Oath Review and Drafting Task Force

Meeting Agenda
January 12, 2026 – 2:00 – 3:30 p.m.

In person: Washington State Bar Association
1325 Fourth Ave., Suite 600, Seattle, WA 98101-2539
Or remotely via Zoom:
https://wsba.zoom.us/j/83575170491?pwd=CxhJDxeo6xjzSCftVT7Nwzaj5dJcTO.1
Meeting ID: 835 7517 0491
Passcode: 421855

1. Call to Order

2. Reading and Approval of Minutes of December 15, 2025 meeting

3. Report on Meeting Materials

   - Oath of Office: US Military Officers – 5 USC § 3331
   - Oath of Office: Washington State elected officials – RCW 43.01.020
   - Renewing Our Vows – The Lawyer's Oath and Our Pledge to Democracy
   - The Oath of Office: A Pillar of the Rule of Law
   - Recommendation to amend Pennsylvania attorney oath, the Pennsylvania Bar Association's Civility in the Profession Committee

4. Discussion on Draft Surveys: Lawyer, LLLT, LPO

5. Upcoming Meeting Discussion

   a. Complete the internal Ranking the Current Components of the Oath of Attorney poll prior to our next meeting.

6. Adjourn

WASHINGTON STATE
BAR ASSOCIATION

OATH REVIEW AND DRATING TASK FORCE

MEETING MINUTES

December 15, 2025

The meeting was held in person and remotely via Zoom.

Members present were Rajeev Majumdar (Chair), Kyle Sciuchetti, Hunter Abell, Hon. Rebecca Glasgow, Roger Wynne, Prof. Monte Mills, Hon. James Smith, Angela Balconi. Also present were David Ward (Principal Legal Analyst, AOC), Doug Ende (Chief Disciplinary Counsel), Sara Niegowski (Chief Communications and Outreach Officer), Rachel Agent (Disciplinary Program and Systems Manager), Matthew Dresden (Board of Governors liaison), Sergio Flores (Access to Justice Board Member), and Steve Crossland (Chair of the Limited License Legal Technician Board).

The Chair called the meeting to order at 2:00 p.m.

1. Agenda Overview and Reading and Approval of Minutes of October 31, 2025 Meeting[Chair]

The Chair presented the meeting agenda, and the minutes of the October 31, 2025 meeting were approved.

2. Overview of recent activity

The Chair updated the Task Force about notification of various stakeholders about the Task Force and its objectives. This included WSBA staff mailing letters and the Chair sending emails to community-group representatives. The Task Force has a new email address oathtaskforce@wsba.org for communications.

3. Report on Meeting Materials: 2025 Report of the ABA Task Force for American Democracy

Chief Disciplinary Counsel Ende provided an overview of the meeting materials, including the 2025 Report of the ABA Task Force for American Democracy, which features a recommendation that state-level oaths of admission be amended to include a commitment to upholding democracy and the rule of law.

4. Report on Draft Surveys

Chief Communications Officer Niegowski presented three draft surveys (Lawyer, Limited License Legal Technician, and Limited Practice Officer) designed to gather data from stakeholder groups and members about the idea of amending the three oaths. Chief Niegowski engaged the Task Force members in a dialogue about the content of the survey and received suggestions for revision. A revised version of the survey will be shared with the Task Force at its next meeting, with an objective of distributing the survey to stakeholders in February.

Angela Balconi, noted that Limited License Officer Board will be discussing the work of the Task Force at its next meeting in January.

5. Guided Discussion Concerning the Current Oaths and Potential Improvements

The Chair led a dialogue with the Task Force members and others present about the form, content, and tone of the current oaths, sought preliminary opinions about merging the three oaths or keeping them separate, and inquired about what aspects ought to be retained, removed, or revised, as well as whether there are ideas not included in the oaths that ought to be.

Comments regarding the current oaths and potential improvements included the following:

- The length of Oregon's oath was referenced as praiseworthy example. Most would prefer a shorter oath. The brevity of the federal oath form was noted.
- Many cited with approval provisions stating support for the state and federal constitutions, the rule of law, and democracy.
- The value of honesty and integrity clauses was discussed.
- Several mentioned the importance of retaining a duty to the defenseless and indigent, as well as highlighting the importance of access to justice.
- Several referenced the desirability of retaining the clause pledging adherence to the Rules of Professional Conduct; others posited that this was inherent in licensure.
- As to the format of administering the oath, there was a suggestion to alter it so that applicants would respond "I do" at intervals instead of reciting it in its entirety.

Discussion was held around the intended meaning of "offensive personalities" and whether this clause should be retained. Drawing on principles of parliamentary procedure, Counsel Ende provided a historical context for the term "personality," explaining that the provision was historically understood to mean that a lawyer should not engage in personal attacks during debate. For reasons that are not entirely clear, the singular "personality" was amended to the plural "personalities," and Washington State is the only jurisdiction to use the plural. It was suggested that the offensive personalities clause is at least adjacent to notions of civility and professionalism, which would be concepts worth retaining in the oath.

In response to a question from a Task Force Member, Counsel Ende noted that Washington Rule of Professional Conduct 8.4 (k) provides that professional misconduct includes violating the oath of attorney, and that there are counterpart provisions in the LLLT RPC and the LPORPC.

Hunter Abell highlighted the importance of including honor and truthfulness in the oath and noted military and legislative oaths capturing these elements. Abell will provide these oaths to the Task Force.

The Chair requested preparation of a survey of Task Force members to determine opinions about the importance of each of the existing clauses in the Oath of Attorney.

6. Administrative Matters

The attention of the Task Force was directed to the Future Meeting Schedule included in the meeting materials.

7. Adjourn

There being no further business, the meeting was adjourned at 3:17 p.m.

Board under any other law, rule, or regulation, in lieu of administrative redress under this section.

(2) A preference eligible may not pursue redress for an alleged violation described in subsection (a) under this section at the same time the preference eligible pursues redress for such violation under any other law, rule, or regulation.

(Added Pub. L. 105–339, §3(a), Oct. 31, 1998, 112 Stat. 3182; amended Pub. L. 108–454, title VIII, §804(a), Dec. 10, 2004, 118 Stat. 3626.)

AMENDMENTS

2004—Subsec. (a)(1). Pub. L. 108–454 designated existing provisions as subpar. (A) and added subpar. (B).

§ 3330b. Preference eligibles; judicial redress

(a) In lieu of continuing the administrative redress procedure provided under section 3330a(d), a preference eligible, or a veteran described by section 3330a(a)(1)(B) with respect to a violation described by such section, may elect, in accordance with this section, to terminate those administrative proceedings and file an action with the appropriate United States district court not later than 60 days after the date of the election.

(b) An election under this section may not be made—

(1) before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board under section 3330a(d); or

(2) after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal.

(c) An election under this section shall be made, in writing, in such form and manner as the Merit Systems Protection Board shall by regulation prescribe. The election shall be effective as of the date on which it is received, and the administrative proceeding to which it relates shall terminate immediately upon the receipt of such election.

(Added Pub. L. 105–339, §3(a), Oct. 31, 1998, 112 Stat. 3184; amended Pub. L. 108–454, title VIII, §804(b), Dec. 10, 2004, 118 Stat. 3626.)

AMENDMENTS

2004—Subsec. (a). Pub. L. 108–454, which directed insertion of ", or a veteran described by section 3330a(a)(1)(B) with respect to a violation described by such section," after "a preference eligible" in subsec. (a) of section 3330b, without specifying the Code title to be amended, was executed by making the insertion in subsec. (a) of this section, to reflect the probable intent of Congress.

§ 3330c. Preference eligibles; remedy

(a) If the Merit Systems Protection Board (in a proceeding under section 3330a) or a court (in a proceeding under section 3330b) determines that an agency has violated a right described in section 3330a, the Board or court (as the case may be) shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. If the Board or court determines that such violation was willful, it shall award an amount equal to backpay as liquidated damages.

(b) A preference eligible who prevails in an action under section 3330a or 3330b shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses.

(Added Pub. L. 105–339, §3(a), Oct. 31, 1998, 112 Stat. 3184.)

SUBCHAPTER II—OATH OF OFFICE

§ 3331. Oath of office

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." This section does not affect other oaths required by law.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 424.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 16.	R.S. §1757. May 13, 1884, ch. 46, §§2, 3, 23 Stat. 22.

All but the quoted language in R.S. §1757 is omitted as obsolete since R.S. §1757 was originally an alternative oath to the oath prescribed in R.S. §1756 which oath was repealed by the Act of May 13, 1884, ch. 46, §2, 23 Stat. 22. The words "An individual, except the President, . . . in the civil service or uniformed services" are substituted for "any person . . . either in the civil, military, or naval service, except the President of the United States". The second sentence of former section 16 is changed to read, "This section does not affect other oaths required by law.".

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 3332. Officer affidavit; no consideration paid for appointment

An officer, within 30 days after the effective date of his appointment, shall file with the oath of office required by section 3331 of this title an affidavit that neither he nor anyone acting in his behalf has given, transferred, promised, or paid any consideration for or in the expectation or hope of receiving assistance in securing the appointment.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 424.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 21a.	Dec. 11, 1926, ch. 4, §1, 44 Stat. 918. Mar. 2, 1927, ch. 284, 44 Stat. 1346. Sept. 23, 1950, ch. 1010, §10, 64 Stat. 987.

The section is restated for clarity and conciseness. The term "officer" is coextensive with and substituted

RCW 43.01.020 Oath of office. The governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, commissioner of public lands, and insurance commissioner, shall, before entering upon the duties of their respective offices, take and subscribe an oath or affirmation in substance as follows: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the state of Washington, and that I will faithfully discharge the duties of the office of (name of office) to the best of my ability.

The oath or affirmation shall be administered by one of the justices of the supreme court at the capitol. A certificate shall be affixed thereto by the person administering the oath, and the oath or affirmation so certified shall be filed in the office of the secretary of state before the officer shall be qualified to discharge any official duties: PROVIDED, That the oath of the secretary of state shall be filed in the office of the state auditor. [1965 c 8 s 43.01.020. Prior: 1909 c 43 s 1; RRS s 10981.]

Attorney general, oath of office: RCW 43.10.010.

Commissioner of public lands, oaths of employees: RCW 43.12.021.

Court commissioners, oath of office: RCW 2.24.020.

Engineers and land surveyors' board of registration, oath required: RCW 18.43.030.

Horse racing commission, oath of office: RCW 67.16.012.

Judges of superior court, oath of office: State Constitution Art. 4 s 28; RCW 2.08.080, 2.08.180.

Judges of supreme court, oath of office: State Constitution Art. 4 s 28; RCW 2.04.080.

Liquor and cannabis board, oath of office: RCW 66.08.014.

Militia, oath of office: RCW 38.12.150, 38.12.160.

Oaths, mode of administering: State Constitution Art. 1 s 6.

Perjury, oath defined: RCW 9A.72.010.

State administrative officers, oath required: RCW 43.17.030.

State auditor, oath of office: RCW 43.09.010.

State treasurer, oath of office: RCW 43.08.020.

University of Washington, board of regents, oath required: RCW 28B.10.520.

Utilities and transportation commission: RCW 80.01.020.

Washington State University, board of regents: RCW 28B.10.520.

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Renewing Our Vows: The Lawyer's Oath and Our Pledge to Democracy

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RENEWING OUR VOWS: THE LAWYER'S OATH AND OUR PLEDGE TO DEMOCRACY

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ABSTRACT

For centuries, lawyers have sworn to an oath as a prerequisite to admission. The oath, barely evolved from their historical roots, represents the guiding commitment lawyers make to democratic principles of honesty, integrity, fairness, and the rule of law. This commitment is in exchange for the power and privilege of belonging to the legal profession. However, the ethical landscape for legal practitioners has evolved, particularly in response to the alarming events of the 2020 U.S. presidential election. These events revealed significant lapses in the judgment and conduct among some lawyers, exposing the need for a recommitment to the democratic principles embedded in the oath. This article critically examines the historical development of the lawyer's oath and argues for its modernization to better reflect the ethical challenges of contemporary legal practice. It highlights the need for the oath to include explicit commitments to democratic principles, the rejection of bias, and the reinforcement of ethical responsibility. The article further explores how these modernized principles can be integrated into legal education and professional conduct to help avoid future lapses. In advocating for these reforms, the article asserts that a renewed and modernized oath is essential for the legal profession to reclaim its role as a defender of justice and public trust.

