "difficult to interpret." He suggested that perhaps it made clear that the king was entitled to priority if the king wanted Gilbert to act in one geographical area at the same time as his private client wanted him to act in a different place. See e-mail from Paul Brand to Jonathan Rose (June 25, 1998) (cited in note 148).

166. Brundage believes that such a notion may have its roots in the Roman doctrine about "treasury counsel" (*advocati fisci*). See letter from Paul Brundage to Jonathan Rose (July 14, 1999) (cited in note 46). A leading treatise on the crown's law officers makes no mention of any formal restriction during the medieval period as these types of lawyers emerged. See Edwards, *Law Officers of the Crown* at 12-31 (cited in note 152). Interestingly, this issue seems not to have received any treatment in this work. See *id.* Paul Brand suggests that the absence of any formal prohibition may be due to the fact that there was usually only one serjeant in any one court during this period and, therefore, any litigation brought on behalf of the king would have to be instituted by the serjeant. See letter from Paul Brand to Jonathan Rose (November 16, 1999) (on file with the author).

167. See e-mail from Paul Brand to Jonathan Rose (June 25, 1998) (cited in note 148); notes 147-49 and accompanying text.

168. See Edwards, *Law Officers of the Crown* at 18-19, 24 (cited in note 152); Sayles, ed, 5 *Select Cases in the Court of King's Bench* at xlix-li (cited in note 57).

169. Although there was no systematic way to discover such instances, sufficient cases were identified in the process of looking for cases in other categories to suggest that it was a fairly common practice. My research turned up eleven cases of simultaneous representation of multiple parties. See note 68. Paul Brand states that simultaneous representation of multiple parties was "a very common practice" in the thirteenth and fourteenth centuries and may have been "the norm." See Brand November 16, 1999 letter, *supra* note 146.

a variety of fact patterns. Several cases involved simultaneous representation of plaintiffs. The 1282 case involving William Wells¹⁷⁰ involved simultaneous representation of five plaintiffs, perhaps many of the men of the manor of South Petherton, who sued the lord of the manor for demanding excessive "customs and other services."¹⁷¹ In 1340, Thomas of Knaresborough represented two knights in their claim for expenses in attending parliament.¹⁷² In the same year, four co-heirs retained Walter Golias to sue an assize of novel disseisin.¹⁷³ In 1470, one attorney represented several plaintiffs who sued a jailer for allowing a judgment debtor to escape.¹⁷⁴ Other cases involved multiple representation of defendants. In 1292, the King's Bench indicated it was inappropriate for one man to speak on behalf of multiple defendants unless he were their attorney.¹⁷⁵ In 1330, John and Thomas of Wilton acted as attorneys for several officials, charged by the plaintiff with releasing the defendant from custody in return for payments by the latter, thus delaying the plaintiff's suit.¹⁷⁶ Two of these cases are particularly significant as they have criminal overtones. In 1330, Edmund of Cambridge and William of Woodford represented a large number of defendants, who were sued for an assault that wounded the plaintiff, and who were also fined by the court for their "default."¹⁷⁷ The attorneys said that they were "attorney[s] for everyone" except one person.¹⁷⁸ In 1524, Thomas Turpyn represented three defendants charged with maintenance.¹⁷⁹ William of Goldingham's successful defense of the 1305 ambidexterity charges involved an interesting case of multiple representation. William's clients included not only several named individuals, but "the whole community of Gloucester," whom he agreed to represent in all pleas, presumably both as

170. See notes 85, 121-24 and accompanying text. To the extent that William represented numerous men of the city and they seemed to have a common grievance against the lord of the manor, this litigation may be an example of medieval group litigation, a forerunner of the modern class action. See note 178.

171. See Sayles, ed, 1 *Select Cases in the Court of King's Bench* at 67-68, 80-81 (cited in note 9).

172. See Sayles, ed, 5 *Select Cases in the Court of King's Bench* at 89-90 (cited in note 57).

173. See note 73. An assize of novel disseisin was used to recover land, of which a party had been unjustly dispossessed. See, for example, Baker, *Introduction* at 70, 267, 270-71 (cited in note 16); *Black's Law Dictionary* 121 (West 6th ed 1990).

174. See *Ely v Chertsey* in N. Neilsen, ed, *Year Books of Edward IV: 10 Edward IV and 49 Henry VI: A.D. 1470 92-95* (47 Selden Soc'y 1931).

175. See Sayles, ed, 2 *Select Cases in the Court of King's Bench* at xlviiii-xlix, cxx (cited in note 57).

176. See Sayles, ed, 5 *Select Cases in the Court of King's Bench* at 81-83 (cited in note 57).

177. See *id* at 45-47.

178. *Id* at 47. In fact, the attorneys lacked a warrant of attorney for another defendant, and the court imprisoned them for acting as an attorney without a warrant. See *id*.

179. See *Roos v Hurleston* in Baker, ed, 2 *Spelman's Reports* at 342-44 (cited in note 80).

plaintiffs and defendants, as well as undertaking the duty “to seek and claim the franchise of the town whenever necessary.”¹⁸⁰

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.”¹⁸¹

Only one case, which involved a different factual pattern, suggested that multiple representation might involve a conflict of interest. In the 1293 Shropshire eyre, Abbot Thomas, the warrantor of defendants in land litigation selected his counsel, Matthew of Villiers, to defend them. Although the defendants “in his counsel . . . did put their whole trust, being folk that knew naught of the law,” the counsel took “a bad exception” to release the Abbot from his warranty and liability. The defendants were dispossessed and lost their right of action as result of “this wrong . . . done by collusion.”¹⁸² The warranty process by which the defendant asked another to come and defend the suit made these parties in effect co-defendants,¹⁸³ but the warrantor’s adverse

180. See note 139. The named individuals “and other men of Gloucester” retained William to undertake these duties. The nature of this litigation is interesting. Although it would appear from the language that William represented the named individuals personally (see JUST 1/287, m.4d, reprinted in PB3 (xxii) (cited in note 26)), it may be an instance of his representation of a group. Stephen Yeazell has studied medieval group litigation as a historical antecedent of the modern class action. He has viewed this medieval group litigation in terms of medieval societal organization and social, economic, religious and community groups. See Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* 23-71 (Yale 1987). He then puts this group litigation in the context of medieval political theory and the influence of changing context on its persistence and validation. See *id.* at 72-131. This Gloucester litigation, both in terms of description of the plaintiffs and the nature of their desire for William to “claim the franchise of the town,” resembles some of the examples that Yeazell discusses. See *id.* at 37-68.

181. See Year Book for 11-12 Edward III (Easter Term 1338), reprinted in Luke Pike, ed, 1 *Rolls Series* 436 (Stationery Office 1883) (reprint, Kraus 1964). The attorney appeared for one tenant, claiming the entirety and also as guardian for another tenant, also claiming the entirety. Although the facts are a bit unclear, the court seemed to treat the matter as one attorney appearing for two parties. The attorney responded to the court’s concern by stating, “Not so; he pleads in the names of two persons.” *Id.* The attorney was apparently “among the most skillful counsel of his day.” See Year Book for 12-13 Edward III (1338), reprinted in Luke Pike, ed, 2 *Rolls Series* cxxvii (Stationery Office 1885) (reprint, Kraus 1964). In another matter, the court, however, said that appearing as an attorney and guardian was different. *Id.* at 344, no 31.

182. See Bolland, ed, *Select Bills in Eyre* at 68-69 (cited in note 57).

183. In this case, the obligation of Abbot Thomas to warrant the defendants arose when the Abbot’s predecessor sold the land to the father of one of the defendants. The record indicated that it was “the custom of the town,” of Abbots Bromley for the Abbot and Convent to warrant the title of the purchaser and his heirs and assigns with respect to land enrolled in their rolls. In such a case, they “are bound to warranty as effectively as by a charter.” See *id.* at 68.

interest is more evident than in the typical multiple representation cases discussed above. Although there is no indication of the ultimate disposition of this complaint, it seems likely that, if true, a remedy would have been appropriate for the complainants.¹⁸⁴ Bolland stated that the complaint proved “the foolishness of the man who puts his trust in the advice of one who has clients of much greater importance to him; clients whose interests are opposed to the interests of the smaller one.”¹⁸⁵ 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.

e. Consent

The medieval loyalty norms that emerged from the cases in the prior four categories require some discussion of the notion of consent to determine what role it played, if any, in the medieval law of lawyering. None of the cases deal with consent explicitly. Examining the various categories suggests that perhaps a consent principle was operating implicitly. The clearest examples are the cases involving adversity to a current client in different litigation, the retainer arrearage cases. First, in these cases, as noted earlier, a voluntary, consensual agreement was the source of the loyalty norm. Moreover, in some cases the retainer explicitly authorized adversity in the representation of pre-existing clients, to whom the lawyer was already bound by an earlier retainer. This explicit exception is the strongest evidence of a medieval consent principle. In the other retainer cases, consent likely operated by virtue of the parties’ understanding of an implicit exception.¹⁸⁶ One might also find consent operating implicitly in the multiple representation cases and adversity to former client cases. In the former group, the knowing retention of one attorney to represent multiple parties could be understood as consent to the potential conflict that might arise. Similarly, failure to object in the former client cases might be seen as implicit consent.

One might suggest also that there was an implicit category of nonconsentable conflicts, the cases involving switching sides in the same litigation. Any concept of consent seems quite inconsistent for conduct for

184. The eyre record simply concluded “Endorsements” and “Finished.” See Bolland, ed, *Select Bills in Eyre* at xxi, xxv-xxx (cited in note 57). Bolland could find no further records and said that he “must leave the story unfinished.” *Id.* at xlv.

185. *Id.* at xlv-xlv.

186. See note 148.

which lawyers were imprisoned, suspended, disbarred or fined. Similarly, consent seems inappropriate to the extent that the Statute of Westminster I, chapter 29 and the London Ordinance of 1280 prohibited ambidexterity. A 1702 case noting a category of nonconsentable conflicts seems to be the first explicit reference to consent. The court stated, "No man, though by consent of the parties, can be attorney on both sides."¹⁸⁷

Even if there were an implicit consent principle in operation, it was a quite limited one. Client agreement or failure to object are the basis of all the above suggestions. In none of these cases is there any suggestion that medieval norms imposed any duty on the lawyer to explain anything to the client to insure a true, knowing consent to the possible conflicts of interest. Thus, consent played a very limited role in the medieval law of lawyering.¹⁸⁸

*f. Conflict Between the Client's Interest
and the Lawyer's Personal Interest*

Although there appear to be relatively few cases involving this type of conflict of interest, a sufficient number exist to suggest that these problems arose from time to time.¹⁸⁹ Moreover, some of these cases suggest that such a conflict violated medieval loyalty norms although the evidence for this is mixed.

Several mid-fifteenth 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.¹⁹⁰ 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."¹⁹¹ Similar accusations of personal profiting from knowledge of a client's affairs were made in Chancery against

187. See *Anonymous* (Case 64), 7 Modern Reports 47 (King's Bench, Trinity Term 1702). In 1815, the Lord Chancellor seemed to recognize that some conflicts were nonconsentable. See *Cholmondeley v Clinton*, 34 Eng Rep 515, 520 (Chancery 1815).

188. Nor was it a major issue in canon law. See e-mail from James Brundage to Jonathan Rose (June 1, 1999) (cited in note 62).

189. Five cases were found. See note 68.

190. See Ives, *Common Lawyers of Pre-Reformation England* at 314-15, 467 (cited in note 16).

191. *Id.* The complaint was apparently recounted in a letter to John Paston, a lawyer and member of a famous family (see note 193), perhaps seeking his help in mediating the dispute. Although there is no evidence as to the success of such efforts, one might be dubious as Jenny was "engaged in unceasing litigation with the Pastons." See Neilsen, ed, *Year Book 10 Edu IV & 49 Hen VI* at xix (cited in note 172).

lawyers John Tunstead and Edmund Hasilwode.¹⁹² 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.¹⁹³ 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.

On the other hand, perhaps the best known instance of conflict with a lawyer's personal interest may point in the opposite direction. This matter involved the notorious dispute over the 1459 will of Sir John Fastolf, a prominent knight.¹⁹⁴ John Paston, a barrister and member of a famous family,¹⁹⁵

192. See Ives, *Common Lawyers of Pre-Reformation England* at 314, 315 n 38 (cited in note 16).

193. See JUST 1/744 (Shropshire Trailbaston 1305), reprinted in PB2, no 20 (cited in note 26). Although Walter was a professional lawyer, it is unclear whether he was acting as such for Alice in this matter, although the record contains evidence of his ambidexterity as a professional lawyer. See note 107 and accompanying text. Paul Brand believes that although Walter was a professional lawyer, he did not benefit personally from the transaction and was only "a conduit" to transfer land to others to make it more difficult for Alice to recover the land from her sister. See e-mail from Paul Brand to Jonathan Rose (September 16, 1998) (on file with author).

194. See Birks, *Gentlemen of the Law* at 60-61 (cited in note 16); Ives, *Common Lawyers of Pre-Reformation England* at 315 (cited in note 16). Fastolf was a friend of Henry V and fought at Agincourt. He was a very successful businessman, whose activities involved many lawyers and much litigation. Although he may have been a model for Shakespeare's Falstaff, he apparently in fact bore little in common with the latter. See Birks, *Gentlemen of the Law* at 59-67 (cited in note 16); "John Fastolf" in Leslie Stephen and Sidney Lee, eds, 6 *Dictionary of National Biography* 1099, 1103 (Smith, Elder 1908). Fastolf's activities seemed to have created some notoriety, perhaps due especially to his involvement in controversy and extensive litigation, on which he spent an enormous amount of money and to his possible bribery of Sir John Fortescue, chief justice of the King's Bench. See Ives, *Common Lawyers of Pre-Reformation England* at 144, 299, 301, 305-06, 309-11, 318-21.