INTRODUCTION

Every lawyer takes an oath upon admission to the legal profession. This oath, of ancient origin, requires that today's lawyers swear or affirm to conduct themselves in an ethical manner. The oldest lawyer oath in the country provides that:

> Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:
>
> I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.[1]

The lawyer's oath embodies the democratic principles of the rule of law and stands as a pledge for justice, equality, and due process in a democratic legal system. Indeed, lawyers are not merely participants in the legal process; they are architects of policy, interpreters of laws, and guardians of democratic institutions. Their power must be balanced by their obligations. It is within this framework, that the lawyer's oath finds profound significance and its modernization a critical step

[1] MASS. GEN. LAWS ch. 221, § 38 (2022).

toward a professional recommitment to the principles embedded in the oath.

Reciting the lawyer's oath is more than a ceremony. It is a pledge that binds the legal profession to the highest standards of integrity, fairness, and a commitment to the rule of law. But recent history, specifically the lawyer led efforts to undermine the 2020 U.S. presidential election, has exposed serious concerns in the ethical foundations of the profession. Lawyers, who should be the bulwark against the anti- democratic movements, were instead seen at the forefront of efforts to distort the truth, manipulate the electoral process, and undermine public confidence in our democratic institutions. The consequences of these actions are not merely professional lapses— they are existential threats to the integrity of democracy.

This article considers the origin and evolution of the lawyer's oath to establish its significance in regulating lawyers as their role in the development of democratic institutions demonstrates the import of ethical conduct that obligates the lawyer to democratic ideals. It begins by exploring the historical roots of the oath in Section II, tracing its journey from ancient civilizations to its modern-day embodiment in legal practice. In this section, I rely heavily on the extensive historical exploration of the oath by Carol Rice Andrews, as well as the scholars that she cites.[2] The discussion reveals how the oath has long served as a moral compass, guiding lawyers in their dual roles as advocates and public servants.

In Section III, the article turns its focus to the contemporary landscape, examining the unique role that

[2] Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1386 (2004) [hereinafter Andrews, *Standards of Conduct*]; Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009) [hereinafter Andrews, *Lawyer's Oath*]; Geoffrey C. Jr. Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571 (1981) [hereinafter *Hazard, Legal Ethics*]; Geoffrey C. Jr. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1990) [hereinafter *Hazard, Future of Legal Ethics*]; JOSIAH HENRY BENTON, THE LAWYER'S OATH AND OFFICE (1909).

lawyers play in democracy today. Whether in the courtroom, the legislature, or the advisory boardroom, lawyers' decisions shape the legal and ethical standards that govern society. This section discusses the inherent challenges and ethical dilemmas that arise when a lawyer's duties conflict.

The ethical breaches during the 2020 election are the focus of Section IV.

Here, the article scrutinizes the actions of lawyers who crossed the line from advocacy to manipulation, highlighting cases where misinformation, fraudulent schemes, and incitement to violence were used as tools to subvert the democratic process.

In response, Section V offers a path forward, proposing a recommitment to the principles within the lawyer's oath. This section calls for modernizing the language of the lawyer's oath to reflect the values of today's diverse legal ethical concerns, and humbly offers a sample modification of the Massachusetts lawyers' oath. Section V further suggests various enhancements to formal legal education and continuing legal education, revisions to the ABA Model Rules of Professional Conduct, and improvements to disciplinary procedures.

By reexamining the intersection of legal ethics and democracy, this article argues for a renewed dedication to the principles of lawyer's oath as a vital safeguard for the integrity of the legal profession and, by extension, democracy itself. A recommitment to the principles inherent in the oath can enhance the public trusts in the legal system as a guardian of democracy. Modernizing the oath is an essential step to this professional recommitment.

I. A BRIEF HISTORY OF THE OATH & ITS EVOLUTION IN U.S. LAW

The lawyer's oath embodies deeply rooted principles of ethical conduct. Its evolution in democratic legal system underscores the oath's significance in our modern legal landscape. As Professor Andrews' important historical

exploration of the oath reveals, its historical context demonstrates the importance of advocating for a recommitment to its underlying principles of ethical conduct.[3]

A. The Early Oaths

Oath taking dates back to ancient civilizations.[4] Oaths were essential in confirming truthfulness and loyalty.[5] Indeed, ancient Greek and Roman societies integrated oaths in their legal systems, representing their significance in ensuring justice.[6] For example, in Greece, advocates swore oaths to their gods, sacred altars and relics.[7] And, Romans required oaths from witnesses, judges, and litigants, underscoring the integrity of the judicial process.[8] These oaths served a moral function—committing advocates to ethical conduct under the threat of divine reckoning.[9] The earliest recorded oaths can be found in

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[3] Andrews, Standards of Conduct, *supra* note 2; Andrews, Lawyer's Oath, *supra* note 2.

[4] Andrews Lawyer's Oath, *supra* note 2, at 7; *See also* JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE, AND HISTORY (London, John W. Parker 1834); HELEN SILVING, ESSAYS ON CRIMINAL PROCEDURE 4 (1964); JOSEPH PLESCIA, THE OATH AND PERJURY IN ANCIENT GREECE (1970); Matthew A. Pauley, I Do Solemnly Swear: The President's Constitutional Oath – What It Means, Why It Matters (1999) (Ph.D. dissertation, Harvard University) (on file with University Microfilms International).

[5] *See* Andrews, *Standards of Conduct*, *supra* note 2, at 20; Jonathan Belcher, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 WM. & MARY L. REV. 287; Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009).

[6] Frederick B. Jonassen, *"So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 303, 312 (2013); Belcher, *supra* note 5, at 291; Andrews, *Lawyer's Oath*, *supra* note 2, at 8-9.

[7] Milhizer, *supra* note 5 at 8; Belcher, *supra* note 5, at 291.

[8] *See* BENTON, *supra* note 2, at 19; *see also* Milhizer, *supra* note 5, at 11-12.

[9] *E.g.*, Milhizer, *supra* note 5, at 4. *See also* Jonassen, *supra* note 6, at 312; Andrews, *Lawyer's Oath, supra* note 2, at 7; William R. Nifong, *Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law Notes*, 49 DUKE L.J. 1077, 1103-04 (2000).

the Old Testament, reflecting this profound connection between faith in a god and ethical conduct.[10] Professor Andrews rightfully suggests that by invoking supernatural oversight, early oath taking emphasized the importance of ethical conduct in a civilized society under the threat of lay punishment and heavenly retributions.[11]

These early oaths served as the first formal set of standards for legal advocates.[12] Interestingly, some of these early advocate oaths read strikingly similar to modern oaths. For example, in the Justinian era, advocates were required to swear to be "true and just" and "not prosecute a lawsuit…[that] is dishonest, utterly hopeless or composed of false allegations."[13] This oath emphasizes the balance of a lawyer's duties between client and justice.

The oath became more formalized within various legal systems in medieval Europe as litigation and courts modernized. For example, in 1221, Roman Emperor Frederic II, required advocates to renew annually that they will pursue their cause "with all good faith and truth, without any tergiversation, succor; nor will they allege anything against their sound conscience; nor will they undertake desperate causes . . . by misrepresentation . . ."[14] Like the Justinian oath, this oath imposed a duty to the judicial system as well as the client.

The evolution of European oaths continued to regulate advocate conduct to protect both the client and the law. In London, a 1234 ecclesiastical decree required advocates to swear an oath to "plead faithfully, not to delay justice . . . but to

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[10] *See Genesis* 21:23-24 (New International) ("Now swear to me here before God that you will not deal falsely with me or my children or my descendants . . . Abraham said, 'I swear it.'"); Andrews, *Standards of Conduct*, *supra* note 2; Jonassen, *supra* note 7, at 309.

[11] Andrews, *Standards of Conduct, supra* note 2, at 1392-93; BENTON, *supra* note 2.

[12] BENTON, *supra* note 2, at 9-10; Andrews, *Lawyer's Oath, supra* note 2, at 6-7.

[13] Andrews, *Lawyer's Oath, supra* note 2, at 9.

[14] *Id.* at 10. *See generally* JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE AND HISTORY (1834).

defend his client both according to law and reason."[15] In France, advocates took oaths to maintain truthfulness, avoid delays, and serve the poor.[16] These oaths reflected the growing recognition of the lawyer's role as a public servant with obligations beyond just client services but to the greater public expectations of the legal profession.

B. The "Do no Falsehood" Oath

Oaths continued as the primary regulatory tool of advocates in Europe.[17] The English "do no falsehood" oath, dating back to 1402, required attorneys to swear they would not engage in falsehoods or deceit in their practice.[18] The oath mandated that lawyers affirmatively report falsehoods to the court.[19] It also barred delays, limited the fees, and required a pledge of competence.[20] This oath laid the groundwork for modern legal oaths, establishing a foundational commitment to honesty and integrity.[21] Similarly, a lawyer's oath in Denmark and Norway from 1683 emphasized fairness in litigation,

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[15] Andrews, *Lawyer's Oath*, *supra* note 2, at 11; Nifong, *supra* note 9, at 1091.
[16] *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 7; *see also* BENTON, *supra* note 2, at 12, 112-21.
[17] Andrews, *Lawyer's Oath*, *supra* note 2, at 25; Milhizer, *supra* note 5, at 19-27 (Oath-taking was not limited to medieval Europe. In ancient Africa, truth-telling was often pledged with animal sacrifice, blood-spilling, incantations, and swearing on nature or objects. Traditional Chinese oaths had similar themes like decapitating a chicken and writing sacred characters on paper and burning it to emphasize the truthfulness of their cause. In Aztec culture, witnesses invoked the Sun and Earth gods while touching a finger to the ground and then to their tongue to pledge their commitment to honesty).
[18] BENTON, *supra* note 2, at 59; Jonassen, *supra* note 6, at 313; Andrews, *Lawyer's Oath*, *supra* note 2, at 13; Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404, 406-07 (1967).
[19] BENTON, *supra* note 2, at 43; *see also* Jonassen, *supra* note 6 at 347; Goodman, *supra* note 18 at 407.
[20] Jonassen, *supra* note 6; *see also* Goodman, *supra* note 18 at 406; Andrews, *Lawyer's Oath*, *supra* note 2 at 13.
[21] *See* BENTON, *supra* note 2, at 44-47; *see generally* Jonassen, *supra* note 6.

honesty, and the avoidance of frivolous delays.[22] Oaths ensured that advocates conducted themselves with a sense of duty and ethical responsibility.[23] These oaths were not merely ceremonial but integral practices emphasizing truthfulness and fair play in a judicial system.

C. American Colonies Adopt the Oath

Unsurprisingly, the English and European legal systems significantly influence the development of American legal ethics.[24] Early American colonies adopted oaths influenced by English, French, and other European models.[25] The adoption of these models was driven by the need to establish an ethical legal system in the new colonies.[26] Similar to Europe at this time, early American colonial oaths served as the primary regulation of the legal profession.[27]

Like their European counterparts, oaths in the American colonies emphasized a lawyer's duties of honesty, competency, and the support of just causes. The most common adopted model was the English "do no falsehood" oath.[28] For example, the Massachusetts Bay Colony oath required lawyers to commit to integrity and faithfulness to justice.[29] In 1701, Massachusetts formally adopted a modified version of the "do no falsehood"

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[22] BENTON, *supra* note 2, at 24-25; Andrews, *Lawyer's Oath*, *supra* note 2, at 17.
[23] *See* Jonassen, *supra* note 6; BENTON, *supra* note 2, at 28; Goodman, *supra* note 18, at 409.
[24] *See* BENTON, *supra* note 2, at 9; Andrews, *Lawyer's Oath*, supra note 2, at 4; *and* Jonassen, *supra* note 6, at 323*; and* Goodman, *supra* note 18, at 406-07.
[25] BENTON, *supra* note 2; Andrews, *Lawyer's Oath*, *supra* note 2. *See also* Goodman, *supra* note 18, at 404-11.
[26] *See generally* Jonassen, *supra* note 6; *and* Andrews, *Lawyer's Oath*, *supra* note 2.
[27] Andrews, *Lawyer's Oath*, *supra* note 2, at 19; *see* Goodman, *supra* note 18, at 406-07.
[28] *See generally* BENTON, *supra* note 2. *See also* Andrews, *Lawyer's Oath*, *supra* note 2, at 4; *see also* Goodman, *supra* note 18.
[29] Milhizer, *supra* note 5, at 27-28.

oath.[30] The adoption of the English oath tradition highlighted the social need for regulatory guidance in civic matters, like jury duty, witness testimony, holding public office, and, of course, serving as an advocate.[31]

Following the American Revolution, states began adopting their own versions of the lawyer's oath, with some incorporating a pledge to state and federal constitutions.[32] For example, in 1787, New York's oath required lawyers to "truly and honestly demean" themselves in their practice according to their knowledge and ability.[33] In 1799, New Jersey required lawyers to take an oath of allegiance to the state as well as an oath of honesty and faithfulness in practice.[34] Delaware and Pennsylvania also adopted modified "do no falsehood" oaths that include pledges of allegiance to constitutions.[35]

The Nineteenth century marked a significant period in the formalization of legal ethics and the lawyer's oath in the United States. Legal scholars and practitioners such as David Hoffman, Simon Greenleaf, and George Sharswood played pivotal roles in shaping the ethical framework for lawyers.[36] However, the evolution of the oath reflected a shift from a moralistic approach to one more closely aligned with the concept of zealous advocacy for clients.[37]

Published in 1817, David Hoffman's "A Course of Legal Study" first introduced a comprehensive set of ethical guidelines for American lawyers, emphasizing the importance

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[30] Andrews, *Lawyer's Oath, supra* note 2, at 20. *See also* Milhizer, *supra* note 5, at 28; Goodman, *supra* note 18, at 407.
[31] *See Andrews*, *Lawyer's Oath, supra* note 2, at 8-9, 11, 24-25, ; Herbert Pope, *The English Common Law In The United States*, 24 HARV. L. REV. 6 (1910).
[32] Andrews, *Lawyer's Oath*, *supra* note 2, at 22; Goodman, *supra* note 18, at 408; *see generally* Herbert, *supra* note 31.
[33] Andrews, *Standards of Conduct*, *supra* note 2 at 1416 n.179.
[34] *Id.* at 1417 n.186.
[35] *Id*. at 1416 nn.206, 209.
[36] Michael H. Hoeflich, *Legal Ethics in the Nineteenth Century: The Other Tradition Special Issue on Professional Responsibility: Essay*, 47 U. KAN. L. REV. 793, 794 (1998).
[37] *Id.* at 816.

of personal morality in legal practice.[38] Hoffman's "Resolutions in Regard to Professional Deportment" explicitly rejected frivolous defenses, promoted honesty in legal proceedings, and underscored the lawyer's duty to both the client and the broader justice system.[39] This early view was tied closely to the lawyer's oath, which Hoffman and his contemporaries saw as a binding commitment to justice and the public good.[40]

In his inaugural address at Harvard Law School in 1834, Simon Greenleaf emphasized this dual loyalty to a client and the public.[41] Greenleaf viewed the lawyers role in society as paramount because of the lawyer's unique access to the justice system and ability to assist in the prevention or reparation of wrongs.[42] Greenleaf argued that the lawyer's oath required lawyers to prioritize justice and the broader social good over blind alliance to their clients objectives.[43] Greenleaf's focus on the oath highlighted the notion that a lawyer's obligations were not simply to the client cause, but to the public good, with a duty to the legal system and democratic institutions.[44]

As the century progressed, George Sharswood introduced a more nuanced perspective, acknowledging the tension between a lawyer's moral beliefs and professional duties.[45] In his 1854 seminal work "An Essay on Professional Ethics," Sharswood further developed the concept of the lawyer's oath by articulating the potentially conflicting

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[38] *See* DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (London, John Miller, 2d ed. 1836); Hoeflich, *supra* note 36, at 797.
[39] *See* HOFFMAN, *supra* note 38, at 754; Hoeflich, *supra* note 36, at 795-96.
[40] *See* HOFFMAN, *supra* note 36, at 798-99.
[41] *See* Simon Greenleaf, *A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University*, in THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 134 (Michael H. Hoeflich ed., 1988).
[42] *See id*. at 140.
[43] *Id.* at 151.
[44] *See id.* at 153.
[45] *See* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 102-03 (Philadelphia, T. & J.W. Johnson, 5th ed. 1884); Hoeflich, *supra* note 36, at 803-04.

responsibilities of lawyer between the obligations as advocates for their clients and as officers of the court.[46] While Sharswood maintained that lawyers owed fidelity to their clients, he also recognized that this obligation was tempered by their role as officers of the court, bound by their official oath.[47] Sharwood's approach represented a middle ground, allowing lawyers to represent clients zealously while still adhering to a moral framework that considered the public interest. Sharswood's ideas emphasized that lawyers should balance their duty to clients with their obligation to uphold justice and the integrity of the legal system.[48]

D. The "Zealous Advocacy" Adjustment

However, by the late Nineteenth century, the principles of zealous advocacy gained momentum while the notions of a societal obligation to fairness, ethical conduct and public service waned.[49] The emerging industrial economies demanded lawyers represent clients with all legal means, despite its ethical consequences.[50] This mis-aligned focus on client demands marked a significant departure from earlier ethical approaches. A lawyer's duty to the public gave way to client advocacy. This diversion reflected a broader transformation in legal ethics in the United States.

The lawyer's oath, once a lawyer's mandate of morality and public service, increasingly became a mere formality, second to client demands.[51] Principles of truthfulness and justice gave way to the rise of zealous advocacy and laid the groundwork for our modern legal ethics.[52] The shift from an

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[46] Hoeflich, *supra* note 36, at 803.
[47] *Id.* at 806.
[48] *See id.* at 805-06.
[49] *See* Hoeflich, *supra* note 36, at 816; Andrews, *Lawyer's Oath*, *supra* note 2, at 29.
[50] *See* Hoeflich, *supra* note 36, at 817.
[51] *See* Andrews, *Lawyer's Oath, supra* note 2, at 33, 39-41; Hoeflich, *supra* note 36, at 817.
[52] *See* Hoeflich, *supra* note 36, at 815.

oath to a set of guidelines reflected the growing complexity of legal practice and the need for more detailed ethical standards.[53] This transition was driven by the recognition that while the oath provided a broad moral framework, there was a need for specific rules to address the diverse ethical dilemmas faced by lawyers in their practice.[54]

E. Formalization and Codification of Legal Ethics

In the late Nineteenth and early Twentieth century, the legal profession in the United States continued to evolve with increasing formalization of ethical standards and oaths.[55] The American Bar Association (ABA), founded in 1878, played a crucial role in standardizing legal ethics across the country.[56] The ABA's Canons of Professional Ethics, adopted in 1908, were among the first comprehensive set of ethical guidelines for lawyers, setting the stage for modern codes of conduct.[57]

As part of the Canons of Professional Ethics, the ABA also adopted a model oath in 1908.[58] In its final report the ABA committee explained that the oath served as a set of "clear and concise" set of binding duties, while the canons discussed the obligations of lawyers as they perform their specific professional role.[59] The ABA's 1908 Model Oath stated:

> DO SOLEMNLY SWEAR:
> I will support the Constitution of the United States and the Constitution of the State of . . .;

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[53] *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 31, 54-55.
[54] *See id.* at 28.
[55] *See* Hoeflich, *supra* note 36, at 813; Andrews, *Lawyer's Oath*, *supra* note 2, at 18-19.
[56] *See* Andrews, Standards of Conduct, *supra* note 2, at 1435.
[57] *Id.*
[58] Hoeflich, *supra* note 36; Andrews, Standards of Conduct, *supra* note 2, at 1835; *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 584 (1908).
[59] *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 570. 573, 584-85 (1908); *see also* Andrews, Standards of Conduct, *supra* note 2, at 1451-52.

> I will maintain the respect due the Courts of Justice and judicial officers;
> I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;
> I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;
> I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;
> I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.
> SO HELP ME GOD.[60]

[60] *Final Report of the Committee on Code of Professional Ethics*, 31 ANNU. REP. ABA 567, 585 (1908). *See also* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & SOC. INQUIRY 1 (1999).

This oath combined elements from historical oaths and emphasized supporting the Constitution.[61] The oath's pledge included respect for the courts and upholding honesty in litigation.[62] The oath also included a "just cause" provision, allowing lawyers to refuse cases deemed unjust, requiring a lawyer balance the duty to client advocacy with broader ethical considerations.[63] The codification of the oath suggested a potential significant milestone in providing a framework for ethical conduct and reinforcing a lawyer's role as guardians of the justice system.

The ABA Model Rules of Professional Conduct, first adopted in 1983 and subsequently revised, incorporate many principles inherent in the lawyer's oath.[64] These rules emphasize core values such as competence, confidentiality, and loyalty, reflecting the enduring importance of the lawyer's oath in guiding ethical behavior.[65] The formulation of these rules was driven by the recognition that the oath alone was insufficient to address the complex ethical issues faced by modern lawyers, necessitating a more detailed and standardized set of guidelines.[66] The ABA's efforts to codify ethical standards were motivated by the need to address inconsistencies in the ethical practices of lawyers across different states.[67] The Model Rules provided a comprehensive framework that could be adopted by state bar associations, ensuring that all lawyers adhered to the same high

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[61] *See generally* Hoeflich, *supra* note 36; *see* Andrews, *Standards of Conduct*, *supra* note 2, at 1425-26 n.278. 1438-39, 1442; *see also* Goodman, *supra* note 18.

[62] Hoeflich, *supra* note 36, at 812-13.

[63] *Id.* at 801, 805-06.

[64] Andrews, *Standards of Conduct, supra* note 2, at 1434-35; Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 178-179 (2010); Eric C. Chaffee, *Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law*, 28 GEO. J. LEGAL ETHICS 323, 332-33 (2015).

[65] Andrews, *Lawyer's Oath, supra* note 2, at 60; *see* Hoeflich, *supra* note 36; Davis, *supra* note 64, at 176; Chaffee, *supra* note 64, at 365.

[66] Andrews, *Lawyer's Oath, supra* note 2, at 34; Chaffee, *supra* note 64, at 331-32.

[67] *See* Chaffee, *supra* note 64, at 333; Andrews, *Lawyer's Oath, supra* note 2, at 34; Jonassen, *supra* note 6.

standards of professional conduct.[68] Consequently, the adoption of the ABA rules across jurisdictions overshadowed the oath as a beacon for ethical conduct.

II. LAWYER'S SPECIAL ROLE IN DEMOCRACY

In democratic societies, the rule of law serves as the bedrock upon which justice, equality, and the protection of individual rights are built.[69] Lawyers, as key players within a democratic legal system, occupy positions of significant power, privilege, and influence.[70] Their reach extends far beyond the courtroom. Lawyers serve in both government and non-government roles. In government roles, lawyers serve as legislators, judges, government attorneys, and advisors who shape public policy, interpret the law, and ultimately influence the trajectory of democratic governance.[71] Lawyers serving in non-government roles also hold significant power, privilege and influence in their client advocacy.[72] Lawyers, in any capacity, who lend their professional credibility to false claims about critical components of

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[68] *See* Chaffee, *supra* note 64, at 334; Andrews, *Lawyer's Oath, supra* note 2, at 43; Davis, *supra* note 64, at 165.

[69] Bruce A. Green, *The Lawyer's Role in a Contemporary Democracy, Foreword*, 77 FORDHAM L. REV. 1229, 1229-32 (2009); Rakesh K. Anand, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role*, the Role of the Lawyer in American Democracy, 77 FORDHAM L. REV. 1611 (2009).

[70] Anand, *supra* note 69, at 1619-20; Green, *supra* note 69, at 1239-40; Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 744 (2022). *See also* DELIBERATIVE DEMOCRACY—ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1999); CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18–20 (1993).

[71] *See* Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 251, 153, 266-67 (2011).