195. The Paston family letters and papers have been an important source of information for historians of this period. See Norman Davis, ed, *Paston Letters and Papers of the Fifteenth Century: Parts I-II* (Clarendon 1971-76) ("Davis, *Paston Letters*"); James Gairdner, ed, *The Paston Letters* (Alan Sutton 1983) ("Gairdner, *Paston Letters*"). Fifteenth century historians have written extensively about the Paston family, including their relationship with John Fastolf and the will controversy. See, for example, Richard Barber, *The Pastons: A Family in the Wars of the Roses* (Boydell 1993); Henry Bennett, *The Pastons and Their England: Studies in an Age in Transition* (Cambridge 1922); Frances and Joseph Gies, *A Medieval Family: The Pastons of Fifteenth-Century England* (HarperCollins 1998); E.F. Jacob, *The Fifteenth Century 1399-1485* (Clarendon 1961); Colin Richmond, *The Paston Family in the Fifteenth Century: The First Phase* (Cambridge 1990) ("*The First Phase*"); Colin Richmond, *The Paston Family in the Fifteenth Century: Fastolf's Will* (Cambridge 1996) ("*Fastolf's Will*"). Legal historians writing about the legal profession, relying on these letters and papers, also have referred extensively to the Paston family, which included several generations of lawyers, including John Paston, who were well known for their lawyering activities, especially in Norfolk. See, for example, Birks, *Gentlemen of the Law* at 59-67, 72, 78, 89-90 (cited in note 16); Cohen, *History of the*

had served as Fastolf's lawyer for many years,¹⁹⁶ was one of his most important counsellors,¹⁹⁷ and apparently had great influence over Fastolf in his latter years.¹⁹⁸ On November 3, 1459, two days before he died, Fastolf created a nuncupative will, superceding his June 1459 will. Paston memorialized this new oral will in writing, which made Paston its primary beneficiary and one of its two chief executors.¹⁹⁹ As a result of "Paston's deathbed 'bargain' with the old knight,"²⁰⁰ a substantial controversy erupted over the validity of the will and the right to Fastolf's property. Litigation erupted on several fronts, including a 1464 suit in the Archbishop of Canterbury's Court of Audience contesting the will's validity instituted by King's Bench Justice Yelverton, also an executor, and the serjeant, William Jenny, the leaders of the anti-Paston forces in the Fastolf will controversy.²⁰¹ Testimony was taken for several years with numerous witnesses on each side,²⁰² with numerous attacks on the witnesses' credibility

English Bar at 268, 378, 472 (cited in note 16); Holdsworth, 2 *History of the English Law* at 501, 509-10 (cited in note 16); 6 id at 449, 451 (cited in note 16); Ives, *Common Lawyers of Pre-Reformation England* at 16, 21, 85, 115, 311-15, 373 (cited in note 16).

196. John Paston seems to have worked regularly as a lawyer for Sir John Fastolf. See, for example, Davis, 2 *Paston Letters* at 111-19, 122-24, 127-37 (cited in note 193); Barber, *The Pastons* at 73-74 (cited in note 193); Gies, *A Medieval Family* at 104-07, 112-14 (cited in note 193); Richmond, *The First Phase* at 225-28 (cited in note 193).

197. According to Richmond, John Paston and William Jenny were "foremost among his legal counsellors" by 1450 and by 1455 Paston was Fastolf's "most influential councillor." See id at 231, 248.

198. See Barber, *The Pastons* at 73-74 (cited in note 193); Bennett, *The Pastons and Their England* at 9-10 (cited in note 193); Jacob, *The Fifteenth Century* at 344-45 (cited in note 193); Richmond, *The First Phase* at 243-49 (cited in note 193). John Paston may have been a distant relative of Fastolf. They referred to each other and often signed their letters as "cousin," although the use of that term was not limited to actual relatives. See Ives, *Common Lawyers of Pre-Reformation England* at 115 (cited in note 16); Davis, 1 *Paston Letters* at 88, 99 (cited in note 193); Davis, 2 *Paston Letters* at 118, 123, 128-29, 135, 168-69 (cited in note 193). The relation to Fastolf may have been through Paston's wife, Margaret. See Davis, 1 *Paston Letters* at lv, 38-39 (cited in note 193).

199. See Davis, 1 *Paston Letters* at lxiv-lxviii, 87-91 (cited in note 193); Bennett, *The Pastons and Their England* at 10-14 (cited in note 193); Birks, *Gentlemen of the Law* at 60-61 (cited in note 16); Gairdner, 1 *Paston Letters* at 234-35 (cited in note 193). The Gies have summarized the provisions of the June 1459 will. See Gies, *A Medieval Family* at 121-23 (cited in note 193).

200. See Ives, *Common Lawyers of Pre-Reformation England* at 315 (cited in note 16). The Paston Letters make numerous references to the "bargain" between John Paston and Fastolf. See, for example, Davis, 1 *Paston Letters* at 161-62, 416, 420, 424, 535, 554-59 (cited in note 193).

201. See Barber, *The Pastons* at 90-93 (cited in note 193); Bennett, *The Pastons and Their England* at 14-17 (cited in note 193); Davis, 1 *Paston Letters* at xlv, lv, 203 (cited in note 193). Richmond has the most detailed discussion of the controversy. See Richmond, *Fastolf's Will* at 89-220 (cited in note 193). Both Davis and Gairdner have provided useful summaries in their editions of the Paston Letters. See Davis, 1 *Paston Letters* at xliv-xlvi, liv-lv, lxviii-lxix; Gairdner, 1 *Paston Letters* at 195-203, 234-38 (cited in note 193).

202. Richmond has summarized the witness testimony. See Richmond, *Fastolf's Will* at 133-40 (cited in note 193). Davis has included many of the witness declarations in his edition of the Paston Letters, and Gairdner abstracted many of them in his edition. See Davis, 2 *Paston Letters* at 534-45, 542-44, 547-48, 561-69 (cited in note 193); Gairdner, 4 *Paston Letters* at 101-04, 154, 181-85, 236-45, 303.

and accusations of perjury resulting from bribery of the witnesses.²⁰³ Several witnesses, including Paston's co-defendant and perhaps Justice Yelverton, accused Paston of fabricating the will in order to divert Fastolf's large estates in Norfolk and Suffolk to himself.²⁰⁴ Prominent persons—the king,²⁰⁵ important nobility including Chaucer's granddaughter, judges and lawyers,²⁰⁶ and religious figures—chose sides in the dispute and it raged for years, with a compromise finally adopted in 1470.²⁰⁷ Although the Pastons ultimately obtained some of

203. Yelverton's witnesses alleged that the testimony of the witnesses supporting Paston was perjured or unreliable due to Paston's efforts to bribe witnesses and to use witnesses known to be unreliable. See Gairdner, 4 *Paston Letters* at 236-45 (cited in note 193); Bennett, *The Pastons and Their England* at 168-71 (cited in note 193); Birks, *Gentlemen of the Law* at 61-67 (cited in note 16); Gies, *A Medieval Family* at 126-29 (cited in note 193); Ives, *Common Lawyers of Pre-Reformation England* at 315 (cited in note 16). Gairdner, however, cautions about giving significant weight to these allegations. See Gairdner, 1 *Paston Letters* at 234 (cited in note 193). Contemporaneous observers as well as subsequent scholars have had doubts on whether the evidence supported charges of bribery. See Gairdner, 4 *Paston Letters* at 245 (cited in note 193); Richmond, *Fastolf's Will* at 135 (cited in note 193).

204. See Bennett, *The Pastons and Their England* at 15 (cited in note 193); Davis, 1 *Paston Letters* at 160-63 (cited in note 193); Davis, 2 *Paston Letters* at 202-03 (cited in note 193); Gairdner, 1 *Paston Letters* at 234-36 (cited in note 193); Richmond, *Fastolf's Will* at 93, 137-40 (cited in note 193). The most famous accusation of forgery by Paston was by his co-defendant, Thomas Howes, responding to a desire to clear his conscience. See Davis, 2 *Paston Letters* at 561-70 (cited in note 193); Gairdner, 4 *Paston Letters* at 303 (cited in note 193); Gies, *A Medieval Family* at 200-01 (cited in note 193); Richmond, *Fastolf's Will* at 137-40 (cited in note 193). The Gies cast doubt on the veracity of Howes's charges of forgery and bribery. Gies, *A Medieval Family* at 201 (cited in note 193). Only Ives specifically states that Yelverton accused Paston of forgery. See Ives, *Common Lawyers of Pre-Reformation England* at 315 (cited in note 16). Ives points out that Yelverton's motives were suspect as the latter resented being excluded from the will and had Thomas Playter, a lawyer who did work for the estate, write to Paston that Yelverton "will not hurt you in your bargain if you could be friendly to him ... for without a friendlihood on your part he seemeth that he should not greatly help you in your bargain." Id at 287, 315. See also Davis, 1 *Paston Letters* at 161-62 (cited in note 193).

205. Several documents reflect Edward IV's intervention on behalf of John Paston. See, for example, Davis, 1 *Paston Letters* at 145-46 (cited in note 193); Davis, 2 *Paston Letters* at 300-02, 549-50 (cited in note 193). Although Paston was successful in enlisting the King's support on some occasions, he was unsuccessful on others; and he may have sufficiently antagonized Edward IV that the king had him imprisoned for failing to present himself when ordered to do so. See Charles Ross, *Edward IV* 314-15, 399-401 (California 1974). Unfortunately, Paston died before the king's proclamation clearing the Paston name and endorsing its pedigree. See Davis, 2 *Paston Letters* at 549-52 (cited in note 193); Gies, *A Medieval Family* at 184-85 (cited in note 193).

206. Yelverton's King's Bench colleagues, Chief Justice Fortescue and Justice John Markham sided with the Pastons. William Jenny, a prominent serjeant and longtime adversary of the Pastons (see note 189), supported Yelverton and was actively involved in many of the anti-Paston activities. See, for example, Gies, *A Medieval Family* at 150-55 (cited in note 193); Ives, *Common Lawyers of Pre-Reformation England* at 315 (cited in note 16); Richmond, *Fastolf's Will* at 114-22 (cited in note 193). Richmond referred to Jenny as a "parasitical" lawyer. See id at 118.

207. William Wainfleet, the Bishop of Winchester and only remaining executor, arranged the compromise. See Davis, 1 *Paston Letters* at xlvi, 167-68, 419-26 (cited in note 193); Bennett, *The Pastons and Their England* at 18-19 (cited in note 193); Gies, *A Medieval Family* at 230-31, 235-37 (cited in note 193); Gairdner, 1 *Paston Letters* at 258 (cited in note 193); Richmond, *Fastolf's Will* at 213-20 (cited in note 193). The compromise released Paston from his obligation under the original bargain to pay 4,000 marks. See Davis, 1 *Paston Letters* at xlvi (cited in note 193). The Gies stated that John Paston II and William

the more important lands, John Paston was not able to enjoy any of the benefits as he was imprisoned three times between 1461-66²⁰⁸ and died in 1466.²⁰⁹ Despite the settlement of the litigation,²¹⁰ the fighting over the land continued as it was intertwined with the War of the Roses and private disputes.²¹¹

Most important, from the standpoint of legal ethics, is the fact that Paston drafted a will for a client under which Paston was the chief beneficiary. Interestingly, there is no evidence that Paston was disciplined for his role or that anyone even suggested that his conduct involved a conflict of interest.²¹² The accusations of forgery only would have made matters worse; the ethical

Yelverton had agreed to accept Bishop Wainfleet's "binding arbitration." See Gies, *A Medieval Family* at 230 (cited in note 193). In discussing the will dispute, Birks said that "the legal wrangles ... lasted as long as the War of the Roses." See Birks, *Gentlemen of the Law* at 61 (cited in note 16).

208. See Davis, 1 *Paston Letters* at liv-lv (cited in note 193); Gairdner, 1 *Paston Letters* at 216-32 (cited in note 193); Richmond, *Fastolf's Will* at 125 (cited in note 193). His deposition in the Canterbury Court of Audience litigation was taken while he was in the Fleet prison. See Davis, 1 *Paston Letters* at 140-45 (cited in note 193); Gairdner, 4 *Paston Letters* at 181-85 (cited in note 193); Gies, *A Medieval Family* at 175-78 (cited in note 193); Richmond, *Fastolf's Will* at 125-28 (cited in note 193).

209. Some have thought that the stress of the litigation and fighting over the land hastened his death. See, for example, Davis, 1 *Paston Letters* at xlvi (cited in note 193); Gairdner, 1 *Paston Letters* at 232-33; Richmond, *Fastolf's Will* at 153-54 (cited in note 193). Although Paston "made a killing from [Fastolf's] estates, his entanglement in the affairs of Sir John Fastolf led, in his wife's view, to 'his destruction.'" See Ives, *Common Lawyers of Pre-Reformation England* at 373 (cited in note 16). After he died, in discussing his relationship with Fastolf, she told her son, "Remember it was the destruction of your father." See Davis, 1 *Paston Letters* at xliv, 361 (cited in note 193). Paston's wife wrote him that the Bishop of Norwich told her that "he would not have abided the sorrow and trouble that you had abided to win all Sir John Fastolf's goods." See *id.* at 300.