[72] *See* Colin Marks & Nancy B. Rapoport, *The Lawyer's Role in a Contemporary Democracy, Promoting the Rule of Law, the Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269 (2009); Green, *supra* note 69, at 1240.

our democratic institutions pose a significant risk to democracy, itself.[73]

Lawyers possess unparalleled access to the mechanisms of power within democratic societies.[74] As legislators, judges, and executive branch lawyers, they play a central role in shaping laws, policies, and societal norms.[75] As non-government lawyers, they influence democratic norms through their representative capacities. This access is a double-edged sword. While it enables lawyers to effectuate justice and uphold the rule of law, it also places them in positions where ethical lapses can have dire consequences for democracy.[76]

A. Government Lawyers

Lawyers serving in legislative capacities are entrusted with the significant responsibility of safeguarding and promoting democracy through their lawmaking and policymaking roles. Their legal expertise, coupled with a deep understanding of constitutional principles, positions them uniquely to influence the creation of laws that uphold democratic ideals. These role place lawyers at the heart of governance, where they must ensure that the laws they create align with constitutional principles and democratic values.[77]

Lawyer-legislators play a critical role in ensuring that the laws they draft reinforce and protect the core values of

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[73] Andrew M. Perlman, *The Legal Ethics of Lying About American Democracy*, 22-2 SUFFOLK UNIV. L. SCH. LEGAL STUD. RSCH. PAPER SERIES 1 (2023).
[74] Green, *supra* note 69, at 1239; Goldstein, *supra* note 70, at 745-46, 748, 754, 756, 763
[75] *See generally* Deborah M. Hussey Freeland, *What Is a Lawyer - A Reconstruction of the Lawyer as an Officer of the Court*, 31 ST. LOUIS Univ. PUB. L. REV. 425 (2012); *see also* Green, *supra* note 69, at 1238-41; Kruse, *supra* note 71, at 264-65.
[76] Goldstein, *supra* note 70, at 747-48, 753-54, 758.
[77] *See id.* at 739-41, 744; Green, *supra* note 69, at 1230, 1232-33; Mary L. Smith, *Lawyers Must Act Now to Save Our Democracy*, US NEWS & WORLD REP. (July 28, 2024), https://www.usnews.com/opinion/articles/2024-07-28/lawyers-must-act-now-to-save-our-democracy.

democracy.[78] This responsibility is heightened by their legal training, which equips them to foresee potential constitutional challenges and to design legislation that not only complies with the Constitution but also promotes broader democratic principles such as equality, transparency, and participation.[79] Their duty extends beyond merely ensuring legal compliance; they must also work to enhance democratic governance by crafting laws that empower citizens and protect individual rights.[80]

As policymakers, lawyers must navigate the complexities of modern governance, where laws must balance the needs of diverse constituencies while upholding the rule of law. This is particularly important in areas such as civil rights and electoral laws, where the potential for laws to either bolster or undermine democratic processes is significant.[81] The democratic duty of lawyer-legislators is to ensure that such laws enhance citizen participation and safeguard against disenfranchisement or discrimination.[82]

Lawyers in legislative roles must also balance their legal ethical obligations with their obligations to the electorate.[83] This requires a careful consideration of both legal principles and the democratic will of the people. Lawyer-legislators are not only public servants but also stewards of the public trust, responsible for ensuring that their legislative actions reflect the

[78] Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Anand, *supra* note 69, at 1614.
[79] Lawson, *supra* note 78.
[80] *Id. See also* Anand, *supra* note 69, at 1620.
[81] Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1860-61 (2023).
[82] *Id.* at 1877-78.
[83] Christopher F. Zurn, *Deliberative Democracy and Constitutional Review*, (2002), https://papers.ssrn.com/abstract=2271598 (last visited Aug 10, 2024); Dale Bumpers, *The Congressional Oath of Office*, 24 U. ARK. LITTLE ROCK. L. REV. 803 (2001); Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What - The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK. L. REV. 897 (2000).

will of the people while adhering to constitutional norms.[84] This balance is essential to maintaining both the legitimacy of the legislative process and the public's faith in democratic institutions. The principle of democratic accountability requires that lawyer-legislators engage in meaningful deliberation and debate, ensuring that the laws they propose are thoroughly vetted and debated in public forums. This process is crucial for fostering transparency and ensuring that the legislative process remains open and responsive to the needs of all citizens.[85]

Beyond drafting laws, lawyers who influence policy must ensure that the policies they develop are aligned with democratic values. Whether working within government agencies, think tanks, or advocacy groups, lawyers have a duty to advocate for policies that enhance transparency, protect civil liberties, and promote equal access to justice.[86] Their legal expertise enables them to identify potential legal and constitutional challenges early in the policy-making process, ensuring that policies are both legally sound and democratically robust.[87] In this capacity, lawyer- policymakers must remain vigilant against the erosion of democratic norms. This includes resisting efforts to undermine the rule of law or to concentrate power in ways that threaten democratic governance. By upholding their duty to democracy, lawyers in these roles contribute to a legal and political framework that supports the flourishing of democratic principles and practices.

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[84] J. Michael Luttig, *American Democracy in Peril 121st Sibley Lecture*, 58 GA. L. REV. 1 (2023). *See also* Kruse, *supra* note 71, at 263; Anand, *supra* note 69, at 1629.

[85] Ross L. Malone, *The American Lawyer's Role in Promoting the Rule of Law*, 43 MARQ. L. REV. 3 (1959); Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 605 (2024); Goldstein, *supra* note 70, at 745.

[86] Barry Daniel Malone, *The Burden of Our Privilege*, ABA, https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-management/the-burden-of-our- privilege/ (last visited Aug 10, 2024). *See generally* Bulman-Pozen, *supra* note 81; Cummings, *supra* note 85

[87] Cummings, *supra* note 85. *See also* Malone, *supra* note 85; Goldstein, *supra* note 70, at 645.

Lawyer-judges also play a significant role in ensuring democratic integrity. Judicial power in a democracy is a cornerstone of maintaining the balance of power among the branches of government and ensuring the protection of constitutional rights. Judges wield significant authority, as their rulings not only resolve individual disputes but also set precedents that can shape the law for generations.[88] This power underscores the need for judges to exercise their authority with the utmost integrity, impartiality, and adherence to the rule of law.[89] It is important to note that this article does not address the current state of judicial ethics. Separate and apart from specific judicial ethical obligations (or the lack thereof) is an independent analysis that is deserving of its own analysis. Here, the focus remains on lawyer-judge obligations stemming not from independent judicial oaths but from the same lawyer oath taken by most judges.

The doctrine of judicial review grants judges the power to determine the constitutionality of legislative and executive actions, effectively serving as a check on the other branches of government.[90] As guardians of the Constitution, judges are tasked with ensuring that all laws and government actions align with the foundational principles of democracy.[91] However, the

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[88] *See* Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSPECTIVES ON POL. 805 (2009); Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 669-70 (2001).

[89] *See generally* Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy Symposium: The Lawyer's Role in a Contemporary Democracy: Promoting Social Change and Political Values*, 77 FORDHAM L. REV. 1591 (2008); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 190 (2006); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 162 (2003).

[90] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803); Shapiro, *supra* note 90, at 669.

[91] Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined Conference: Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 929, 938 (2006). *See also* AKHIL REED AMAR, AMERICA'S

exercise of judicial review requires a delicate balance; judges must avoid the perception of overreach, where the judiciary might be seen as encroaching on the roles of the legislative and executive branches.[92]

The power of judicial interpretation also extends to the creation of common law, where judges set legal standards that will guide future cases.[93] This lawmaking function is critical in areas where statutory law is silent or ambiguous, allowing judges to fill gaps in the law through reasoned analysis and precedent.[94] However, this creative aspect of judicial power must be exercised with restraint, as judges are unelected officials, and excessive judicial activism can lead to accusations of undemocratic governance.[95]

Moreover, judicial decisions often reflect broader societal values, making the judiciary a powerful agent of social change.[96] Landmark rulings, such as those in Brown v. Board of Education, Roe v. Wade, Citizens United v. FEC, Dobbs v. Jackson Women's Health Organization, illustrate how judicial interpretations can have profound implications for civil rights and liberties.[97] These judicial opinions demonstrate the judiciary's role in shaping the moral and legal fabric of the

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UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 29 (2012).

[92] *See* Dinh, *supra* note 91, at 11; Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations Conference: Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 909, 912-13 (2006).

[93] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 20 (1921); Shapiro, *supra* note 90, at 669; Zurn, *supra* note 83, at 528.

[94] RICHARD A. POSNER, HOW JUDGES THINK, 85-86 (2008). *See also* Burbank, *supra* note 92 at 914

[95] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16 (1962); *see generally* Geyh, *supra* note 89.

[96] Owen M. Fiss, *The Forms of Justice Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 2 (1979).

[97] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Roe v. Wade, 410 U.S. 113, 153 (1973); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022). *See also*, Geyh, *supra* note 89.

nation, further highlighting the ethical responsibilities that accompany judicial power.

Accordingly, judicial impartiality is not only a professional duty but also a constitutional mandate. The Due Process Clause of the Fifth and Fourteenth Amendments guarantees every litigant the right to a fair trial before an impartial judge.[98] The appearance of bias or the perception that a judge has a personal stake in the outcome of a case can undermine the integrity of the entire judicial system.[99] Consequently, judges must meticulously avoid conflicts of interest and any behavior that could compromise their neutrality. The ethical imperatives that guide judicial behavior are not only foundational to the individual judge's role but also crucial to maintaining the public's confidence in the legal system. The judiciary's power, while immense, must always be exercised with a profound sense of responsibility, grounded in ethical principles that safeguard the integrity of the democratic process.

Government lawyers also occupy a unique and powerful position within the legal system, as they are responsible not only for representing the government in legal matters but also for ensuring that the actions of government officials comply with the law. This dual role places them at the intersection of legal advocacy and public accountability, where their decisions can profoundly impact the interpretation and enforcement of laws.[100]

Government lawyers, including attorneys general and agency, are key players in the implementation of government policy.[101] They provide legal counsel to government officials,

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[98] Tumey v. Ohio, 273 U.S. 510, 523 (1927).
[99] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883-84 (2009). *See also* Dinh, *supra* note 91.
[100] *See* W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law Symposium: The Lawyer's Role in a Contemporary Democracy: Promoting the Rule of Law*, 77 FORDHAM L. REV. 1333, 1337 (2008).
[101] *Id.*

draft legislation, and represent the government in court.[102] Their work often involves complex legal issues that require a deep understanding of both the law and the broader policy objectives of the government.[103] For instance, when advising on matters related to national security, environmental regulation, or civil rights, government lawyers must navigate the fine line between advancing the policy goals of the administration and ensuring that these policies do not violate constitutional principles.[104]

The influence of government lawyers extends beyond the courtroom. Their legal opinions and interpretations of the law can shape the direction of government policy and influence public perception of the legality and legitimacy of government actions.[105] This is particularly true in high-stakes situations where the legality of executive actions is in question. For example, during the Trump administration, government lawyers played a pivotal role in defending executive orders related to immigration, environmental deregulation, and national security, each of which sparked significant legal and public debate.[106]

The ethical responsibilities of government lawyers are paramount, given their role in upholding the rule of law while serving the interests of their government clients.[107] These lawyers must adhere to professional ethical standards that require them to act with integrity, honesty, and impartiality.[108] This can be particularly challenging in politically charged

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[102] *See generally* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009). *See also* Wendel, *supra* note 100.

[103] *See generally* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2018).

[104] *See id.* at 2183-88.

[105] *See* Reinstein, *supra* note 102.

[106] Susan S. Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education After the Trump Administration: Lessons and Legacies for the Legal Profession*, 69 WASH. U. J. L. & POL'Y 17 (2022).

[107] *Id.*; Wendel, *supra* note 100 at 1335; *see also* Kent et al., *supra* note 103 at 2118.

[108] *See* Wendel, *supra* note 100 at 1335. *See generally* Reinstein, *supra* note 102.

environments where there may be pressure to prioritize political loyalty over legal objectives.

One of the most significant ethical challenges for government lawyers is the duty to uphold the Constitution and the law, even when it conflicts with the directives of their clients. This duty is codified in the Model Rules of Professional Conduct, which state that a lawyer representing a government agency must prioritize the public interest and the integrity of the legal system over the interests of individual government officials.[109] This means that government lawyers must be prepared to refuse to defend actions or policies that they believe are unconstitutional or unlawful, even at the risk of political or professional repercussions. The power wielded by government lawyers carries with it a significant ethical responsibility. As guardians of the rule of law within the government, they must navigate the complexities of legal advocacy while maintaining their commitment to constitutional principles and public trust.

B. Non-Government Lawyers

Non-government lawyers also play a crucial role in upholding democratic institutions.[110] Non-government lawyers include (1) lawyers in private practice; (2) in- house lawyers representing institutions; and (3) lawyers in the non-profit sector, ranging from legal aid/legal services to public interest law reform advocacy.[111] These lawyers, whether in private practice or corporate settings, carry a broad responsibility to society that extends beyond their duties to individual clients.[112] Their actions and decisions can have far-reaching implications

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[109] *See* MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9 & 1.11 (AM. BAR ASS'N 2024); Wendel, *supra* note 100.

[110] *See* Green, *supra* note 69.

[111] Rosen, *supra* note 89 at 168; Zacharias, *supra* note 89 at 1599. *See also* Irma S. Russell, *The Lawyer as Public Citizen: Meeting the Pro Bono Challenge Symposium on Innovations in Pro Bono Practice*, 72 UMKC L. REV. 439, 445 (2003); Wendel, *supra* note 100 at 11.