210. Ultimately, the will was declared valid, but John Paston II agreed to abide by the Wainfleet compromise, which deprived the Paston family of much of the benefit of the legal victory. See Davis, 1 *Paston Letters* at 436-37 (cited in note 193); Barber, *The Pastons* at 167 (cited in note 193); Richmond, *Fastolf's Will* at 227 (cited in note 193). The nature of the Chancery proceeding in which John Paston prevailed against Yelverton and Jenny is not described, nor is its relation to the Canterbury Court of Audience proceeding. Perhaps it was related to the Chancery proceeding, which may have been initiated a decade earlier by his father, John Paston I (see Davis, 1 *Paston Letters* at 98-102 (cited in note 193)), or to a Paston suit seeking restitution for certain of his lands. See Gies, *A Medieval Family* at 181 (cited in note 193). Nevertheless, the context makes it clear that John Paston II will "perform and fulfill" all the terms of his agreement with William Wainfleet despite this legal victory. See Davis, 1 *Paston Letters* at 437. One beneficiary of the compromise was Magdalen College, Oxford, founded by Wainfleet.

211. See Gies, *A Medieval Family* at 237-310 (cited in note 193); Davis, 1 *Paston Letters* at lxviii-l (cited in note 193); Gairdner, 1 *Paston Letters* at 259-98 (cited in note 193); Richmond, *Fastolf's Will* at 234-57 (cited in note 193).

212. A late nineteenth century historian states that Paston, as one of Fastolf's executors, obtained the Caistor Castle and lands, one of the most important Fastolf properties, "by forgery and breach of trust." See James H. Ramsay, 2 *Lancaster and York: A Century of English History* 345 (Clarendon 1892). The author does not explain what he meant by "breach of trust." There is no indication that he is referring to Paston's obligation as a lawyer, for that fact is not even mentioned. In context, it seems most likely that his statement refers to Paston's role as Fastolf's executor. Moreover, the author cites no authority nor contemporary documents for his statement. Others opine that the facts did not justify Ramsay's statement. See "John Paston" in Sidney Lee, ed, 15 *Dictionary of National Biography* 448 (Smith, Elder 1909).

issue remained even if those accusations were untrue.²¹³ But the controversy seemed to focus solely on the validity of the will and not on any special obligations that Paston might have had as a result of being Fastolf's lawyer. More broadly, the activities of the judges and lawyers in this matter seemed to reflect a different perspective on legal and judicial ethics.

Overall, conflicts between the lawyer's personal interest and that of a client seem not to have been a significant medieval ethical problem.²¹⁴ 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 that a remedy in these cases might be justified on a broader agency principle, not distinctive to lawyers.²¹⁵ 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. In the Fastolf will controversy, the apparent lack of concern with John Paston's ethics suggests that medieval loyalty norms did not prohibit a lawyer from making himself a beneficiary of a client's will. Paul Brand concurs in this conclusion and has offered a cogent explanation. First, medieval legal ethics focused primarily on litigation and courtroom behavior and not on transactional work; and second, wills were the primary concern of the ecclesiastical courts and drafting misconduct would be within

213. Richmond, whose treatment of the matter is the most detailed and thorough, finds it impossible to determine whether John Paston had in fact forged the will or drafted a will in conflict with Fastolf's intentions. He concludes that there are too many conflicting and contradictory statements and it is therefore impossible to determine what happened and what Fastolf's intentions were. He also believes that it is unlikely that Fastolf was manipulated. However, he finds the evidence supporting John Paston persuasive and is willing to give him the benefit of the doubt regarding the will. See Richmond, *The First Phase* at 225, 255-59 (cited in note 193). The Gies seems to agree. Gies, *A Medieval Family* at 128-29 (cited in note 193).

214. Paul Brand reports that in his extensive research regarding the medieval legal profession, he recalls no cases involving misuse of client information for the lawyer's personal benefit and only found cases disclosing such information to the client's opponent. See e-mail from Paul Brand to Jonathan Rose (September 16, 1998) (cited in note 191). Conflicts between the client's interest and lawyer's personal interest were not a significant issue in canon law. See e-mail from James Brundage to Jonathan Rose (June 1, 1999) (cited in note 62).

215. Perhaps any agent who undertook to do something, such as purchase property, on behalf of a principal would be liable for failure to do so, especially if the agent bought the property for himself. Such a principle may explain the result in *Lucy v Walwyn*, a 1581 case important in the development of the doctrine of consideration. See Baker, *Introduction* at 388 (cited in note 16); John H. Baker and S.F.C. Milsom, *Sources of English Legal History: Private Law to 1750* 485-87 (Butterworths 1986). There is no evidence that Walwyn was a lawyer and his liability in that case seems irrespective of whether he was a lawyer. This notion is discussed in greater detail later. See notes 292-96.

their jurisdiction and outside that of the common law courts over professional lawyers.²¹⁶

3. Medieval Ambidexterity: Some Conclusions and Comparisons

In drawing some conclusions about medieval ambidexterity, there are a number of interesting similarities with modern conflict of interest regulation. Perhaps the most significant similarity is that ambidexterity was as common and important a type of lawyer misconduct in the medieval period as it is today.²¹⁷ The large number of cases discussed above establish that it was both a common and serious problem. In the medieval period, as today, the most significant problem involved conflicts between two current clients.²¹⁸ Moreover, also as is true today, medieval norms extended loyalty duties to former as well as present clients.²¹⁹ In addition, in establishing these loyalty norms, medieval courts emphasized the need to safeguard the client's confidential information. Finally, the issues in the medieval former client cases—the relation between the prior and subsequent litigation and the threat to client information—are strikingly similar to the issues in modern former client cases.²²⁰

On the other hand, the medieval cases reveal important and pronounced differences with modern conflict of interest law. First, the nature of the core category of medieval cases, switching sides in the same litigation, is quite different than most modern conflict cases. These medieval cases often involved fraudulent and deceitful conduct. The type of conduct involved in these cases is much more serious and immoral than in modern conflict cases. Many of these cases involve collusion with the opponent and a failure even to appear on behalf of the original client. In most of the cases, it is difficult to imagine how the lawyer could claim a good faith ability to represent both clients, which is at

216. See e-mail from Paul Brand to Jonathan Rose (September 17, 1998) (on file with author). A fifteenth century case confirms Brand's explanation. In that case, a woman sought relief in Chancery for her lawyer's deception in taking her money but failing to act in her behalf in a dispute over her husband's will in the Canterbury ecclesiastical court. See Ives, *Common Lawyers of Pre-Reformation England* at 314 & n 36. Richard Helmholz also suggests that this lack of concern may be due to the fact that it was uncommon for lawyers to draft wills, which was more commonly a task for clergy and friends. See e-mail from Richard Helmholz to Jonathan Rose (September 5, 1998) (on file with author).

217. See Brand, *Origins* at 120-42 and accompanying notes (cited in note 7); Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 59-62, 123-30 (cited in note 23).

218. Switching sides in the same litigation would clearly be prohibited today. See *Model Rules* 1.7 (cited in note 3); *Restatement* §§ 201, 209 (cited in note 3). Moreover, such conflicts of interest would in all likelihood be treated as conflicts between two current clients because the "hot potato" rule precludes lawyers from converting such conflicts into former client conflicts, which are treated under more lenient rules. See Wolfram, *Former Client Conflicts*, 10 *Georgetown J Legal Ethics* 677, 708-09 (1997).

219. See *Model Rules* 1.9 (cited in note 3); *Restatement* §§ 201, 213 (cited in note 3).

220. See *Restatement* § 213 (2) and Comments (b) and (d) (iii) (cited in note 3).

least claimed in many modern conflict of interest cases. Perhaps the underlying motive in both medieval and modern cases is financial with the former more blatant and the latter more subtle. Nevertheless, the most common medieval type of ambidexterity involved a more serious and blameworthy form of lawyer misconduct.

Second, in several respects, the medieval duty of loyalty is narrower than the modern one. The familiar modern concern with potential conflicts of interest inherent in simultaneous representation of multiple plaintiffs and defendants seems nonexistent in the medieval period. Moreover, the role of consent in the medieval law of lawyering is much more limited and generally an implicit one, at best. In addition, there is little evidence to suggest that medieval loyalty norms were sensitive to conflicts between the lawyer's personal interest and that of the client. At most, it was a very limited concern.²²¹ Moreover, the Fastolf will controversy may reveal an institutional deficiency in the medieval regulation of conflict of interest. The royal courts apparently lacked jurisdiction to punish lawyers for transactional misconduct and for misconduct in other courts; and possibly there were no other avenues for relief.²²² Finally, the medieval duty of loyalty to avoid adversity to an existing client on an unrelated matter is significantly more limited in nature and scope than the modern one.²²³

221. The use of confidential information by a lawyer to the disadvantage of a client conflicts with both the law of lawyering and common law agency principles. See *Model Rules* 1.8 (b) (cited in note 3); *Restatement* § 112 (2) (cited in note 3); American Law Institute, *Restatement (Second) of the Law of Agency* § 388 and Comment (c) (1933). Moreover, it is clearly unethical for a lawyer to draft a will making the lawyer a beneficiary. See *Model Rules* 1.8 (c) (cited in note 3); *Restatement* § 208 (1) (cited in note 3). The possible distant blood-relationship between John Paston and Sir John Fastolf would not alter this conclusion.

222. It remains to be determined whether a victim client might obtain a remedy elsewhere, for example in chancery. Perhaps the ecclesiastical courts could punish common-law lawyers for misconduct committed in or revealed by proceedings in such courts; John Paston's alleged tampering with Fastolf's will would have been example of such misconduct. In studying the availability of chancery remedies, one must distinguish between those equitable remedies such as rescission or restitution, sought to undo the consequences of the lawyer's misconduct, and efforts actually to discipline the lawyer. Brundage's scholarship on canon laws suggests that lawyers could be sanctioned for ambidexterity and other misconduct in the church courts, but those courts might not have been concerned with conflicts with lawyer's personal interest as occurred with John Fastolf's will. See notes 212 and 311.

223. However, it is interesting that some modern scholars have proposed reducing the stringency of the modern loyalty duty in such cases and would be more lenient in allowing lawyers to sue a current client. See, for example, Thomas Morgan, *Suing a Current Client*, 9 *Georgetown J Legal Ethics* 1157 (1996) (cited in note 2). Professor Morgan believes the current strict rule caused "courts and rule drafters alike to lose sight of the conflict of interest issues they were trying to address." In particular, he feels that the current rule does not focus sufficiently on the adverse impact of such representation on the clients as "[w]hat it did was remove the requirement that the effect of the lawyer's conduct be 'material' and transform a reasonably balanced rule into a tactical weapon for litigators." *Id.* at 1194. Not surprisingly, not everyone agrees completely with his proposed relaxation of the rule. See, for example, Brian Redding, *Suing a Current Client: A Response to Professor Morgan*, 10 *Georgetown J Legal Ethics* 487 (1997). Moreover, to the extent

The remedies also differ in the two periods. In one sense, the remedies for medieval ambidexterity were narrower than those for modern conflicts of interest. Punitive sanctions were the primary medieval remedy. Notably, judicial disqualification of lawyers seems to have been quite uncommon although civil liability, as discussed later, was also a medieval remedy. On the other hand, medieval disciplinary sanctions for ambidexterity were generally much more severe than those in the typical modern case. Imprisonment and fines, two of the most common medieval sanctions, are not modern forms of disciplinary sanctions.²²⁴ Moreover, disbarment and probably suspension seem to have been more common for medieval than for modern conflicts. But, of course, the medieval cases typically involved much more serious and flagrant misconduct.

In some ways, the differences between medieval and modern conflicts of interest seem more pronounced than their similarities or, at least, create the need to be careful not to overstate the similarities. These differences seem to be the product of three interrelated causes. First, the medieval loyalty norms were relatively new and, therefore, less developed. Modern courts have had the benefit of years of case development, commentary, professional activities, and institutional efforts in developing modern conflict of interest rules. Second, the judicial role in articulating rules or doctrine seems more limited than today. Although medieval judges certainly played an important role in developing loyalty norms, they did not articulate doctrine nor rules in the sense that modern courts do. The nature of medieval pleading limited the extent to which the courts developed substantive law and engaged in legal analysis; and the ultimate result in many cases depended on subsequent jury resolution of factual disagreements.²²⁵ In this connection, Professor Baker notes that “[t]he courts themselves rarely decided points of law with formal judgments No one expected a gradual accretion of law from case to case The rules were, in a sense, given; it was the game that mattered.”²²⁶ Finally, one suspects that the

that the medieval duty arises consensually and not by official fiat, it seems consistent with the views of modern law and economics scholars. See Macey and Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 Iowa L Rev 965 (cited in note 2).

224. To the extent that they are used at all, it is only when the conflict of interest involves some more serious offense. For example, a federal court sentenced a lawyer in a leading New York law firm to 15 months in prison for his conviction of fraud and perjury for failing to reveal his conflict of interest to the bankruptcy court. See *United States v Gellene*, 182 F3d 578, 1999 US App LEXIS 16715 (7th Cir 1999).

225. See Baker, *Introduction* at 90-96, 223-27 (cited in note 16); Milsom, *Historical Foundations of the Common Law* at 37-50 (cited in note 16). Professor Milsom initially articulated the classic exposition of this notion. See S.F.C. Milsom, *Studies in the History of the Common Law* 171-89 (Hambleton 1985).