[112] Green, *supra* note 69 at 1236; Russell, *supra* note 111 at 444; Zacharias, *supra* note 89 at 1600.

for the rule of law, public trust, and the integrity of democratic institutions.[113] Non-governmental lawyers do face unique ethical challenges, however, particularly when balancing their duty to zealously represent clients with their broader responsibilities to the legal system and society.[114] While the duty to advocate for clients is fundamental, it must be balanced against a lawyer's ethical obligations to the court, the public, and the democratic system.[115]

This tension is especially pronounced in corporate law, where lawyers must navigate complex issues involving legal compliance, ethical business practices, and the societal impact of corporate actions. For instance, corporate lawyers advising businesses must ensure that their legal guidance not only advances the interests of their clients but also aligns with democratic values such as transparency, accountability, and social responsibility.[116] This ethical balancing act is critical in maintaining the integrity of both the legal profession and the democratic system.

Further, non-governmental lawyers are often at the forefront of defending democratic principles through litigation and advocacy. Public interest litigation, for example, has historically been a powerful tool for advancing democratic ideals and protecting individual rights.[117] Lawyers engaged in this type of work challenge unjust laws, defend civil liberties, and hold powerful entities accountable, thereby playing a pivotal role in societal progress.[118] For example, lawyers outside of government roles were instrumental in ensuring the integrity of the electoral process and protecting the democratic right to

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[113] *See* Green, *supra* note 69; Malone, *supra* note 86.
[114] *See* Green, *supra* note 69; Freeland, *supra* note 76; Bruce A. Green & Russell G. Pearce, *Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2008).
[115] *See generally* Rosen, *supra* note 89. *See also* Kruse, *supra* note 71 at 251.
[116] Green, *supra* note 69 at 1231. *See generally* Marks & Rapoport, *supra* note 72.
[117] Rosen, *supra* note 89 at 166-67; Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 BUFF. L. REV. 659, 663 (2014).
[118] Rosen, *supra* note 89; Galperin, *supra* note 117.

vote during the election challenges related to the 2020 U.S. election.[119] These efforts underscore the essential role that non-governmental lawyers play in upholding democracy.

Public trust in the legal system is foundational to a functioning democracy.[120] Lawyers, through their actions and behavior, significantly influence this trust.[121] Ethical lapses or misconduct by lawyers can erode public confidence in the justice system, undermining the very foundation of democratic governance.[122] Conversely, acts of integrity and justice by lawyers can reinforce public trust and the legitimacy of legal institutions.[123]

The behavior of lawyers, particularly in high-profile cases or those with public policy implications, can shape public attitudes toward the legal profession and the justice system. When lawyers act with integrity, transparency, and a commitment to justice, they help build confidence in the legal system, ensuring it is perceived as fair and impartial. Consequently, government and non-governmental lawyers occupy a pivotal role in democratic societies, wielding significant influence in shaping the legal system and public policy. This position comes with a corresponding responsibility to defend democratic ideals, uphold the rule of law, and maintain public trust. Upholding the highest standards of ethical conduct is essential for maintaining public trust and ensuring that the legal system functions effectively in a democratic society.

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[119] Goldstein, *supra* note 70.

[120] *See generally* Rosen, *supra* note 89; Freeland, *supra* note 75. *See also* Cummings, *supra* note 86 at 537; Martin Bohmer, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, Equalizers and Translators: Lawyer's Ethics in a Constitutional Democracy*, 77 FORDHAM L. REV. 1363 (2009).

[121] Rosen, *supra* note 89 at 189.

[122] *See* Green, *supra* note 69.

[123] Ascanio Piomelli, *The Lawyer's Role in a Contemporary Democracy, Promoting Access to Justice and Government Institutions, The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1400 (2009). *See generally* Bohmer, *supra* note 120.

III. CHALLENGES TO DEMOCRACY: A CASE STUDY OF THE 2020 U.S. ELECTION

The 2020 U.S. presidential election was marked by unprecedented efforts to subvert democracy. And, lawyers spearheaded a significant number of these efforts. These actions include (a) the propagation of false claims of voter fraud, (b) the orchestration of the fake electors plot, (c) the filing of baseless lawsuits, (d) the pressure campaign to "find votes," (e) the involvement in the January 6th insurrection, and (f) voting not to certify the election. Each of these actions represented a deliberate attempt to overturn the will of the American electorate and posed a grave threat to the integrity of democratic institutions. While it is true that many of these lawyers are facing consequences, both criminally and professionally,[124] the conduct alone underscoring the critical need for a professional recommitment to the ethical obligations expected by the oath.

A. Propagation of False Claims

Concerted efforts, by lawyers, to undermine and delegitimize the results of a free and fair election underscores the critical need for a recommitment to the oath's ethical guidance. These lawyers played pivotal roles in spreading misinformation and perpetuating the false narrative that the election was "rigged" or "stolen."[125] This disinformation campaign was not confined to courtrooms. Instead, it extended into the public sphere, where these legal professionals used

[124] Alison Durkee, *All Of Trump's Lawyers Who Have Faced Consequences—As Jenna Ellis Takes Deal*, FORBES (Sep. 26, 2024) https://www.forbes.com/sites/alisondurkee/2024/08/06/kenneth-chesebro-charged-in-wisconsin-here-are-all-the- former-trump-lawyers-now-facing-legal-consequences/.

[125] Cummings, *supra* note 85; *see also* William L. Wheeler, *When the Dust Has Settled: Fallout from the 2020 Presidential Election and S.B. 202 Placed Georgia's Election Code in the Nation's Crosshairs Comments*, 74 MERCER L. REV. 409, 411 (2022).

media appearances, public statements, and social media to sow doubt about the integrity of the electoral process.[126]

One of the central lawyers in this misinformation campaign was Rudy Giuliani, who served as Trump's personal attorney.[127] Giuliani repeatedly made unfounded claims of widespread voter fraud, asserting that the election had been stolen through illegal votes, manipulation of voting machines, and other fraudulent activities.[128] Despite the lack of evidence to support these claims, Giuliani continued to push this narrative in various media appearances and press conferences, thereby amplifying the misinformation to a broad audience.[129]

Sidney Powell, another attorney closely associated with the Trump campaign, was also instrumental in propagating the "rigged" election narrative.[130] Powell advanced a particularly outlandish theory that involved an international conspiracy to manipulate voting machines.[131] She claimed that this conspiracy involved foreign actors, including Venezuela and China, and that it was orchestrated to ensure Trump's defeat.[132] Powell's assertions were widely discredited, yet she persisted in making these claims in public forums, further spreading misinformation and undermining public confidence in the electoral process.[133]

The misinformation campaign was not limited to these two lawyers. Several other attorneys associated with Trump and his allies engaged in similar efforts to delegitimize the election results.[134] These lawyers often appeared on conservative media outlets, where they repeated the baseless allegations of voter fraud and a stolen election.[135] By doing so, they played a significant role in shaping the perceptions of

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[126] Luttig, *supra* note 84 at 3-4.

[127] Cummings, *supra* note 85; Wheeler, *supra* note 125, at 410-11.

[128] *Id.*

[129] *See* Cummings, *supra* note 85 at 563.

[130] Cummings, *supra* note 85 at 576.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 562.

[135] *Id.*

millions of Americans, many of whom came to believe that the election had indeed been stolen despite all evidence to the contrary.[136]

One of the most concerning aspects of this misinformation campaign was its impact on public trust in the electoral process. Polls conducted in the months following the election revealed that a significant portion of the American public, particularly among Republican voters, believed that the election had been stolen from Trump.[137] This belief was directly attributable to the relentless efforts of lawyers and other Trump allies who continued to propagate these false claims, even in the face of overwhelming evidence that the election was free and fair.[138]

The spread of misinformation by these lawyers also had tangible consequences beyond merely shaping public opinion. It contributed to an atmosphere of mistrust and hostility that ultimately culminated in the January 6th insurrection at the U.S. Capitol.[139] Many of those who participated in the attack were motivated by the belief that the election had been stolen, a belief that was fueled by the disinformation campaign led by Trump's legal team and their allies.[140]

The actions of these lawyers in spreading false claims about the 2020 election represent a significant breach of their ethical obligations.[141] As officers of the court, lawyers have a duty to uphold the integrity of the legal system and the rule of law.[142] By engaging in a campaign of misinformation aimed at undermining the electoral process, these lawyers not only violated their ethical duties but also contributed to a broader erosion of trust in American democracy.[143]

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[136] Cummings, *supra* note 85 at 597.
[137] *Id.*
[138] *Id.* at 597-98.
[139] *Id.* at 595; Luttig, *supra* note 84 at 9.
[140] Smith, *supra* note 78.
[141] *See* Rosen, *supra* note 89 at 185.
[142] *Id.*; Cummings, *supra* note 85 at 528-529.
[143] Galperin, *supra* note 117; Rosen, *supra* note 89.

Furthermore, the continued propagation of these false claims has had a lasting impact on the political landscape in the United States. The narrative of a "rigged" election has become a central tenet of the political discourse among Trump supporters, leading to ongoing efforts to challenge and undermine future elections.[144] This persistent undermining of the electoral process poses a serious threat to the stability of American democracy and highlights the dangerous consequences of the misinformation spread by lawyers in the aftermath of the 2020 election. Such conduct demands that the profession reflect and recommit its founding principles embedded in the oath.

B. Fake Electors Scheme

One of the most audacious and troubling aspects of the efforts to overturn the 2020 presidential election was the fake electors scheme. This plan involved creating and submitting false slates of electors in several key battleground states that had been won by Joe Biden.[145] The intent was to replace the legitimate electors who were bound to vote for Biden with Trump supporters, thereby creating a pretext for rejecting the official electoral votes and potentially throwing the election to Donald Trump.[146] Lawyers played a central role in orchestrating and legitimizing this scheme, which represented a direct attack on democratic processes.[147]

The fake electors scheme was conceived as part of a broader strategy to overturn the 2020 election results through both legal and extralegal means. The plan centered around the idea that if multiple states submitted competing slates of electors, Vice President Pence, who was presiding over the certification of the electoral votes on January 6, 2021, could

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[144] Cummings, *supra* note 85 at 593.
[145] SELECT COMM. TO INVESTIGATE THE JAN. 6 ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 341 (2022); Cummings, *supra* note 85, at 582.
[146] Cummings, *supra* note 85 at 582-584. *See also* Luttig, *supra* note 84 at 3-4.
[147] Cummings, *supra* note 85 at 514-515.

declare the election results invalid in those states.[148] If successful, the plan would have resulted either in Trump being declared the winner or, more likely, throw the decision to the House of Representatives, where Republicans controlled a majority of state delegations.[149]

The scheme required the cooperation of Republican officials in several battleground states, including Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin.[150] In each of these states, Trump's legal team and their allies pressured local Republican leaders to submit alternate slates of electors who would cast their votes for Trump, despite the fact that Biden had won the popular vote in those states.[151] These fake electors would then send their votes to Congress, where they would be presented as legitimate alongside the official slates.[152]

Lawyers were deeply involved in the planning and execution of the fake electors scheme. One of the key figures in this effort was John Eastman, a conservative legal scholar and attorney who advised Trump and his allies on how to use the fake electors to overturn the election.[153] Eastman drafted memos outlining the legal rationale for the scheme, arguing that the Vice President had the authority to reject the official electoral votes and recognize the fake electors instead.[154] These memos were widely circulated among Trump's legal team and served as the blueprint for the scheme.[155]

Eastman's legal theory was based on a distorted interpretation of the Constitution and the Electoral Count Act of 1887.[156] Eastman argued that because there was precedent for Congress to resolve disputes over electoral votes, the Vice

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[148] *Id.* at 582.

[149] *Id.*

[150] Cummings, *supra* note 85 at 582.

[151] *Id.*

[152] *Id.*

[153] Cummings, *supra* note 85 at 543.

[154] *Id.* at 591.

[155] *See id.*

[156] *Id.* at 584, 589.

President could unilaterally decide which slate of electors to recognize.[157] This interpretation was widely rejected by legal scholars and was ultimately dismissed by Pence, who refused to go along with the plan.[158] Nonetheless, Eastman and other lawyers continued to push this theory, using it to justify the submission of fake electors.[159]

Giuliani also played a crucial role in coordinating the efforts to submit the fake slates, working closely with Republican officials in the targeted states.[160] He pressured these officials to convene meetings of the state legislatures to formally approve the alternate electors, even though there was no legal basis for doing so.[161] Giuliani's efforts were part of a broader campaign to create chaos and confusion around the certification of the electoral votes, thereby providing a pretext for rejecting Biden's victory.[162]

The fake elector's scheme was executed with varying degrees of success across the targeted states. In some states, Republican officials were persuaded to sign certificates falsely claiming that they were the duly appointed electors of their state.[163] These certificates were then sent to Congress and the National Archives, where they were intended to be presented alongside the legitimate electoral votes on January 6, 2021.[164] In Michigan, for example, a group of Republican officials met in the state capitol on December 14, 2020, the same day that the legitimate electors were meeting to cast their votes for Biden.[165]

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[157] *Id.* at 543, 584, 589, 591.

[158] *Id.* at 584, 587.

[159] *Id.*

[160] Cummings, *supra* note 85, at 591.

[161] *Id.* at 560-65.

[162] Cummings, *supra* note 85, at 562-64.

[163] *See id.*; Alan Feuer & Katie Benner, The *Fake Electors Scheme, Explained*, N.Y. TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html.

[164] *See* Cummings, *supra* note 85, at 584

[165] Laurence H. Tribe, *Anatomy of a Fraud: Kenneth Chesebro's Misrepresentation of My Scholarship in His Efforts to Overturn the 2020 Presidential Election*, JUST SECURITY (Aug. 8, 2023),

The group signed a certificate declaring themselves the "duly elected and qualified electors" of Michigan, even though Biden had won the state by over 150,000 votes.[166] Similar actions took place in other states, including Georgia and Pennsylvania, where alternate slates of electors were also assembled and their votes submitted to Congress.[167]

These actions were not just symbolic. The efforts were intended to create a genuine dispute over the election results that could be used to justify further legal challenges or even direct intervention by the Vice President or Congress.[168] The lawyers involved in this scheme were fully aware of its potential to disrupt the constitutional process and to undermine the peaceful transfer of power.[169] Their actions represented a profound breach of their ethical obligations as officers of the court and as defenders of the rule of law.

The fake electors scheme ultimately failed, largely due to the refusal of Vice President Pence and other key officials to go along with it.[170]

On January 6, 2021, as Congress met to certify the electoral votes, Pence rejected the efforts to recognize the fake electors and proceeded with the certification of the legitimate votes.[171] However, the scheme contributed to the broader effort to delegitimize the election and played a role in inciting the violent attack on the U.S. Capitol that followed.[172]

The involvement of lawyers in the fake electors scheme has led to significant legal and ethical repercussions. Some of the lawyers involved, including John Eastman, have faced investigations and disciplinary actions for their roles in

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https://www.justsecurity.org/87498/kenneth-chesebros-misrepresentation-of-laurence-tribe-scholarship-in-his- efforts-to-overturn-the-2020-presidential-election/.

[166] *Id.*; Cummings, *supra* note 86; Proposals for Reform, *supra* note 138.

[167] Cummings, *supra* note 85.

[168] *Id.* at 584.

[169] *Id.*

[170] *Id.* at 592-94, 606.

[171] *Id.*

[172] *Id.*

attempting to subvert the election.[173] The conduct of the lawyers involved in this scheme fall well below the ethical expectations of the profession. Through false and misleading information, these lawyers used their position of power and influence to manipulate the electoral process for the purpose of interrupting the peaceful transfer of power after a democratic election. Such conduct is violative of a lawyer's obligations to the democratic principles of honesty, fairness, and rule of law, demonstrating a need to recommit to the ethical guidance provided in the oath.

C. Litigation Efforts

In the wake of the 2020 United States presidential election, a wave of lawsuits was launched across the country, all aiming to overturn the results of the election that had declared Joe Biden as the winner. Once again, lawyers spearheaded these baseless legal efforts.[174] Despite the lack of credible evidence, these lawsuits were aggressively pursued in numerous courts, reflecting a broader strategy to delegitimize the election and maintain Trump's hold on the presidency.[175]

One of the most prominent legal efforts was led by Sidney Powell, who infamously referred to her lawsuits as releasing the "Kraken."[176] Powell filed multiple lawsuits in key battleground states, including Georgia, Michigan, Wisconsin, and Arizona, alleging widespread voter fraud and conspiracy theories involving the voting machines.[177] Powell's lawsuits claimed that votes were switched from Trump to Biden through the manipulation of voting machines, and she further alleged that this was part of an international plot to rig the election.[178]

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[173] *Id.* at 516 n.11.
[174] *See generally* Cummings, *supra* note 85.
[175] *Id.*
[176] *Id.* at 576.
[177] *Id.* at 576-77.
[178] *Id.* at 576 n.331.

However, these lawsuits were based on unfounded claims and lacked credible evidence. Courts across the country dismissed Powell's cases, often in scathing terms, citing the absence of any substantive proof to support her allegations.[179] Judges criticized the lawsuits for being filled with speculative and implausible assertions, noting that they failed to meet even the basic standards of legal pleading.[180]

Despite these dismissals, Powell and her legal team continued to push these lawsuits, using them as a platform to propagate the false narrative that the election had been stolen.[181] This strategy was not just about winning in court; it was about sowing doubt and confusion among the public, with the ultimate goal of undermining confidence in the electoral process.[182]

These lawsuits were emblematic of the broader legal strategy to use the courts not necessarily to win, but to create a narrative of a flawed and illegitimate election.[183] By filing these lawsuits, the Trump lawyers sought to cast doubt on the validity of the election results and to keep the possibility of overturning the outcome alive, even as the courts consistently rejected their claims.[184]

One of the more brazen legal efforts came from the State of Texas, whose attorney general filed a lawsuit directly with the U.S. Supreme Court seeking to invalidate the election results in four battleground states: Georgia, Michigan, Pennsylvania, and Wisconsin.[185] The Texas lawsuit, backed by Trump's legal team

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[179] *See* Cummings, *supra* note 85, at 577; Alexandra Just, *Trumping Unmeritorious Election Contests: The Need for Uniform Election Contest Laws in the Wake of 2020 Election Litigation Notes*, 62 U. LOUISVILLE L. REV. 167, 184 (2023).

[180] Just, *supra* note 179, at 184.

[181] Cummings, *supra* note 85 at 588.

[182] *See* Luttig, *supra* note 84, at 4.

[183] Cummings, *supra* note 85.

[184] *Id.*

[185] Texas v. Pennsylvania, 2020 U.S. LEXIS 5994 (2020); Adam Liptak, Texas Files An Audacious Suit with the Supreme Court Challenging the Election Results, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/08/us/politics/texas-files-an-

and supported by several Republican attorneys general and members of Congress, argued that these states had violated the Constitution by changing their election procedures in response to the COVID-19 pandemic.[186] The lawsuit claimed that these changes had led to widespread voter fraud and that the results in these states should be invalidated, thereby handing the election to Trump.[187] However, the U.S. Supreme Court swiftly rejected the lawsuit, stating that Texas lacked standing to challenge the election results in other states.[188] The Court's decision effectively ended one of the most significant and far-reaching legal efforts to overturn the 2020 election.[189] The Texas lawsuit highlighted the extreme lengths to which Trump's legal team and their allies were willing to go in their efforts to overturn the election. Despite the lack of any credible evidence to support their claims, they were prepared to engage in unprecedented legal action that, if successful, would have subverted the will of millions of voters across multiple states.[190]

The multiple lawsuits filed after the 2020 election raised significant ethical concerns within the legal profession. Lawyers are bound by ethical obligations to uphold the rule of law, to refrain from filing frivolous lawsuits, and to avoid engaging in conduct that undermines public confidence in the legal system. However, the post- election lawsuits filed by Trump's legal team and their allies violated these fundamental ethical principles. These lawsuits were widely seen as an abuse of the legal system, using the courts as a tool to pursue a political agenda rather than to seek justice.[191] By filing baseless lawsuits and making unsupported allegations of voter fraud, these lawyers violated the ethical obligations explicit in the Rules of Professional Conduct, as well as the guiding principles of the

audacious-suit-with-the-supreme-court-challenging-the-election-results.html.

[186] *Id.*

[187] *See* Just, *supra* note 179 at 194 n.171.

[188] *See Texas*, 2020 U.S. LEXIS 5994 (2020).

[189] *See* Cummings, *supra* note 85.

[190] *Id.*

[191] *Id.* at 559-60.

oath, suggesting the need for a recommitment to these ethical guidelines.

D. Pressure Campaign

In addition to the multiple lawsuits, a fake electors scheme, and widespread misinformation campaign, another critical component of the efforts to subvert the 2020 election results was a targeted pressure campaign directed at state officials. Lawyers closely aligned with former President Donald Trump played a pivotal role in this campaign, attempting to coerce and intimidate state officials into overturning the certified election results in key battleground states.[192]

The pressure campaign on state officials was another concerted effort to reverse the outcome of the 2020 presidential election by influencing state legislatures, governors, secretaries of state, and election officials.[193] The central goal was to convince these officials to decertify the election results, declare the election invalid, or appoint alternate slates of electors who would cast their votes for Trump instead of Biden.[194] This campaign targeted states where Biden had won by narrow

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[192] *See* Barbara McQuade, *United States v. Donald Trump: A 'Model Prosecution Memo' on the Conspiracy to Pressure Vice President Pence,* JUST SECURITY (Feb. 22, 2022), https://www.justsecurity.org/80308/united-states-v-donald-trump-model-prosecution-memo/; Amy Gardner, 'I just want to find 11,780 votes': In extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in his Favor, WASH. POST (Jan. 3, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html. ; Leigh Ann Caldwell, Josh Dawsey & Yvonne Wingett Sanchez, *Trump Pressured Arizona Gov. Doug Ducey to Overturn 2020 Election*, WASH. POST (July 1, 2023), https://www.washingtonpost.com/nation/2023/07/01/trump-2020-election-arizona-governor-doug-ducey/; *Here's Every Word From the Fourth Jan. 6 Committee Hearing on its Investigation*, NPR (June 21, 2022), https://www.npr.org/2022/06/21/1105848096/jan-6-committee-hearing-transcript.

[193] *Id.*

[194] Cummings, *supra* note 85.

margins, including Georgia, Michigan, Pennsylvania, and Arizona.[195]

Lawyers played a crucial role in this campaign by providing legal arguments, drafting memos, and directly engaging with state officials.[196] They sought to exploit ambiguities in state election laws, as well as the heightened political tensions following the election, to achieve their objectives. The pressure campaign was not limited to private conversations. It also included public statements, media appearances, and coordinated efforts to mobilize Trump's supporters to apply additional pressure on state officials.[197]

One of the most prominent lawyers involved in the pressure campaign was again, Rudy Giuliani. Giuliani was at the forefront of efforts to persuade state legislators and election officials to overturn the election results.[198] In multiple public hearings organized by Republican lawmakers in states like Michigan, Pennsylvania, and Arizona, Giuliani presented baseless claims of voter fraud and urged lawmakers to take action to nullify the election's results.[199] These hearings, though unofficial and lacking any legal authority, were used as platforms to propagate the false narrative of a stolen election and to pressure state officials into compliance.[200]

Giuliani's strategy involved a mix of legal arguments and inflammatory rhetoric. He argued that state legislatures had the constitutional authority to override the popular vote and appoint electors directly, a claim that was widely discredited by constitutional scholars.[201] Despite the lack of legal merit, Giuliani persisted, using his position and influence to push state officials towards taking unprecedented and illegal actions.[202] Attorney John Eastman also played a key role in the pressure

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[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] Cummings, *supra* note 85, at 852-53.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

campaign. Eastman authored legal memos that were circulated among state officials, outlining the supposed constitutional and statutory grounds for decertifying the election results.[203] These memos argued that states could declare the election results invalid due to alleged irregularities and appoint new electors.[204] Like Giuliani, Eastman's arguments were based on a distorted interpretation of the law, but they were instrumental in providing a legal veneer to the pressure campaign.[205]

One of the most infamous examples of the pressure campaign involved a phone call between Trump, his lawyers, and Georgia Secretary of State Brad Raffensperger.[206] During this call, Trump, with Giuliani's involvement, pressured Raffensperger to "find" enough votes to overturn Biden's victory in Georgia.[207] Giuliani played a crucial role in framing the conversation, repeatedly asserting that widespread voter fraud had occurred in Georgia and that Raffensperger had the authority to correct the alleged wrongdoing.[208] This call, which was later made public, exemplified the direct and coercive tactics employed by Trump's legal team to subvert the election results.[209]

This pressure campaign continued in other key states. In Michigan and Arizona, Giuliani and other lawyers pressured Republican members of the state legislature to decertify the

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[203] Cummings, *supra* note 85, at 588-91; BOB WOODWARD & ROBERT COSTA, PERIL 131, 209-12 (2021); *Read: Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html [hereinafter "*Two Page Memo*"]; *Read: Trump Lawyer's Full Memo on Plan For Pence to Overturn the Election*, CNN (Sept. 21, 2021), https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-penceoverturn-election/index.html [hereinafter "*Full Memo*"].