226. John Baker, *The Third University of England: The Inns of Court and the Common-Law Tradition* 19-20 (Selden Soc’y 1990). For a very different reason, Robert Palmer de-emphasizes the judicial role in law

medieval social and professional expectations of loyalty produced a narrower and simpler norm. Medieval society probably did not perceive a need for a more extensive duty of loyalty. In addition, more subtle and broader forms of disloyalty were probably both less common. Thus, the medieval norm focused on the most serious form of disloyalty, direct and current adversity in the same litigation. To a large extent, these differences are all a product of the seven centuries that separate these two periods.

B. CIVIL LIABILITY

1. Tracing the Initial Development

Although a full discussion of the evolution of the civil liability of lawyers is outside the scope of this article, some background on this topic is necessary to facilitate understanding the subsequent discussion of the cases. Moreover, tracing this development is especially important for the modern student of the law of lawyering, who may be tempted to view this medieval civil liability as equivalent to modern legal malpractice. Such an approach would likely be at least somewhat misleading.

Not surprisingly, there is an abundance of scholarship on the evolution of tort and contract liability.²²⁷ However, the development of the civil liability of lawyers seems to have been outside that development. Moreover, in studying the process by which liability for negligence emerged through trespass and more importantly through actions on the case, one finds no cases imposing negligence based liability on lawyers. In contrast, as early as the fourteenth century, there are a number of cases dealing with liability of the medical profession for negligence,²²⁸ long before the formal recognition of an

making while emphasizing that of the chancery. See Robert Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* 296-306 (North Carolina 1993).

227. See, for example, Baker, *Introduction* at 67-75, 360-426, 454-529 (cited in note 16); C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens 1949); Albert K. Kiralfy, *The Action on the Case* (Sweet & Maxwell 1951); Milsom, *Historical Foundations of the Common Law* at 283-400 (cited in note 16); Plucknett, *Concise History of the Common Law* at 424-502, 628-56 (cited in note 16); A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon 1975); Baker, ed, 2 *Spelman's Reports* at 220-98 (cited in note 80); Morris Arnold, ed, 1 *Select Cases of Trespass from the King's Courts 1307-1399 ix-lxxxv* (100 Selden Soc'y 1985). Even among traditional approaches to legal history, there have been differences of opinion and alternative theories for these developments. See, for example, Milsom, *Studies in the History of the Common Law* at 28-30, 59-60, 83-90, 91-103, 149-70 (cited in note 223). For a very different, but provocative and insightful, approach to the development of trespass, assumpsit and action on the case, see Palmer, *English Law in the Age of the Black Death* at 137-306 (cited in note 224).

228. See, for example, Baker, *Introduction* at 376, 460 (cited in note 16); Fifoot, *History and Sources of the Common Law* at 66, 82, 92, 156-57 (cited in note 225); Kiralfy, *Action on the Case* at 8, 40, 90, 138-40,

independent tort of negligence.²²⁹ As subsequent discussion of the ambidexterity cases will illustrate, one explanation may be that the early lawyer liability cases, like the discipline cases, did not involve negligent or careless, but fraudulent and intentional, conduct. More generally, though, the evolution of the civil liability of the legal profession followed a different path, one quite distinct from that more general process.²³⁰ The civil liability of lawyers had its origins in the common law writ of deceit and the subsequent action on the case for deceit.²³¹ Before turning to the use of these two remedies against lawyers, a brief discussion of their general nature is warranted.

The writ of deceit, a very old writ dating to 1201, was directed at deceit of the court and used to remedy misconduct toward the court, with a primary focus on abuse of the legal process.²³² It was one of several writs ordering the

224-26 (cited in note 225); Milsom, *Historical Foundations of the Common Law* at 318 (cited in note 16); Palmer, *English Law in the Age of the Black Death* at 185-96 (cited in note 224); Plucknett, *Concise History of the Common Law* at 471 (cited in note 16); Baker, ed, 2 *Spelman's Reports*, Introduction at 264-65 (cited in note 80).

229. Although the root of the idea of liability for negligence may be seen in the fourteenth and fifteenth century cases, its emergence as an identified basis for liability probably did not occur until the eighteenth century, with many scholars pointing to its inclusion as separate types of action on the case in John Comyns's *Digest* in 1762. Late eighteenth century and early nineteenth century cases more clearly reflected its recognition as an independent tort. Milsom believes that the modern tort of negligence arose in 1833. See Baker, *Introduction* at 454-55, 459-70 (cited in note 16); Milsom, *Historical Foundations of the Common Law* at 392-400 (cited in note 16); Plucknett, *Concise History of the Common Law* at 471-72 (cited in note 16).

230. At least by 1767, negligence was a basis for attorney liability. See *Russell v Palmer*, 95 Eng Rep 837 (Common Bench 1767); Fifoot, *History and Sources of the Common Law* at 157 (cited in note 225). An ambiguous statement in Blackstone's *Commentaries*, because of its use of "diligence and skill" in referring to several types of liability including that of attorneys, might be read as imposing liability for negligence, although that reading seems dubious. See 3 Blackstone, *Commentaries* at *163-64 & n (x). Although a later edition of Comyns's *Digest* referred to a case involving an attorney to illustrate an action on the case for negligent breach of trust, it was an 1809 American case (Connecticut), which could not have been included in the original 1762 edition and could not have evidenced the early use of negligence as an English theory of lawyer liability. See Comyns, 1 *Digest* at 414 (cited in note 27). The liability of barristers for negligence has prompted substantial discussion. See notes 260-72 and accompanying text.

231. One category of early cases imposing tort liability involved the "common callings" and the "custom of the realm" in such cases. Innkeepers and carriers were clearly included and several legal historians have also included surgeons. See, for example, Baker, *Introduction* at 461-62, 471 (cited in note 16); Kiralfy, *Action on the Case* at 39-40, 141, 151-57 (cited in note 225); Milsom, *Historical Foundations of the Common Law* at 318-20 (cited in note 16); Plucknett, *Concise History of the Common Law* at 480-82 (cited in note 16). Although at least one commentator suggests that lawyers were such a calling and that notion influenced their liability, such a suggestion is clearly against the weight of scholarly opinion and finds no support in those cases. See Kiralfy, *Action on the Case* at 148-49 (cited in note 225). Baker suggests that an individual's status, including that of attorney, played a role in the extension of assumpsit to nonfeasance. See Baker, *Introduction* at 382 (cited in note 16).

See Holdsworth, 2 *History of English Law* at 366 (cited in note 16); 3 *id* at 407; Kiralfy, *Action on the Case* at 73-74 (cited in note 225); Plucknett, *Concise History of the Common Law* at 640 (cited in note 16); Pollock and Maitland, 2 *History of English Law* at 534-35 (cited in note 8); Simpson, *History of the Common Law of Contract* at 253-54 (cited in note 225). Such actions could also be commenced by bill. See Plucknett,

sheriff to bring the defendant to the king's court to explain why (*ostensurus quare*) he had engaged in wrongdoing.²³³ Although the victim commonly obtained the writ, the defendant was required to answer the king as well as the complainant.²³⁴ According to Pollock and Maitland, "the cause of action [was] no mere fraud, but a fraudulent perversion of the course of justice."²³⁵ As such, they felt that the "punitive element [was] strong;" and conventional punitive sanctions such as imprisonment and fines were imposed.²³⁶ However, the remedies were not limited to such punishment and remedies for the victim, including monetary compensation, were available in the same action.²³⁷ This use of the writ of deceit to obtain both public and private remedies in one action illustrated perhaps the traditional association of early tort law with the criminal law.²³⁸ Despite the fundamental nature of the writ of deceit initially as remedy for deceiving the king and his courts, subsequent writers seemed to emphasize its use as a private remedy. In his well-known 1534 treatise, *The New Natura Brevium*, Fitzherbert's discussion of the writ of deceit seemed to focus primarily on its use by the private victims of deceit.²³⁹ Similarly in his 1787 *History of The English Law*, Reeves, in discussing the law during the reign of Edward II (1307-27), stated that the writ of deceit "was to redress a person in damages for any injury he had sustained by reason of collusive, oppressive or deceitful proceedings in judicial matters."²⁴⁰

Concise History of the Common Law at 640 (cited in note 16). In his study of the development of the writ of conspiracy, which was directed at abuse of the legal process comparable to the modern tort of malicious prosecution, Winfield notes use of the writ of deceit to prevent "cozening a court" and its relation to the writ of conspiracy. See Winfield, *History of Conspiracy and Abuse of Legal Procedure* at 33, 119 (cited in note 8).

233. See Baker, *Introduction* at 70-71 (cited in note 16). The common law distinguished between the assertion of a right, which required a *praecipe* writ, and a complaint about a wrong, which used the *pone* writ. The *ostensurus quare* formula was used in the *praecipe* writ for the defendant to explain the failure to comply with the demand, but was imported into the *pone* writ as its essence. See *id* at 68-70.

234. Plucknett seems to imply that it was more common for victims to initiate those proceedings and that the crown did so primarily when the victim had not. See Plucknett, *Concise History of the Common Law* at 640 (cited in note 16).

235. See Pollock and Maitland, 2 *History of English Law* at 535 (cited in note 8). They state that the defendant "is to answer, not only the private person whom he has defrauded, but also and in the first instance the king." *Id*.

236. *Id*. Plucknett also says that the "nature" of the writ of deceit "was essentially penal." See Plucknett, *Concise History of the Common Law* at 640 (cited in note 16).

237. See Pollock and Maitland, 2 *History of English Law* at 535 (cited in note 8).

238. See, for example, David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 BU L Rev 59 (1996); Plucknett, *Concise History of the Common Law* at 422-23, 455-62 (cited in note 16); Pollock and Maitland, 2 *History of English Law* at 511-43 (cited in note 8).

239. See Fitzherbert, *New Natura Brevium* at 95E-100D (cited in note 8).

240. See John Reeves, 2 *History of the English Law* 329 (3d ed 1814).

The focus on private remedies for deceit became more dominant as trespass on the case emerged in the late fourteenth century.²⁴¹ About the same time, an action on the case for deceit as a form of trespass on the case appeared, probably evolving as a form of trespass on the case from the writ of deceit and providing a remedy to victims injured by deceit.²⁴² For a while, at least, the action on the case for deceit apparently became available as an alternative in all cases where the writ of deceit lay.²⁴³ But by the sixteenth century, the action on case supplanted the writ of deceit.²⁴⁴

Lawyers were a target of the writ of deceit, which was the initial basis of their liability.²⁴⁵ Given the writ's central focus, as indicated above, that result is not surprising. Lawyers were officers of the court and their litigation misconduct was a clear form of abuse of the legal process and deceit of the court. Moreover, the Statute of Westminster I, chapter 29, the initial and primary regulation of lawyer misconduct, was explicitly directed at "deceit and collusion."²⁴⁶ Although this statute provided new and distinctive remedies, commentators have stated that it confirmed the common law, presumably

241. See, for example, Baker, *Introduction* at 73-75 (cited in note 16). Kiralfy summarizes the initial development of the action on the case and identifies its four main features as wrong, damages, need of remedy and analogy. See Kiralfy, *Action on the Case* at 1-17 (cited in note 225).

242. See, for example, Baker, *Introduction* at 376-78 (cited in note 16); Fitzherbert, *New Natura Brevium* at 95D (cited in note 8); Kiralfy, *Action on the Case* at 73-98 (cited in note 225); Plucknett, *Concise History of the Common Law* at 640-41 (cited in note 16). Although the term "case for deceit" caused some confusion, it was a form of trespass on the case and not a separate cause of action. See Kiralfy, *Action on the Case* at 94-97 (cited in note 225). Baker and Kiralfy note that there was a linkage between the writ of deceit and trespass. See *id.* at 3, 73-74; Baker, *Introduction* at 72 n 29 (cited in note 16). Kiralfy attaches significance to the use of the word "trespass" in the Statutes of Westminster, chapter 29. See Kiralfy, *Action on the Case* at 3, 73 (cited in note 225). Baker also points out that in serious trespass cases, a fine payable to the king could be imposed in addition to a private remedy. See Baker, *Introduction* at 71 (cited in note 16). That feature may indicate another connection to the writ of deceit. See notes 234-35 and accompanying text.

243. See Kiralfy, *Action on the Case* at 74 (cited in note 225). This duplication of remedies is interesting, as it was common to deny a new remedy on ground that an older writ could be used. See *id.* at 14-15. The great debate over the use of assumpsit in cases where debt lay, culminating in the renowned *Slade's Case*, involved this issue. See, for example, Baker, *Introduction* at 392-94 (cited in note 16); Milsom, *Historical Foundations of the Common Law* at 339-56 (cited in note 16); Plucknett, *Concise History of the Common Law* at 644-46 (cited in note 16). Reeves discussed the overlap between the newer actions on the case and the older writs and attempted to identify the fifteenth century distinctions in the use of an action on the case and a writ of deceit as remedies. See Reeves, 3 *History of English Law* at 393-94 (cited in note 238).

244. See Kiralfy, *Action on the Case* at 96 (cited in note 225). Many legal historians have asserted that deceit played an important role in the development of assumpsit and its extension to nonfeasance. See, for example, Baker, *Introduction* at 376-78 (cited in note 16); Milsom, *Historical Foundations of the Common Law* at 322-39 (cited in note 16); Plucknett, *Concise History of the Common Law* at 640-43 (cited in note 16); Simpson, *History of the Common Law of Contract* at 253-57 (cited in note 225). Compare Baker, ed, 2 *Spelman's Reports* Introduction at 274-75 (cited in note 80).

245. See Baker, *Introduction* at 382-83 (cited in note 16).

246. See notes 36-43 and accompanying text.

referring to the writ of deceit.²⁴⁷ In addition, a writ of deceit was one way, perhaps a very common one, that a client victim could initiate a proceeding to punish a lawyer under this important, initial regulation of the legal profession.²⁴⁸ In his discussion of the writ of deceit in the 1534 *New Natura Brevium*, Fitzherbert identified several instances of its use against lawyer misconduct.²⁴⁹ More recently, Kiralfy catalogued the common instances where the writ of deceit was used and many of them described various forms of lawyer misconduct.²⁵⁰ Finally, the writ of deceit was not available for similar misconduct against a nonlawyer, who was, therefore, liable only for damages and not subject to imprisonment.²⁵¹

An action on the case for deceit was also a remedy for lawyer misconduct and lawyers were targets of such actions for the types of conduct actionable initially by a writ of deceit.²⁵² William Rastell, in *A Collection of Entries* (1566),

247. See, for example, Coke, 1 *Second Part of the Institutes* at 213 (cited in note 38); Kiralfy, *Action on the Case* at 73 (cited in note 225). Kiralfy believes that the Statutes of Westminster, chapter 29, had a significant impact on the form of the writ of deceit and on the development of the action on the case. See id at 3, 73-74.

248. Professor Palmer discusses two cases in which the disbarment or imprisonment of an attorney, perhaps pursuant to Chapter 29, may have emerged from a writ of deceit by the client against the attorney. See Palmer, *Origins of the Legal Profession*, 11 *Irish Jurist* at 137-39 (cited in note 16). Also, Coke, in a rather confusing discussion of the final phrase in chapter 29, "greater punishment ... at the King's pleasure," illustrated the meaning with two cases involving an action or writ of deceit by the victim. See Coke, 1 *Second Part of the Institutes* at 216-17 (cited in note 38); Coke, *Fourth Part of the Institutes* at 102 (cited in note 38). One of these cases, which involved Matthew of the Exchequer, may be the same case that Brand discusses regarding imprisonment of a serjeant for violation of chapter 29. Matthew, who was given two prison sentences for two Chapter 29 violations, was also imprisoned for other misconduct and was the subject of other complaints. See Brand, *Origins* at 123 & nn 20-21 (cited in note 7).

249. See Fitzherbert, *New Natura Brevium* at 95E n (a), 98H (successful defense by attorney against whom writ was brought), 99G-J (cited in note 8).

250. The common instances included deceit by suing without authority, deceit by non-summons, deceit by false returns to writs, deceit by casting a false protection, deceit for groundless civil actions, deceit for suing in a court that has no jurisdiction and deceit for suing on forged documents. See Kiralfy, *Action on the Case* at 74-82 (cited in note 225).

251. In 1292, in *Bernwell v Vyneter*, the defendant said that he was not a common attorney of the Bench in order to avoid the use of a particular form of the writ of deceit and the possibility of imprisonment. If not such a common attorney, the plaintiff may have had only a trespass or covenant action against him as "one of the people." See Palmer, *Origins of the Legal Profession*, 11 *Irish Jurist* at 138-39 (cited in note 16). The issue of the defendant's status was set for resolution by a jury at the next assize. See id at 138; Baker, *The Third University of England* at 26 n 22 (cited in note 224). His status was complicated as he was clearly acting as the plaintiff's "attorney" even if he was not a Bench attorney, illustrating the ambiguity of the profession's fringes.

252. See Baker, *Introduction* at 382-83 (cited in note 16); Simpson, *History of the Common Law of Contract* at 253-55 (cited in note 225); Baker, ed, 2 *Spelman's Reports* at 85, 231, 288 (cited in note 80). One case discussed by Baker in his introduction to the Reports seems both particularly interesting and unusual as it appears to have involved an attempt by the attorney to plead a contractual defense, an accord, to his client's deceit suit. See id at 288 & n 5. Baker and Kiralfy both note that London courts recognized such an action against a lawyer before the royal courts. See Baker, *Introduction* at 383 n 45 (cited in note 16); Kiralfy at 148-49 (cited in note 225).

a formulary of pleading precedents, listed a number of examples of actions on the case against attorneys.²⁵³ Early treatises and collections of cases such as Sheppard's *Actions upon the Case for Deeds* (1663), *The Impartial Lawyer* (1709), and Viner's *A General Abridgment of Law and Equity* (1741-53) all included a number of actions against lawyers in the sections dealing with actions on case for deceit.²⁵⁴ It is noteworthy that some of these cases treated lawyer misconduct outside the litigation process also as actionable.²⁵⁵

Interestingly, these early deceit actions were often directed at ambidexterity. Pollock and Maitland noted that in the thirteenth century, a use of the writ of deceit included "the case of an attorney who colludes with his client's adversary."²⁵⁶ In the *New Natura Brevium*, Fitzherbert noted that a tenant could obtain relief when his attorney caused a default "by covin" with the opposing party.²⁵⁷ Later, lawyer conflict of interest was also a target of actions on the case. Pleading formularies such as the *Registrum Brevium* and Rastell's *A Collection of Entries* illustrated ambidexterity as actionable against an attorney or counsellor.²⁵⁸ Similarly, two centuries later, Blackstone, in discussing private wrongs, noted that a damage remedy arose against an

253. See William Rastell, *A Collection of Entries* 2, 96-97 (1596 ed) (1566).

254. See Sheppard, *Actions upon the Case for Deeds* at 12, 277, 295, 331, 384, 784 (cited in note 27); *The Impartial Lawyer* at 10-11, 16-17, 79, 111-12, 156-66 (cited in note 27); Viner, 1 *Abridgment* at 562, 576-77 (cited in note 27); Viner, 8 *Abridgment* at 491-92, 497-99 (cited in note 27). Viner referred to the Statutes of Westminster I, chapter 29, although he mistakenly noted it as chapter 30. See *id.* at 499. *The Impartial Lawyer* may be the earliest treatise on the legal profession.

255. Kiralfy, in fact, thinks that these cases of lawyer liability for nonlitigation misconduct were the initial basis for the expansion of assumpsit. See Kiralfy, *Action on the Case* at 87-90 (cited in note 225). In this section, he discusses a number of well-known cases regarding the development of assumpsit, such as *Somerton v Colles* and *Doige's Case*. In those cases, he seems to assume that the defendant was a lawyer. That seems erroneous in *Doige's Case* and unclear in *Somerton*. See, for example, Baker, *Introduction* at 382-86 (cited in note 16); Fifoot, *History and Sources of the Common Law* at 333-34, 343-49 (cited in note 225); Milsom, *Historical Foundations of the Common Law* at 328-32 (cited in note 16); Plucknett at 640-43 (cited in note 16). In discussing the importance of *Somerton* and *Doige's Case* in the expansion of promissory remedies, Simpson discusses the significance of actions involving the initial court-based deceit and warranty-based deceit in extending remedies to attorneys acting as agents and more generally to relief in "purely private transactions" and actionable nonfeasance. See Simpson, *History of the Common Law of Contract* at 253-57 (cited in note 225). He credited Fitzherbert with identifying a general principle emerging from these strands of cases: "the principle was that an action for deceit lay where one person acted in the name of another person in such a way that the other person suffered loss." *Id.* at 254.

256. See Pollock and Maitland, 2 *History of English Law* at 534-35 (cited in note 8).

257. This example is somewhat different from the typical deceit case, as it illustrated the use of the writ of *audita querela*, which was used to obtain relief from a prior judgment (see *Black's Law Dictionary* 131 (West 6th ed 1990)) to obtain restitution of the land. See Fitzherbert, *New Natura Brevium* at 103A at 233-34 (cited in note 8).

258. See *Registrum Brevium* 113 (1531K) (4th ed 1687); Rastell, *Collection of Entries* at 2, case no 3 (cited in note 251) (summary translation of 1574 edition in Fifoot, *History and Sources of the Common Law* at 90 (cited in note 225)).

advocate or attorney who “betray[ed] the cause of their client.”²⁵⁹ In addition, a number of cases in the well known treatises and collections of cases involved ambidextrous, collusive misconduct.²⁶⁰ Finally, Kiralfy uses a writ against a lawyer’s disloyal nonlitigation conduct to illustrate the form of an action on the case for deceit.²⁶¹

Despite this history and analysis, there are statements that serjeants were liable for their negligence in the medieval era. Both Holdsworth and Bolland asserted such a principle.²⁶² Moreover, counsel and judges, particularly in the noted case of *Rondel v. Worsley*, have also expressed this view.²⁶³ The authority for this position seems to stem entirely from three Henry VI Year Book cases, only one of which really merits discussion.²⁶⁴

Yet, a careful examination of this 1435 case and what early and subsequent commentators have said about it create substantial doubt whether it lends any support for the liability of medieval serjeants or barristers for their negligence.²⁶⁵

259. Blackstone, 3 *Commentaries* at * 164 (cited in note 157).

260. See, for example, Comyns, 1 *Digest* at 353-54 (cited in note 27); Sheppard, *Actions on the Case for Deeds* at 277, 295 (cited in note 27); *The Impartial Lawyer* at 10-11, 16-17, 79, 223 (cited in note 27); Viner, 1 *Abridgment* at 576 (cited in note 27).

261. He believes that this form of deceit influenced the development of *assumpsit*. See Kiralfy, *Action on the Case* at 87, 219 (cited in note 227).

262. See William Bolland, *A Manual of Year Book Studies* 14 (Cambridge 1925); Holdsworth, 2 *History of English Law* at 491 (cited in note 16). Later commentators have also taken that position. See, for example, Roxburgh, *Rondel v. Worsley*, 84 *L Quarterly Rev* at 178-79 (cited in note 137a).

263. See, for example, *Rondel v Worsley*, 1 Appeal Cases 191, 279 (House of Lords 1969) (Lord Upjohn); *Rondel v Worsley*, 1 Queen’s Bench Division 443, 455-59 (Justice Lawton), 518 (Justice Salmon) (Court of Appeal 1967); *Kennedy v Brown*, 143 *Eng Rep* 268, 278-79 (plaintiff’s counsel), 289 (Chief Justice Erle), 13 *Common Bench (new series)* 677, 702-05, 730-31 (1863); *Swinfen v Lord Chelmsford*, 157 *Eng Rep* 1436, 1448 (Chief Baron Pollock) (Exchequer 1860). *Rondel v Worsley* was a modern consideration of barristers’ liability for negligence. See note 272.

264. See *Doige’s Case*, 20 Henry VI, fol 34, pl 4 (1442), reprinted in Baker and Milsom, *Sources of English Legal History* at 391 (cited in note 213), and in Fifoot, *History and Sources of the Common Law* at 343 (cited in note 227); *Anonymous case*, 14 Henry VI, fol 18v, pl 58 (1435), reprinted in Baker and Milsom, *Sources of English Legal History* at 383 (cited in note 213) and in Fifoot, *History and Sources of the Common Law* at 344 (cited in note 227); *Somerton*, 11 Henry VI, fol 18, pl 10 (1433), reprinted in Baker and Milsom, *Sources of English Legal History* at 387 (cited in note 213) and in Fifoot, *History and Sources of the Common Law* at 343 (cited in note 225). The first and third cases, which do not merit further discussion here, are ones that are well-known developments in the history of *assumpsit*. They have been discussed previously, and *Somerton* will be discussed in detail subsequently. See notes 253, 289-91 and accompanying text. Neither of these cases said anything about the liability of barristers for negligence and dealt with unrelated matters; it is not even clear that they articulated principles distinctive to the legal profession. See notes 253, 282-83 and accompanying text. Even Justice Lawton, who is largely responsible for the modern interest in these Year Book cases, acknowledged in *Rondel v Worsley* that these two cases were not relevant to the issue of whether barristers were liable for their negligence in the medieval era. See *Rondel v Worsley*, 1 QB at 457 (cited in note 261).

265. In supporting their statements as to the liability of serjeants for their negligence, Bolland referred only to this case and Holdsworth relied primarily on it although he did mention *Doige’s Case* generally. See Bolland, *Manual of Year Book Studies* at 14 & n 2 (cited in note 260); Holdsworth, 2 *History of English Law* at 491 & n 5 (cited in note 16). Although some judges and lawyers have stated that Rolle’s *Abridgment*

In this case, the plaintiff, a vendee of land, brought an action on the case alleging that defendant had failed to cause third parties to make a release to the plaintiff as the defendant had covenanted. Thus the issue was whether there was contractual liability for the defendant's nonfeasance. The court said that since there was an action for negligent performance, which was "only accessory to and dependent on the covenant, then as well as having an action for what is only accessory I shall also have an action for the principal."²⁶⁶ The case says nothing directly about negligence nor the liability of serjeants for negligence. The case is yet another development in the actionability of nonfeasance and the evolution of *assumpsit*.²⁶⁷ Both older and current commentators have noted and discussed this 1435 case in that manner.²⁶⁸

In support of the notion that serjeants were liable for their negligence, subsequent judges, lawyers, and commentators have pointed to the dictum of Justice Paston.²⁶⁹ He said, "And if you, who are a serjeant at law, undertake to plead my plea, and do nothing - or do something otherwise than I have told you - so that I suffer loss, I shall have an action on my case."²⁷⁰ Although this statement was dictum, some have claimed it as "strong evidence" of liability for negligence as it was said in the presence of leading and experienced lawyers and judges and, therefore, evidenced their views.²⁷¹ Others, however, have merely

relied on this case for authority that barristers were liable for negligence, that statement is inaccurate. Rolle cited this 1435 case three times. One case involved an instance of nonliability; another stated that an action on the case was available if the client's counsel became counsel for his adversary; and the third case said that an action in deceit was available to a client who lost his case because of the failure of his counsel to appear. See Henry Rolle, 1 *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley* 91 (1668). Nor, as has sometimes been claimed, do any of the illustrations in Rastell's *Entries* regarding attorney liability provide any authority for the liability of counsel for negligence. One entry concerns the availability of an action on the case to a client who lost his action because of his attorney's default, another the actionability of an attorney who discloses confidential information, and another the liability of an attorney who becomes counsel for his client's adversary. See Rastell, *Entries* at 2 (cited in note 251).