[204] *Two Page Memo*, *supra* note 204; *Full Memo*, *supra* note 204.

[205] WOODWARD & COSTA, *supra* note 204, at 209-12.

[206] Cummings, *supra* note 85, at 587-88; Jerry H. Goldfeder, E*xcessive Judicilization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 368 (2021).

[207] Just, *supra* note 179, at 184 n. 124.

[208] *See* Cummings, *supra* note 85, at 584.

[209] *See id.*

election results and appoint an alternate slate of electors.[210] They held a series of meetings with state legislators, presenting them with dubious affidavits and testimonies alleging voter fraud.[211] Despite these efforts, Michigan and Arizona lawmakers refused to comply, citing the lack of credible evidence and their duty to uphold the certified election results.[212]

The involvement of lawyers in the pressure campaign raised serious legal and ethical concerns. The actions of Giuliani, Eastman, and other lawyers involved in the pressure campaign clearly violated democratic principles of rule of law, truthfulness, and integrity in the system. By attempting to coerce state officials into overturning the certified election results, these lawyers not only engaged in unethical conduct but also potentially violated state and federal laws.[213]

The pressure campaign also contributed to the broader erosion of trust in the democratic process.[214] This campaign undermined public faith in the integrity of the electoral process and set a dangerous precedent for future elections. These lawyers continued to misrepresent the facts, push false legal claims, and pressure state actors to violate election procedures for the purpose of changing the results of the election.

These actions are violative of the ethical obligations of lawyers and underscores the need for a recommitment to the high ethical standards the oath expects.

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[210] *See id.* at 586-88; Just, *supra* note 179, at 183.

[211] Cummings, *supra* note 85, at 582.

[212] Just, *supra* note 179 at 187. *See also* Cummings, *supra* note 85, at 587; Margaret Tarkington, *After the Trump Administration: Lessons and Legacies for the Legal Profession: The Role of Attorney Speech and Advocacy in the Subversion and Protection of Constitutional Governance*, 69 WASH. U. J.L. & POL'Y 287 (2022).

[213] *See* Just, *supra* note 179, at 186-87; Cummings, *supra* note 85, at 587-88.

[214] Just, *supra* note 179, at 186. *See generally* Cummings, *supra* note 85; Luttig, *supra* note 84.

E. The January 6, 2021 Insurrection

The January 6th, 2021 insurrection at the Capitol was a watershed moment in American history, as a violent mob sought to overturn the results of the 2020 presidential election by disrupting the certification of the Electoral College votes.[215] Among those who participated in or supported the insurrection were several individuals who were members of the legal profession.[216] These lawyers played various roles, from providing legal advice and justification for the actions of the rioters to directly participating in the events of that day.[217]

Before and during the events of January 6th, several lawyers were instrumental in providing the legal arguments that underpinned the attempts to overturn the 2020 election results.[218] These lawyers advanced theories that the Vice President could unilaterally reject the certified electoral votes from certain states or that state legislatures could appoint alternate slates of electors.[219] These arguments were central to the narrative that the election had been "stolen" and that extraordinary measures were justified to prevent Joe Biden from taking office.[220]

Once again, Attorney Eastman was one of the most influential figures in this regard. Eastman authored memos and gave public speeches in the days leading up to January 6th, arguing that Vice President Pence had the authority to reject the electoral votes from contested states.[221] Though Eastman's legal

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[215] Michael Sozan & William Roberts, Tr*ump and His Allies Must be Held Accountable for the January 6 Insurrection* (Apr. 2023), https://www.americanprogress.org/wp-content/uploads/sites/2/2023/04/Jan6insurrection-report.pdf. *See generally* Cummings, supra note 85.

[216] *See* FINAL REPORT OF THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, H.R. REP. NO. 117-663, at 65-83.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

theories were legally flawed, they also served as a key justification for the actions of the mob that stormed the Capitol.[222] His arguments were cited by those who believed that the insurrection was necessary to "save" the country from a fraudulent election.[223]

Attorney Giuliani was also involved. On the day of the insurrection, Giuliani spoke at the rally that preceded the attack on the Capitol, where he called for "trial by combat" to resolve the election dispute.[224] This rhetoric, combined with his previous efforts to delegitimize the election results, helped incite the mob and contributed to the violence that ensued.[225]

In addition to those who provided legal justification for the insurrection, there were also lawyers who directly participated in the attack on the Capitol. One notable example is Paul Davis, a Texas attorney who was filmed outside the Capitol on January 6th, expressing his support for the rioters and making statements that aligned with the false narrative of a stolen election.[226] Davis, who was employed as an in- house counsel for a company at the time, was later fired from his position due to his involvement in the insurrection.[227] He has since faced legal and professional repercussions, including investigations by the State Bar of Texas.[228] William Calhoun, a Georgia attorney who openly boasted on social media about breaching the Capitol and participating in the violence.[229]

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[222] *Id.*

[223] *Id.*; Cummings, *supra* note 85, at 593-94.

[224] Rudy Giuliani, Speech at Donald Trump's "Save America" Rally (Jan. 6, 2021), https://www.rev.com/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat. *See also* Cummings, *supra* note 85, at 593 n. 446.

[225] Cummings, *supra* note 85 at 593-94.

[226] Debra C. Weiss, *Lawyer Lost His Job, His Fiancée and His Friends After Presence Outside Capitol Riot*, ABA JOURNAL., (Feb. 17, 2022, 11:07 AM), https://www.abajournal.com/news/article/lawyer-lost-his-job-his- fiancee-and-his-friends-after-presence-outside-capitol-riot.

[227] *Id.*

[228] *Id.*

[229] Debra C. Weiss, *Georgia Lawyer Who Bragged of Shutting Down "Stolen Election Shenanigans" is Found Guilty in Jan. 6 Case*, ABA JOURNAL, (Mar. 21,

Calhoun's actions, including his statements that he was part of an "armed revolution" to overturn the election, were emblematic of the extremism that motivated many of the rioters. He was later arrested, charged and convicted with several federal crimes.[230]

The involvement of lawyers in the January 6th insurrection raises serious legal and ethical concerns. The actions of the lawyers involved in the insurrection, whether through providing legal justification or directly participating in the violence, represent a stark violation of these ethical obligations.[231] The participation of lawyers in an insurrection that sought to overturn a democratic election highlights the dangers of politicizing the legal profession and using legal arguments to justify unlawful actions.[232] It also underscores the need for the legal community to reaffirm its commitment to the democratic principles embedded in the lawyers' oath.

F. Voting "Nay" to Certify the Election

Despite the attack on the Capitol, several lawyers spearheaded another effort to alter the outcome of the 2020 election. After a violent mob stormed the U.S. Capitol in an attempt to prevent the certification of the Electoral College results, Congress reconvened to complete the certification process.[233] Despite the unprecedented attack on the Capitol and the clear results of the election, a significant number of lawmakers, including several who were also attorneys, voted to

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2023, 9:21 AM), https://www.abajournal.com/news/article/georgia-lawyer-who-bragged-of-shutting-down-stolen-election-shenanigans-is-found-guilty-in-jan-6-case.

[230] *Id.*

[231] *See* Cummings, *supra* note 85, at 599, 600.

[232] Luttig, *supra* note 84.

[233] *Id.*; Susan S. Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education After the Trump Administration: Lessons and Legacies for the Legal Profession*, 69 WASH. U. J. L. & POL'Y 17 (2022).

reject the electoral votes from certain states that had been won by Joe Biden.[234]

These lawyer-legislators, who had been trained in the law and had taken oaths to uphold the Constitution, argued that the election results in certain states were tainted by fraud.[235] However, these claims were based on the same baseless allegations that had been repeatedly rejected by courts across the country.[236] Despite the lack of credible evidence, these legislators used their legal knowledge and positions of authority to lend legitimacy to the false narrative that the election had been stolen.[237] One prominent example of a lawyer-legislator who voted not to certify the election results was Senator Josh Hawley of Missouri.[238] A graduate of Yale Law School and a former clerk for Chief Justice John Roberts, Hawley had established himself as a legal scholar and a rising star within the Republican Party.[239] Despite his legal background, Hawley was the first senator to announce that he would object to the certification of the electoral votes, citing unfounded claims of voter fraud in Pennsylvania.[240] His decision to lead this objection, despite the lack of evidence, was widely criticized as a political maneuver that undermined the rule of law.[241]

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[234] Cummings, *supra* note 85; Just, *supra* note 179; Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html.

[235] Cummings, *supra* note 85, at 582.

[236] *See id.* at 591.

[237] Press Release, Sen. Josh Hawley, Sen. Hawley Will Object During Electoral College Certification Process On Jan 6, (Dec. 30, 2020), https://www.hawley.senate.gov/sen-hawley-will-object-during-electoral-college-certification-process-jan-6/.

[238] *Id.*

[239] *Id.*

[240] Press Release, Sen. Josh Hawley, Sen. Hawley Will Object During Electoral College Certification Process On Jan 6, (Dec. 30, 2020), https://www.hawley.senate.gov/sen-hawley-will-object-during-electoral-college-certification-process-jan-6/.

[241] Just, *supra* note 179.

Following his lead, another lawyer-legislator who played a key role in the objections was Senator Ted Cruz of Texas.[242] Cruz, a graduate of Harvard Law School and a former Solicitor General of Texas, also objected to the certification of the electoral votes from Arizona.[243] Cruz argued that the objections were necessary to address concerns about the integrity of the election, despite the fact that these concerns were based on debunked conspiracy theories.[244] Cruz's legal background and his role as a constitutional lawyer lent credibility to the objections, even as they were widely dismissed by legal experts and courts as meritless.

The decision by lawyer-legislators to vote against certifying the election results raised obvious and serious legal and ethical questions. As attorneys, these legislators were bound by professional and ethical obligations to uphold the law and to avoid conduct that undermines the legal system.[245] By voting to reject the certified election results based on unfounded claims, these lawyer-legislators violated these ethical obligations and contributed to the erosion of public trust in the electoral process. Their conduct contributed to the broader effort of undermining elections and the peaceful transfer of power by using their legal expertise and positions of authority to advance baseless objections.[246] By advancing baseless objections and lending credibility to unfounded claims of election fraud, these legislators undermined the rule of law and contributed to the erosion of public trust in the democratic process.

All of the lawyer-led schemes to overturn the 2020 U.S. Presidential election were designed to undermine the electoral

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[242] Yourish et al., *supra* note 237; Luttig, *supra* note 84.
[243] *Id.*
[244] Press Release, Sen. Ted Cruz, Sen. Cruz: We Have an Obligation To the Constitution To Ensure That This Election Was Lawful (Jan. 03, 2021), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-we-have-an-obligation-to-the-constitution-to-ensure-that-this-election-was-lawful.
[245] *See generally* Rosen, *supra* note 89.
[246] Luttig, *supra* note 84.

process, create public mistrust, and install, as president, the loser of the election - the antithesis of democracy. These actions have had far-reaching implications for public trust in the legal profession and the integrity of democratic institutions. The audacity to knowingly, or recklessly, advance false claims of fraud in multi-faceted schemes to overturn the will of the people, underscores the importance for the legal profession to recommit to ethical conduct that our oath expects.

V. MODERNIZATION OF THE OATH AND OTHER PROPOSALS

The lapses identified in section IV underscoring the need for a renewed professional commitment to the oath's principles of honesty, integrity, fairness, and the rule of law. Indeed, the ABA Task Force for American Democracy recently published a report highlighting the alarming rise of misinformation, political violence, and polarization.[247] The report urged a renewed focus on ethical training and a reaffirmation of the lawyer's oath.[248] Below are recommendations for modernizing the lawyer's oath. In addition, I offer some additional proposals to reinforce the ethical foundations of the legal profession through reforms for law school education, continuing legal education (CLE), state disciplinary procedures. To be sure, none of these recommendations alone, or in cooperation with each other, will not deter or prevent a lawyer intent on violating their ethical obligations. However, these recommendations will serve to reemphasize the importance of ethical conduct given the critical role lawyers play in a democratic society.