266. See *Anonymous Case*, 14 Henry VI, fol 18v, pl 58 (1435), reprinted in Baker and Milsom, *Sources of English Legal History* at 383 (cited in note 213).

267. See authorities cited in note 225. See also note 253.

268. See, for example, Baker, *Introduction* at 381-82 (cited in note 16); Fifoot, *History and Sources of the Common Law* at 333-34 (cited in note 225); Rolle, 1 *Abridgment* at 91 (cited in note 263); Simpson, *History of the Common Law of Contract* at 224, 227, 248; Baker, ed, 2 *Spelman's Reports* at 266-67, 269 (cited in note 80).

269. See, for example, *Rondel v Worsley*, 1 QB at 456-57 (Lawton, LJ) (cited in note 261); *Kennedy v Broun*, 143 Eng Rep at 268, 278-79 (plaintiff's counsel), 289 (Erle, CJ); Bolland, *Manual of Year Book Studies* at 14 (cited in note 260); Holdsworth, 2 *History of English Law* at 491, n 5 (cited in note 16).

270. See *Anonymous Case*, 14 Henry VI, fol 18v, pl 58 (1435), reprinted in Baker and Milsom, *Sources of English Legal History* at 383 (cited in note 213).

271. Justice Lawton, in his exploration of history in *Rondel v Worsley*, is the strongest exponent of that view. See *Rondel v Worsley*, 1 QB at 455-59, 468. Others have agreed. See, for example, *Rondel v Worsley*, 1 App Cas at 279 (Lord Upjohn); *Rondel v Worsley*, 1 QB at 449 (Official Solicitor), 518 (Salmon, LJ); *Kennedy v Broun*, 143 Eng Rep 268, 278-79 (plaintiff's counsel), 289 (Chief Judge Erle); Roxburgh, *Rondel v Worsley*, 84 L Quarterly Rev at 178-79 (cited in note 137a). In *Rondel*, Justice Lawton said that Justice

treated Paston's dictum as the views of one person or as an illustration.²⁷² Moreover, to the extent that there may have been liability for a failure to follow the client's instructions, the context makes it clear that Paston is talking about contractual liability for misfeasance and not negligence in the sense attributed by the subsequent judges, commentators, and lawyers. Insofar as this case says anything about the liability of serjeants, Professor Baker has treated it as standing for the proposition that serjeants were liable for nonfeasance on their retainers and he has characterized Justice Paston's comments as meaning that an action of deceit was available against dishonest lawyers.²⁷³ Thus, despite the eminence of Holdsworth and Bolland, this 1435 case and Paston's dictum do not seem to establish that medieval lawyers were liable for their negligence.²⁷⁴ In

Juyn, who delivered the court's judgment in the 1435 case, agreed because he did not dissent. See 1 QB at 459. In *Kennedy v Broun*, Chief Judge Erle said that *Swinfen v Lord Chelmsford*, 157 Eng Rep 1436, 1448, 6 Exch Rep 390, 918 (1863) overruled the three Year Book Henry VI cases.

272. See, for example, *Rondel v Worsley*, 1 QB at 483-84 (Official Solicitor); *Swinfen v Lord Chelmsford*, 157 Eng Rep at 1448 (1863) (Chief Baron Pollock). In *Swinfen*, the defendant's counsel thought that Justice Paston was probably misreported. See *Swinfen*, 157 Eng Rep at 1442. In Justice Lawton's view, one that is likely correct, Paston was accurately reported. See 1 QB at 458-59. Justice Lawton referred to four manuscripts of this 1435 Year Book case and claimed that the critical phrase, "or do something otherwise than I have told you" is omitted from two of the manuscripts. However, Baker and Milsom included the phrase in their reproduction although they cited one of the manuscripts from which Justice Lawton said it had been omitted. See Baker and Milsom, *Sources of English Legal History* at 384 (cited in note 213). Both Holdsworth and Fifoot included the phrase but did not indicate which manuscript was their source. See Holdsworth, 2 *History of English Law* at 491 n 5 (cited in note 16); Fifoot, *History and Sources of the Common Law* at 345 (cited in note 225). The manuscript of this case in the Harvard Law Library also includes the critical phrase. See *Anonymous case*, Year Book 14 Henry VI, fol 18, pl 58 (1435), reprinted in *Anno decimo quarto Henrici sexti* (Richard Tottel 1574) (on file with author).

273. See Baker, *Introduction* at 382 (cited in note 16); Baker, ed, 2 *Spelman's Reports* at 85 & n 2 (cited in note 80). Moreover, Baker points out that Paston's views on liability for nonfeasance were "unorthodox" and "against the weight of opinion." See *id* at 266-67, 269. Thus, Paston's statement is a slender reed to support this proposition about serjeants' liability for negligence even when one acknowledges that the "common erudition" and "inherited wisdom" of the legal profession, not just or even primarily case law, reflected medieval legal doctrine, perhaps still at the end of the fifteenth century. See Baker, *Legal Profession and the Common Law* at 461, 466-68, 473-76 (cited in note 16).

274. One reason that this case may have caused this confusion is that many authorities have viewed the right of barristers to sue for their fees (see note 137a) and liability of barristers for breach of their retainer contracts as intertwined and as impacting their liability in negligence. See, for example, *Rondel v Worsley*, 1 QB at 472-74 (Official Solicitor), 497-501 (Lord Denning, MR); *Kennedy v Broun*, 143 Eng Rep 268 (Erle, CJ) (1863); *Swinfen v Lord Chelmsford*, 157 Eng Rep 1436 (Pollock, CB) (1860); Roxburgh, *Rondel v. Worsley*, 84 L Quarterly Rev at 178 (cited in note 138). Others have recognized, however, that, although the contractual basis to sue and be sued had a logical connection, that relationship and incapacity to contract were not relevant to liability for negligence. See, for example, *Rondel v Worsley*, 1 App Cas at 197-98 (appellant's counsel), 281 (Lord Upjohn); *Rondel v Worsley*, 1 QB at 466-68 (Lawton, J), 522-23 (Salmon, LJ). Many authorities have believed that the immunity of barristers from liability for negligence has been clear since *Fell v Brown*, 170 Eng Rep 104, 1 Peake 131 (1791). This view is evident in the many opinions in *Rondel v Worsley*, which reconsidered and affirmed that proposition. Some have criticized this rule of nonliability and suggested that it ought to be modified. See, for example, David Pannick, *The Advocates* 96-102, 197-206 (Oxford 1992).

conclusion, the evolution of the civil liability of lawyers was outside the mainstream of tort law and its antecedents, but the liability of lawyers for their misconduct had its own distinctive basis and was well established.

2. The Cases and Rules

The cases seeking civil remedies by client victims against ambidextrous lawyers fell almost exclusively into two categories, switching sides in the same case and misuse or disclosure of confidential information.²⁷⁵

a. Switching Sides in the Same Litigation

The sides switching cases were clearly the most numerous as was the case with lawyer discipline. Moreover, the factual patterns were very similar. For example, in 1291, Arnold Purdeu claimed 100 shillings as damages against William for representing Arnold's adversaries in two separate cases. Arnold alleged that he had already lost one case involving land since William had refused to return the documents of title and that he was about to lose the other case. William denied all the allegations and asked for a jury.²⁷⁶ Like the discipline cases, those seeking civil remedies also revealed fraudulent and corrupt lawyer misconduct again involving default judgments against the client. In 1293 Ilger of Talighidion complained that his attorney, Simon of Crucoyl caused him to lose his land because of a default made "fraudulently and through collusion with Margery [his adversary in a dower action] by way of prearranged deception."²⁷⁷ In 1299, Gilbert de la Greene and his son complained that they lost a dower action by default as John "by prearranged collusion with Joan [the plaintiff] had maliciously absented himself and made default" twice.²⁷⁸ In addition, Kiralfy notes two fourteenth century cases where a plaintiff used a writ of deceit to obtain restoration of land lost by default

275. At least twenty cases were identified. The references in the various secondary works might increase that number as they contained yearbook references. Unfortunately, there was no direct access to the cited yearbooks, so it is not possible to tell whether the reference is an actual case involving civil liability for ambidexterity or just a recitation or illustration of such a legal principle. Switching sides in the same case accounted for at least twelve cases and disclosure of information for at least six and perhaps eight cases.

276. See CP 40/90, m 13d (Trinity Term 1291), reprinted in PB3 (ix) (cited in note 26). William may have prevailed with the jury. At least he was not permanently disbarred, for Paul Brand notes that he was still practicing as a professional attorney in 1300, when he received 38 appointments. See *id.*

277. See CP 40/101, m 60d (Trinity Term 1293), reprinted in PB3 (xiii) (cited in note 26).

278. See CP 40/127, m 81d (Easter Term 1299), reprinted in PB3 (xix) (cited in note 26). Another 1300 case is similar as the client claimed that he lost in a plea of dower as the "attorney had fraudulently and maliciously made default." He did not claim, however, that the attorney had colluded with the plaintiff and thus there was no evidence of ambidexterity. See CP 40/131, m 62d (Michaelmas Term 1300), reprinted in PB3 (xx) (cited in note 26).

because of a failure to summon the plaintiff resulting from collusion between the attorney and the defendant.²⁷⁹ As in the discipline cases, concern with the actual disclosure of confidential information was also manifested in the side switching cases seeking civil remedies.²⁸⁰

In some cases, the client victim sought both a civil remedy and punishment of the lawyer although the nature of civil remedy was not specified. In the 1293 case involving Ilger of Talighidion, he asked to sue Simon “for this deception” and the Common Bench ordered the sheriff “to produce” Simon “to answer both the king and Ilger for the said trespass and contempt.”²⁸¹ Similarly, in 1299, Gilbert de la Grene and his son asked “for a remedy against the . . . falsity and deception” of their attorney, John de la Haye and the Bench justices ordered the sheriff to produce John “to answer both the king and Gilbert [his client] for said falsity and deception.”²⁸²

The court sometimes felt that more extensive remedies were necessary. From a remedial standpoint, one of the most interesting cases involved a complicated 1296 land dispute where John, son of Thomas of Bruneswell, after losing a suit for land and being amerced for a false claim, brought a trespass and conspiracy plea against his attorney, Richard of Duylond, alleging that the latter failed to assist John although he paid him to do so, that he sided with John’s adversary, and that he acquired the land that John claimed from John’s adversary. Richard denied that he had breached his duty to John as John’s neighbors said he had no right to the land and that John’s payment to Richard was to repay a prior personal loan from Richard. John asked for “some remedy,” assessing his damages at twenty marks, and he opposed Richard’s request for a jury, arguing that the deed made Richard’s obligations to assist him clear. John prevailed and the Common Bench awarded him forty shillings damages and imprisoned Richard, who subsequently agreed to pay a fine. Moreover, the justices invalidated the deed and statutory bond regarding John’s debt to Richard. Finally, the Bench ordered the county coroners to produce the sheriff to answer for his contempt for failing twice to produce Richard as ordered.²⁸³

A much later case involving a debtor aggrieved by a collusive default judgment presented the possibility for multiple remedies against multiple

279. See Kiralfy, *Action on the Case* at 76 (cited in note 225).

280. See, for example, *The Impartial Lawyer* at 17 (citing *Somerton v Colles*, see note 289) (cited in note 27). In contrast, if the client revealed his confidences to a lawyer that he had not retained, there was no liability if the lawyer revealed the information to a later client. See *id.* at 11 (also citing *Somerton*).

281. See note 275.

282. See note 276.

283. See CP 40/112, m 17d (Easter Term 1296), reprinted in PB3 (xv) (cited in note 26). The court also ordered the coroners to produce Richard when the sheriff failed to do so the second time. See *id.*

parties. The debtor brought an *audita querela* action in 1625 against the creditor to nullify a default judgment entered against him. The debtor alleged that the creditor procured an attorney to act for the debtor without any warrant from the latter and that the attorney pleaded *non sum informatus*, resulting in the default judgment against the debtor. The court refused to discharge the debt and stated that, rather than an *audita quarela* for that remedy, the debtor's remedy was a writ of deceit against the attorney and perhaps also an action on the case against the creditor for retaining an attorney for the debtor without his consent.²⁸⁴ As all these cases illustrate, civil remedies were available against lawyers for classic ambidexterity, switching sides in the same case. No cases were found imposing liability on lawyers for representation adverse to a former client.²⁸⁵

b. Disclosure or Misuse of Client Information

Almost all of the remaining civil liability cases involved the lawyer's misuse of the client's information or its disclosure to the client's adversary. As illustrative of disclosure of the client's confidential information, a late fourteenth century writ of deceit alleged that the plaintiff's lawyer, having received money and "seen his charters and writings and heard his counsel abandoned and left the" plaintiff, refusing to represent him further and "handed over copies of said charters to [defendant] . . . and falsely and fraudulently revealed to him there the counsel of [plaintiff] to his grave damage

284. See *Alleley v Colley*, 79 Eng Rep 603 (1625). Although the case itself does not mention a remedy against the creditor, the headnote indicated that an action on the case was available against a person who procured an attorney to appear for a defendant without his consent. But in a 1578 case involving very similar allegations, the debtor lost a deceit action against the attorney because the latter said that he had been retained by the plaintiff's co-debtor to appear for both debtors and the court subsequently held that the plaintiff's allegations of "fraud and covin" between the attorney and the creditor were "traversable." See *Manser v Franklin*, 73 Eng Rep 811 (1578).

285. One very complicated case presented such a possibility. William Pollard was a defendant in two suits brought in 1287 and 1289, both by William, son of Roger. The two suits were related, both involving land in the village of Fulbeck. William of Welby was the defendant's attorney in the first suit and the defendant claimed the same regarding the second suit, in which William of Welby represented the plaintiff. The defendant lost the 1289 suit by default and as a result William Pollard brought two misconduct suits against William of Welby, one alleging William had agreed to act for him and the other alleging William had been appointed to act for him. William Pollard lost both misconduct suits as the first allegation was unprovable and the second was false. See CP 40/126, m 63d (Hilary Term 1299), reprinted in PB3 (xviii) (cited in note 26); e-mail from Paul Brand to Jonathan Rose (July 28, 1998) (cited in note 138). William Pollard did not allege that William of Welby had breached a duty of loyalty by representing the plaintiff in the second related suit after representing William in the first one. He might have fared better had he done so since such conduct was probably a breach of William of Welby's duty of loyalty. See notes 115-36 and accompanying text.

and the manifest danger of his disinheritance.²⁸⁶ Two seventeenth century cases also involved abuse of client confidences. In one, a creditor brought an action on the case against his lawyer for giving the debtor his bond, enabling the debtor to cancel it.²⁸⁷ In the other, a debtor prevailed in an action on the case for breach of trust against his attorney for obtaining a writ to execute a judgment against him, which was likely facilitated by use of confidential information.²⁸⁸ In a somewhat different context, William of Watergate justified his refusal to pay Henry de Burne, his lawyer in a 1279 suit by Henry for his fees on the ground, *inter alia*, that Henry “had revealed his counsel to his adversary.”²⁸⁹

The general tenor of these cases seems closely related to the side switching cases. In a sense, one might characterize them as a kind of incipient ambidexterity. The lawyer has acted disloyally, but in some respect the conduct falls short of classic ambidexterity. In none of the cases has the lawyer actually switched sides and appeared for the adversary or at least there is no clear evidence of side switching. In most of the cases, the client has not yet lost his land or been otherwise injured. Interestingly, Comyns treats disclosure of confidential information and classic ambidexterity similarly, stating they gave rise to an action on the case for breach of trust.²⁹⁰

The information misuse cases all involved a similar fact pattern in which a client hired a lawyer to assist the client in purchasing land and instead the lawyer purchased the land for himself or a third party. *Somerton v. Colles* (1433), a case well known for its impact on the evolution of assumpsit, is a good example.²⁹¹ In *Somerton*, William Somerton brought an action for deceit against John Colles, alleging that he had retained Colles to “be of his counsel”

286. See “Form of deceit when someone is retained of counsel and then reveals his counsel” in Kiralfy, *Action on the Case* at 219 (original Latin) (cited in note 225), reprinted in PB2, no 33 (English translation) (cited in note 26). Paul Brand says the particular details in the writ suggested that it was used in a real case. See *id.*

287. See *Tanton v Harris*, 82 Eng Rep 306 (1626); Kiralfy, *Action on the Case* at 90 (cited in note 225).

288. See *Lawrence v Harrison*, 82 Eng Rep 833 (1654); Kiralfy, *Action on the Case* at 90 (cited in note 225). Although there was no clear evidence of collusion between the lawyer and the debtor’s adversary, the debtor said it was not necessary and the court said that the lawyer’s conduct showed “a combination” against the client.

289. See JUST 1/915, m.39 (Sussex Eyre 1279), reprinted in PB3 (iii) (cited in note 26). William was able to settle the matter himself with his adversary.

290. See Comyns, 1 *Digest* at 348-49 (cited in note 27).

291. *Somerton v Colles*, 11 Henry VI (1433), reprinted in Baker and Milsom, *Sources of English Legal History* at 385-89 (cited in note 213). Many of the leading commentators discuss this case and its impact on assumpsit and on the remedies for nonfeasance. See, for example, Baker, *Introduction* at 382-84 (cited in note 16); Fifoot, *History and Sources of the Common Law* at 332-34, 343-44 (cited in note 225); Kiralfy, *Action on the Case* at 88 (cited in note 225); Milsom, *Historical Foundations of the Common Law* at 363-64 (cited in note 16); Plucknett, *Concise History of the Common Law* at 641 (cited in note 16); Simpson, *History of the Common Law of Contract* at 252-55 (cited in note 225).

in buying land, but that Colles “by collusion between him” and John Blount, “scheming wickedly to defraud” the plaintiff, “maliciously revealed all his counsel” to Blount and “falsely and fraudulently became of counsel” for Blount and purchased the land for him.²⁹² An eighteenth century treatise, *The Impartial Lawyer*, identified a 1435 case allowing an action on the case for deceit against a lawyer who was retained to buy land for a client, but instead fraudulently bought the land for himself.²⁹³

The imposition of liability on lawyers in these information misuse cases reinforced the loyalty norms imposed in the cases involving side-switching in the same case and the few cases involving conflicts between the client’s interest and the lawyer’s personal interest.²⁹⁴ Later treatise writers, focusing both on the client’s failure to obtain the land and the lawyer’s divulgence of confidential information, have treated the cases involving both purchases for a third party or for the lawyer himself as establishing a broader loyalty norm vindicated by an action on the case for deceit or for breach of trust.²⁹⁵ On occasion, this loyalty norm seemed even to be equated with ambidexterity.²⁹⁶ However, it is also possible that these cases stand for an even broader proposition not distinctive to lawyer liability. As was suggested previously with regard to conflicts involving the lawyer’s personal interest,²⁹⁷ these cases involving the failure to obtain the land for the client and the misuse of information may involve an agency principle applicable to anyone who fails to carry out the

292. See Baker and Milsom, *Sources of English Legal History* at 385 (cited in note 213). There is some uncertainty about Colles’s status as a lawyer. Many commentators have treated him as a lawyer. See, for example, Kiralfy, *Action on the Case* at 87-88 (cited in note 225); Milsom, *Studies in the History of the Common Law* at 164 (cited in note 223); Plucknett, *Concise History of the Common Law* at 641 (cited in note 16); Simpson, *History of the Common Law of Contract* at 253-55 (cited in note 225). Baker refers to Colles as an “adviser” (see Baker, *Introduction* at 383 (cited in note 16)) and seems less certain about whether Colles was a lawyer. See letter from John Baker to Jonathan Rose (on file with author). Milsom thinks that the fact that Colles was a lawyer facilitated the use of deceit of the court as a basis for the action. See Milsom, *Studies in the History of the Common Law* at 164 (cited in note 223). “Counsel” was an ambiguous term and did not necessarily indicate the presence of a professional lawyer. See Penny Tucker, *London’s Courts of Law in the Fifteenth Century: The Litigants’ Perspective* in Christopher Brooks and Michael Lobban, eds, *Communities and Courts in Britain 1150-1900* 25, 34-36 (Hambledon 1997).

293. See *The Impartial Lawyer* at 11 (cited in note 27). Simpson also discussed this case. See Simpson, *History of the Common Law of Contract* at 255 (cited in note 225).

294. See notes 69-114, 188-91 and accompanying text.

295. See Sheppard, *Actions upon the Case for Deeds* at 277, 295, 331 (cited in note 27); *The Impartial Lawyer* at 10-11, 17 (cited in note 27). These writers frequently cited *Somerton v Colles* (cited in note 289) as authority for these propositions regarding lawyer liability.

296. See Sheppard, *Actions on the Case for Deeds* at 295 (cited in note 27).

297. See note 213 and accompanying text.

purpose for which the principal retained the agent or generally to disloyal conduct by an agent.²⁹⁸

c. Other Possible Instances of Liability

There is one final possible category of lawyer civil liability. It arose out of the retainers that entitled the lawyer to an annuity in return for service, as discussed above.²⁹⁹ The language in the retainer between a counsellor, Robert of Leicester, and his client, William of Hoo, raised this possibility. It stated that "if William should be undefended in any matter through his failure or neglect he would restore any damage by the arbitration of lawful men."³⁰⁰ More generally, Professor Baker notes that a lawyer could be sued in covenant for a failure to provide services that he expressly agreed to perform.³⁰¹ Presumably this liability could be imposed when the lawyer appeared adverse to the client with whom he had entered the retainer although the liability was premised on the failure to perform and not on the conflict of interest. Although these retainer cases sometimes reflected the implementation of loyalty norms,³⁰² the formal retainer as reflected in the deed, not disloyalty, was the basis of the lawyer's liability. Thus, it is difficult to associate this civil liability with ambidexterity.

3. Medieval Civil Liability of Lawyers: Some Conclusions and Comparisons

In terms of its nature, availability, and remedies, the civil liability of medieval and early modern lawyers to victims of their conflicts of interest seems quite different from that of modern lawyers despite some similarities. The main thrust of modern lawyer civil liability is negligence, based on a

298. Simpson clearly views *Somerton v Colles* and similar cases as establishing an agency principle and not a notion of liability confined to lawyers. He credited Fitzherbert for identifying this principle—that actionable deceit arose when a person acted in the name of another and the other suffered loss. See Simpson, *History of the Common Law of Contract* at 253-55 (cited in note 225). Interestingly, Sheppard cites the same oft-cited passage in Fitzherbert's *New Natura Brevium* for the propositions regarding lawyer liability. See note 293. Although Fitzherbert does talk about lawyers in this passage, it is not limited to lawyers. See Fitzherbert, *New Natura Brevium* (cited in note 8).

299. See notes 137-145a and accompanying text.

300. See Baker, *Legal Profession and the Common Law* at 104 (cited in note 16). William of Leicester was described as a "iuris professor." Id. This retainer was discussed above in the discipline section with respect to adversity to a client in an unrelated matter. See note 146 and accompanying text.

301. See id. Although this might suggest that the language in the Leicester-Hoo retainer was redundant, perhaps it was significant in substituting arbitration as an initial or exclusive remedy in lieu of an action in covenant.

302. See notes 137-51 and accompanying text.

breach of the applicable standard of care, although there are other theories as well.³⁰³ With regard to the nature of medieval civil liability, one must be cautious in opining on its conceptual premises, given the nature of medieval pleading and its impact on the judicial role³⁰⁴ and in viewing the medieval era through a modern jurisprudential lens.³⁰⁵

With those caveats, it seems fair to say that the medieval liability of lawyers to victims of their conflicts of interest is unrelated to negligence, at least at a formal level. As discussed earlier, the medieval liability of lawyers was grounded in deceit and initially arose as an adjunct to deceit of the court.³⁰⁶ Moreover, the leading modern treatise does not consider fraud or deceit as a form of legal malpractice.³⁰⁷ However, in the the cases discussed above, particularly the early modern ones involving actions on the case, there are early manifestations of something akin to the modern notion of liability based on a breach of fiduciary duty.³⁰⁸ This idea is more explicit in seventeenth and eighteenth century commentators and the seventeenth century case specifically stating that a disloyal lawyer could be sued for breach of trust.³⁰⁹ Moreover, as a practical matter, classic ambidexterity would be actionable today either as professional negligence or as a breach of fiduciary duty.³¹⁰ Interestingly, civil liability based on disloyalty has become more common in recent years.³¹¹ Thus, medieval

303. See, for example, *Restatement* §§ 71, 72, 74, 76A (Tentative Draft no 8, March 21, 1997); 1 Ronald Mallen and Jeffrey Smith, *Legal Malpractice* §§ 8.1-8.13 (West 4th ed 1996); 2 *id* at §§ 18.1-18.10.

304. See notes 223-224 and accompanying text.

305. See Baker, *Lecture* (cited in note 32); Millon, *Positivism*, 1989 *Wis L Rev* 669 (cited in note 32).

306. See notes 229-58 and accompanying text.

307. See 1 Mallen and Smith, *Legal Malpractice* at § 8.9 (cited in note 301). The authors regard this tort as a distinct wrong whose elements are unrelated to defendant's status as a lawyer. They state that the same rules are applied to all defendants generally, although they note some contextual aspects of such suits against lawyers. *Id*.

308. See, for example, *Restatement* § 76A (2) and comment (d) (Tentative Draft no 8, March 21, 1997); Mallen and Smith, 2 *Legal Malpractice* at §§ 14.1-14.4 (cited in note 301). The tenor of the later cases is consistent with John Baker's view of the increased importance of judicial opinions as a source of law "in early Tudor times, as a result of the Renaissance emphasis on judicial positivism." See Baker, *Introduction* at 227-28 (cited in note 16). Moreover, he believes that the increase in actions on the case as well as the use of written pleadings influenced this "radical change." See John Baker, *The Superior Courts in England, 1450-1800* in Bernhard Diestelkamp, ed, *Oberste Gerichtsbarkeit und zentrale Gewalt in Europa der frühen Neuzeit* 72, 110 (Böhlau Verlag 1996).

309. See notes 286, 288, 293 and accompanying text. As indicated, these commentators often supported their statements with references to fifteenth century cases, especially *Somerton v Colles*.

310. Mallen and Smith divide legal malpractice into two categories: breach of the standard of care (i.e., professional negligence), and breach of the standard of conduct or fiduciary duty, which includes violations of loyalty and confidentiality. See Mallen and Smith, 2 *Legal Malpractice* at § 14.1 (cited in note 301). Thus, they would treat civil liability based on conflict of interest as the tort of breach of fiduciary duty. See *id* at §§ 15.1-15.20, 16.1-16.27. Many others would consider disloyal misconduct actionable as either tort and would treat the violation of the ethical and fiduciary duty of loyalty as evidence of a breach of the standard of care. See, for example, *Restatement* §§ 72, 74, 76A (2) (Tentative Draft no 8, March 21, 1997).

311. See Mallen and Smith, 2 *Legal Malpractice* at §§ 15.18, 16.23 (cited in note 301).

liability, although unrelated to most common forms of legal malpractice, may have some doctrinal and practical similarities to modern lawyer liability.

The availability of civil remedies to medieval victims of their lawyers' conflicts of interest might be more limited than that of modern lawyers in two senses. First, with respect to the medieval era, it was only clearly available in cases involving switching sides in the same case, classic ambidexterity. As the earlier discussion revealed, although this kind of conflict of interest was the most common and most serious, it was not the only type of case where loyalty norms were imposed. For example, there is little evidence of the availability of civil remedies in instances of adversity to a former client or to a current client on an unrelated matter. In the modern world, a lawyer would be liable in most cases of adverse representation regarding both current and former clients as long as the other elements of the cause of action such as causation and injury were satisfied.³¹² This narrower ambit of civil liability for medieval lawyers seems unsurprising. As noted earlier, loyalty norms were imposed in fewer situations in the medieval as compared with the modern period.³¹³ The narrower civil liability in the medieval and early modern eras reflected, therefore, both the more limited liability norms and the less developed theories and systems of civil liability.

The availability of civil liability might be seen as more limited in another sense as well. Initially, the civil remedies for victims seemed to be a subsidiary or complementary aspect of a disciplinary process that punished lawyers for deceit of the court, a public wrong.³¹⁴ Although modern discipline can include civil remedies for victims,³¹⁵ modern civil liability stands on its own independent footing. On the other hand, over time, particularly as the action on the case developed and such cases were brought against lawyers, the civil liability of lawyers seemed to separate from the initial notion of deceit of the court and to emerge as a more distinct cause of action. Thus, the more limited availability of civil remedies in this sense diminished as tort law evolved.

The remedies in the earlier period also seem more limited. In the modern era, damages for professional negligence or breach of fiduciary duty include standard tort damages, including punitive damages in appropriate cases.³¹⁶ But it is difficult to generalize about the civil remedies imposed in the medieval and

312. See, for example, *Restatement* §§ 71, 72, 74, 75, 76 A (Tentative Draft no 8, March 21, 1997); Mallen and Smith, 1 *Legal Malpractice* at §§ 8.1-8.4, 8.12; 2 *id* at §§ 15.18, 16.23 (cited in note 301).

313. See pages 50-52.

314. See notes 229-238 and accompanying text.

315. See, for example, Ariz Supreme Ct Rule 52 (a) (7) (1998); American Bar Association, *Model Rules for Lawyer Disciplinary Enforcement* Rule 10 (A) (6) (1996) (restitution).

316. See, for example, *Restatement* §§ 75, 76A (Tentative Draft no 8, March 21, 1997); Mallen and Smith, 2 *Legal Malpractice* at §§ 19.1-19.21 (cited in note 301).

early modern periods. In many cases, the nature of the records and state of the proceedings simply do not permit any specific conclusion about remedies.³¹⁷ Some cases, however, do have some details regarding relief. Some of these cases may have involved restitutionary remedies such as returning a fee paid to a lawyer or restoring the land lost as a result of the lawyer's conflict of interest.³¹⁸ In other cases, the victim requested a greater amount of damage, which was not clearly limited to restitution, although the basis of assessment was unclear and the court often awarded a lesser amount.³¹⁹ Although making a comparison is difficult, a conclusion that remedies were more restricted in the earlier period seems warranted.

Thus, overall the medieval and early modern civil liability of lawyers to victims of their disloyalty seems more limited in its nature, availability, and remedies as compared to that in the modern era. Of course, the enormous chronological, social, and economic differences in these two periods make such a conclusion quite understandable and predictable. After all, the comparison is between an aspect of civil liability during its formative and rudimentary period with one that is very sophisticated, complex, and detailed as result of years of judicial, legislative, and commentator activity.

IV. CONCLUSION

Drawing conclusions from this historical research requires some caution. First, one must minimize the natural tendency of any modern observer to see the past in the present and vice versa.³²⁰ Second, one must be careful when viewing historical legal activities and phenomena through the modern optic of conventional positivism.³²¹ Finally, for several reasons, there is a danger of overreading the historical evidence. Many of the medieval judicial records may only contain a result or some procedural determination. As such, it is necessary

317. For example, in 1299, Gilbert de la Grene simply asked for "a remedy against the said falsity and deception" against John de la Haye. The situation was similar in the 1293 case against Simon of Crucoyl. See notes 279-280 and accompanying text.

318. See, for example, text at note 277. Restitution is awarded in modern liability cases also. See *Restatement* § 76A (3) (Tentative Draft no 8, March 21, 1997).

319. For example, in 1291, Arnold Purdeu "assess[ed] his damages at one hundred shillings" in his suit against William Tebaud. See note 274 and accompanying text. In a 1296 case, John, son of Thomas of Brunesswell asked for damages of 20 marks, but was awarded the lesser amount of 40 shillings although his debt bond was also nullified. See note 281 and accompanying text.

320. On the other hand, some have seen a virtue in "emphasizing the similarity of past and present," "the *presentness* of the past" and "pastness of the present." Such an approach would increase the influence of legal history scholarship on legal scholarship, which has, like academic history, emphasized the "pastness of the past" and the past's irrelevance to modern conceptual and normative notions. See Banner, *Legal History and Legal Scholarship*, 76 Wash U L Q at 37-39, 42-44 (cited in note 34) (emphasis in original).

321. See Millon, *Positivism*, 1989 Wis L Rev 669 (cited in note 32).

to be careful about drawing doctrinal conclusions. Moreover, as John Baker has pointed out, to the extent that one sees doctrinal evidence, some confusion rather than neatness is not surprising as “the legal historian . . . is probably looking at law being made.”³²²

With sensitivity to these caveats, several conclusions about medieval ambidexterity are possible. First, ambidexterity was a common and serious form of medieval lawyer misconduct. In its most frequent manifestation, its classic form was switching sides in the same litigation. However, it was not limited to this form as it also appeared as disloyalty to former clients and litigation adverse to clients with whom the lawyer had a retainer. Second, the protection of confidential information was an important concern both in reinforcing the lawyer’s duty of loyalty and in preventing the misuse and disclosure of such information. Third, the remedies against lawyers guilty of ambidexterity were both criminal and civil. The criminal remedies included imprisonment, fines, and disbarment. The civil liability of lawyers to client victims grew out of the criminal offenses and the lawyer’s duty to the court as illustrated by the use of the writ of deceit. As the action on the case for deceit emerged, the private remedies developed an independent footing, but one distinct from the liability of other professions and the general precursors of negligence based liability. As noted, there were both basic similarities and important differences between the medieval and modern aspects of all these legal ramifications of conflict of interest.

In addition to what this research reveals about medieval conflict of interest, however, the research identifies important gaps in knowledge and the need for further research. As Brian Simpson has noted, it is “the nature of historical research” that it “raises as many questions as it solves;”³²³ and so with ambidexterity, there are many unanswered questions. Perhaps the most fundamental question involves the source of the loyalty norms. Their incorporation in the Statute of Westminster I, chapter 29 and the London Ordinance of 1280 and their development and implementation by medieval judges reflect their institutionalization in the legal system. However, this incorporation does not reflect their source, but their adoption and adaptation. Certainly one source would have been the conception of loyalty of the

322. See Baker, *The Legal Profession and the Common Law* at 390 (cited in note 16). He has also noted that cases were not necessarily the only source of doctrinal development as there was a “largely oral systematic tradition” that contributed importantly to the “making” of law through repeated “systematising and explaining.” See Baker, *The Third University of England* at 19-20 (cited in note 224).

323. See A.W.B. Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 *Cardozo L. Rev.* 287, 333 (1989).

professional community of judges and lawyers.³²⁴ In addition, broader societal or cultural, but nonlegal, notions may have been a source of these norms. One possibility is the obligations and norms of knighthood. The characterization of a lawyer as one who serves, *serviens ad legem*,³²⁵ and some of the language of retainers and oaths support knighthood as a possible source of these loyalty norms.³²⁶ Another possibility is that the loyalty norms had a religious source. James Brundage's scholarship on canon lawyers provides clear evidence for this possibility. He found that the lawyer's duties of loyalty and confidentiality were well entrenched in the *jus commune*, the principles combining canon and Roman law, long before the end of thirteenth century when it appeared in the English common law.³²⁷ In addition, the use of the term, ambidexter, in the religious polemics of the fourteenth century reinforces the possibility of a religious influence.³²⁸ More generally, loyalty is a notion deeply embedded in moral, religious, community, and personal norms,³²⁹ which would likely influence professional norms. In any event, further research on the source of the behavioral norms applied to lawyers seems a useful endeavor.

324. Professional lawyers were likely quite influential later on, as in the sixteenth and seventeenth centuries juries of attorneys and members of professional societies were used in King's Bench and Common Pleas attorney discipline cases. See, for example, C.W. Brooks, *Lawyers, Litigation and English Society Since 1450* 131, 141 (Hambledon 1998); Brooks, *Pettyfoggers and Vipers of the Commonwealth* at 119-20, 144-46 (cited in note 16); Baker, ed, 1 *Dyer's Reports* at xxx, 132-33 (cited in note 80); 2 *id* at 309-10.

325. See Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 20 & nn 80-81 (cited in note 23).

326. See notes 145-145a and accompanying text.

327. See James Brundage, *The Ambidextrous Advocate: A Study in the History of Legal Ethics* (unpublished draft, June 1, 1999) (on file with author); e-mail from James Brundage to Jonathan Rose (June 1, 1999) (cited at note 62). Brundage found rules in the *ius commune* prohibiting switching sides in the same case, representation adverse to a former client, and representation to a current client on an unrelated matter that were very similar to those that this article found in the medieval English law, and had similar remedies as well. Moreover, he found that *ius commune* rules, like those in English common law, also were not very concerned with conflicts between the lawyer's personal interest and that of the client or with consent. *Id*.

328. In the Wycliffite controversy at the end of the fourteenth century, one of the twelve Lollard conclusions, which were posted on the doors of Westminster and St. Paul's in 1395 responding to the bishops' accusations, accused the latter of holding temporal and spiritual offices simultaneously. The Lollards believed that this dual office holding was inappropriate, saying, "we think that hermaphrodite or ambidexter would be a good name for such men of double estate" and citing as authority the biblical gospel of Matthew that "no man can serve two masters." See Anne Hudson, ed, *Selections from English Wycliffite Writings* 26 (Toronto 1978). Moreover, complaints about this type of ambidexterity were not new. See Anne Hudson, *Hermofodrita or Ambidexter: Wycliffite Views on Clerks in Secular Office*, reprinted in Margaret Aston and Colin Richmond, eds, *Lollardy and the Gentry in the Later Middle Ages* 41 (St Martin's 1997). Not all agreed with the Lollard charges, and one lengthy response denied a conflict in secular and temporal roles; it characterized it as serving one master, God, in two capacities and noted a commendable kind of ambidexterity, the ability to suffer want and enjoy abundance. See H.S. Cronin, ed, *Rogeri Dymmok Liber Contra XII Errores et Hereses Lollardorum* 155-59 (Wyclif Soc'y 1922). I am grateful to Professor Fiona Somerset of the University of Western Ontario for bringing this to my attention.

329. See, for example, George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford 1993).

Further research is warranted in other areas as well. For example it seems that no broad inquiry into the development of the civil liability of lawyers has been undertaken. Although this article studies this issue in the context of ambidexterity, a more general inquiry is needed into the cases involving civil remedies against lawyers for the numerous types of lawyer misconduct that occurred in the medieval era.³³⁰ Also litigation involving lawyers may have had a disproportionate influence on the general development of civil liability,³³¹ an issue that also warrants further investigation. In addition, the extent of conflicts between the lawyer's personal interest and that of the client and the apparent lack of concern with such conflicts probably merits further study. Thus, important and varied questions concerning the medieval law of lawyering remain to be examined. With broader relevance to legal history generally, James Brundage's research on the canon legal profession³³² and Richard Helmholz' scholarship on defamation and *Magna Carta*³³³ raise broader questions of the cross-fertilization of the *ius commune* and the English common law, challenging the traditional nationalistic and insular view of English legal history.

330. For a cataloguing of the various types of misconduct, see Rose, *Legal Profession in Medieval England*, 48 *Syracuse L Rev* at 60-61, 123-30 (cited in note 23).

331. See, for example, Baker, *Introduction* at 382-84 (cited in note 16); Baker, 2 *Spelman's Reports* at 236-37 (cited in note 80).

332. See, for example, Brundage, *The Ambidextrous Advocate* (cited in note 325); James Brundage, *The Rise of Professional Canonists and the Development of the Ius Commune*, reprinted in 81 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 26 (1995). The influence of canon law on secular law is also evident in his more general work on canon law. See James Brundage, *Medieval Canon Law* 175-89 (Longman 1995).

333. See Richard Helmholz, ed, *Select Cases on Defamation to 1600* (101 *Selden Soc'y* 1985); Richard Helmholz, *Magna Carta and the ius commune*, 66 *U Chi L Rev* 297 (1999).