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[247] ABA TASK FORCE FOR AMERICAN DEMOCRACY, ANALYSIS: OVERCOMING SERIOUS THREATS TO OUR DEMOCRACY (2024), https://www.americanbar.org/content/dam/aba/administrative/news/2024/aba-democracy-task-force.pdf.

[248] *Id.*

A. Modernizing the Lawyer's Oath

While several states have recently updated the language of their oaths, many still contain problematic language.[249] Modernizing the lawyer's oath serves to reinvigorate the solemn obligations it represents - justice, fairness, and the rule of law. These commitments flow from a lawyer's unique position of privilege within a democratic society.[250] Serving as both advocates for individuals and gatekeepers of the legal system, lawyers are entrusted with the duty to uphold justice, protect the rights of their clients, and contribute to the public good.[251] Accordingly, the lawyer's oath must be more than just a ceremonial recitation; it should be a powerful reminder of the responsibilities that come with the privilege of practicing law. Modernizing the lawyer's oath by addressing outdated language, emphasizing democratic principles, and eliminating bias should reinforce the ethical principles inherent in the oath.

Moreover, by modernizing the oath to explicitly include commitments to democratic values and human rights, the legal profession can reinforce its aspirational guidance for fulfilling the lawyer's role in protecting democracy.

Unfortunately, many current lawyer's oaths contain language that is archaic, biased, and complex, which can obscure the significance of these commitments and alienate many lawyers.[252] Oddly, Kentucky requires applicants to the bar to promise that they have not and will not participate in a duel.[253] Traditional oaths, like the Massachusetts or Missouri oath, frequently include terms that are unfamiliar to modern practitioners, such as "lucre" and "artifice," which diminish the oath's impact and make it feel more like an antiquated formality

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[249] Lauren E. Bartlett, *Human Rights and Lawyer's Oaths*, 36 GEO. J. LEGAL ETHICS 411, 429, 432 (2023).
[250] Anand, supra note 69; Green, supra note 69; Luttig, supra note 84, at 16.
[251] Luttig, *supra* note 84, at 16; Green, *supra* note 69, at 1232; Rosen, *supra* note 89, at 55.
[252] *See generally* Bartlett, *supra* note 250.
[253] KY. CONST. § 228.

than a meaningful pledge.[254] Advocates for plain language argue that the oath should be revised to be more accessible, ensuring that every lawyer fully understands the ethical standards they are committing to.[255]

For example, instead of swearing to avoid pursuing claims for "lucre or malice," a modern oath would eliminate these archaic terms and add more relevant and operative words like "fairness" and "honesty."[256] Simplifying the language makes the oath a more powerful and clear declaration of ethical responsibility.[257]

Many oaths fail to explicitly reference a lawyer's commitment to democratic principles.[258] For example, the Connecticut, Massachusetts, and New Hampshire oaths do not include a pledge to uphold the U.S. Constitution.[259] While the Massachusetts' lawyer's oath statute mentions the constitutions, absent in the actual oath is any such language.[260]

To reinvigorate democratic principles, it is essential that the oath reflect a lawyer's responsibility to protect these principles.[261] The omission of such language undermines these critical obligations.[262] To address this gap, modern oaths should include language that explicitly commits lawyers to defending

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[254] Bartlett, *supra* note 250, at 422-24, 441. *See also* Stephen C. O'Neill, *The History of the Lawyer's Oath*, 5 MASS. LEGAL HIST. 91 (1999).
[255] *See* Bartlett, *supra* note 250, at 426.
[256] *See id.*; Frances M. Moran, *An Oath for the Legal Profession*, 35 WOMEN LAW. J. 15 (1949).
[257] *See* Joseph Kimble, *Plain Language: Time for a Clearer, Plainer Alternative to our Lawyer's Oath?*, 98 MICH BAR J. 36 (May 2019); Bartlett, *supra* note 250, at 439.
[258] *See* Bartlett, *supra* note 250, at 439.
[259] Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide*, 30 CARDOZO L. REV. 1843, 1844 (2008); Bartlett, *supra* note 250, at 413; CONN. GEN. STAT. § 1-25 (2017); MASS. GEN. LAWS. ch. 221, § 38 (2022); N.H. REV. STAT. ANN. § 311:6 (2023).
[260] MASS. GEN. LAWS. ch. 221, § 38 (2022).
[261] *See* Green, *supra* note 69, at 43-44; Luttig, *supra* note 84, at 16. *See generally*, Bartlett, *supra* note 250 (describing concerns about pledge to constitution).
[262] Travis Pickens, *The Meaning in a Lawyer's Life*, 93 OKLA. BAR J., April 2022, at 6.

the rule of law, promoting justice, and safeguarding the rights of all individuals. For instance, a revised oath might include specific language related to the protection of federal and state constitutions.[263] This addition would reinforce the lawyer's role as a guardian of these essential values, ensuring that their practice aligns with the broader goals of justice and equality.[264]

Existing oaths also fail to confront language of bias, discrimination, and inequality within the legal profession.[265] Despite the legal profession's emphasis on fairness and justice, current oaths do not explicitly require lawyers to combat systemic biases or advocate for equality.[266] Indeed, many oath's contain problematic language. For example, the Maine, Massachusetts, and Rhode Island oaths all have exclusionary male-gender specific language, suggesting a male dominated profession.[267] Similarly, many states' oaths, including Florida, New York, Massachusetts and Texas, have religious language stemming from its Christian influences, potentially alienating non- Christians, non-religious, and others.[268] These issues can perpetuate inequalities and allow discriminatory practices to persist unchallenged. A modernized oath should eliminate the problematic language and include clear statements obligating lawyers to recognize and oppose bias in all its forms.[269] For example, the oath could require lawyers to oppose all forms of discrimination and commit toward a more just and equitable legal system.[270] By incorporating these commitments, the oath would reaffirm the lawyer's dedication to ethical practice and contribute to creating a more inclusive and fair legal profession.

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[263] Bartlett, *supra* note 250, at 424.
[264] Andrews, *Lawyer's* Oath, supra note 2, at 30, 59-62.
[265] Bartlett, *supra* note 250, at 430.
[266] Bartlett, *supra* note 250, at 419-420.
[267] ME. REV. STAT. ANN. tit. 4, § 806 (2023); MASS. GEN. LAWS ch. 221, § 38 (2022); R.I. SUP. CT. R. art. II, R. 8 (2023).
[268] In re Oath of Admission to the Fla. Bar, 73 So. 3d 149, 150 (Fla. 2011). N.Y. CONST. art. XIII, § 1; MASS. GEN. LAWS. ch. 221, § 38 (2022); TEX. CONST. art. XVI, § 1.
[269] *See* Bartlett, *supra* note 250, at 419-420; Andrews, *supra* note 2, at 52-53, 60-61.
[270] *See* Bartlett, *supra* note 250, at 442-43.

The Massachusetts' lawyer's oath is the oldest American oath—a prime example of an archaic, biased, and confusing oath—ripe for modernization.[271] Below, the Massachusetts' lawyer's oath is used as a template for potential modernization.

Currently, the full text of the Massachusetts statute enacting the lawyer's oath provides:

> Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:
>
> I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.[272]

A review of the oath's language exposes several critical concerns of archaic language, bias and poor writing. As the oldest oath in the country, it is not surprising that it contains outdated language like "lucre" instead of "profit" and "wittingly or willingly" rather than "knowingly or intentionally."[273] The oath also contains biased language that undermine the professions efforts at inclusivity. The use of gender specific

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[271] *See* Andrews, *Lawyer's Oath*, *supra* note 2, at 19-21.
[272] MASS. GEN. LAWS ch. 221, § 38 (2024).
[273] *Id.*

terms like "him" and "man" in the oath is exclusionary and more inclusive language must be substituted. The oath also assumes a belief in a monotheistic deity. By swearing "So help me, God," the oath excludes followers of other religions, the non-religious, and those that belong to a belief system that prohibits such conduct. A modern oath would eliminate gendered language and all religious references, thereby eliminating exclusionary language and replacing with more inclusive terminology.

Furthermore, the oath is poorly written for the modern context. First, the entire oath is written as a single run-on sentence, which makes it difficult to read and understand. The oath also repeats the prohibition of false claims. Oath-takers first "swears" to "do no falsehood" in the first segment of the sentence, and then, to not "promote or sue any false…suit" in the second section. Breaking the oath into shorter, more concise sentences would improve clarity and understanding.

Finally, the Massachusetts lawyer's oath, as written, references three separate oaths. The first line of the oath statute seems to require that attorneys take the supporting oaths for both the United States and Commonwealth Constitutions. However, following that language, the statute provides the specific oath of attorney office. The separate treatment of these oaths suggests a disconnect between what is required and what is actually sworn to by newly minted lawyers. At best, the mere reference to the constitutions but failure to include in the actual oath demonstrates ambiguity and a lack of consistency in writing. At worst, the omission of constitutional commitments in the oath undermines the intent of the oath and the attorney's duty to uphold the democratic principles contained in these constitutions.

To modernize the Massachusetts oath, it is critical to draft language that addresses the ethical demands of today's legal practice.[274] This includes simplifying the language,

[274] Luttig, *supra* note 84; James Podgers, *A New Look: ABA Plans First Comprehensive Review of Disciplinary Enforcement Rules in 20 Years*, ABA JOURNAL (Nov. 1, 2012, 8:00 AM), https://www. https://www. https://www.abajournal.com/magazine/article/a_new_look_aba_plans_first_comprehensive_review_of_disciplinary_enforcement.

eliminating bias language, as well as adding specific commitments to democratic principles. An effective modern oath will provide a simple statement connecting a lawyer's privilege to their obligations to client, the public, and the justice system in a democratic society.

Drawing from existing oath languages, including from several revised state oaths, and various human rights oath variations, can provide some guidance toward a more modern and impactful oath. For example, all but four state constitutions include a pledge to uphold the U.S. Constitution.[275] A few states have eliminated gender-specific language.[276] And still others include language related to the dignity, honesty and fairness.[277]

However, none of the current lawyer oaths explicitly mention human rights.[278] Fortunately, we can look to human rights organizations for guidance on language that supports and defends human rights. For example, the Universal Declaration of Human Rights (UDHR) provides guidance for explicit language for recognition of the inherent rights and freedoms, like equality under the law, dignity, non-discrimination, speech, religious and political participation and affiliation, personhood, access to justice, and so on.[279]

Applying these modifications, a more modern version of the Commonwealth of Massachusetts' oath could read:

> I promise to support the Constitutions of the United States and the Commonwealth.

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[275] *See* Bartlett, *supra* note 250, at 413 n.7.

[276] *E.g. Rule 6: Admission of Attorneys*, TENN. ADMIN. OFF. OF THE CTS., https://www.tncourts.gov/rules/supreme-court/6 (last visited Aug 22, 2024).

[277] *Id. See generally* Bartlett, *supra* note 250.

[278] BARTLETT, *supra* note 250, at 437.

[279] G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at 71 (Dec. 10, 1948). *See generally* Risa E. Kaufman, *By Some Other Means: Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2011); Davis, *supra* note 64.

> I will employ and defend the principles of fairness and the impartial administration of justice.
>
> I commit to practice with honesty, integrity, and respect, and oppose all forms of discrimination and injustice. Recognizing the profound responsibility that comes with the license's privileges, I will use my legal knowledge only to protect my clients and the justice system with the highest ethical standards.

This revised oath maintains the core commitments of the original while incorporating modern ethical considerations that are essential for today's legal practice. By explicitly addressing issues such as bias, human rights, and democratic values, the modernized oath provides a simple yet comprehensive ethical framework that aligns with the responsibilities of contemporary lawyers.

The proposed changes, including the use of plain language and the incorporation of commitments to democracy, human rights, and the elimination of bias, reflect the evolving responsibilities of lawyers in society source might be good here. The revised Massachusetts Lawyer's Oath serves as a template for these changes, demonstrating how traditional ethical commitments can be updated to meet contemporary challenges. By modernizing the oath, the legal profession can reinforce its commitment to justice, equality, and the rule of law, ensuring that lawyers continue to serve as guardians of these vital democratic principles.

A. Additional Proposals

1. Law School Curriculum

Law schools play a critical role in the development of professional lawyers.

Accordingly, law schools are an appropriate place for considered reforms to integrate the principles inherent in the lawyer's oath source might be good here. Integrating these principles — honesty, integrity, fairness, and the rule of law — into Professional Responsibility (PR) courses would find faculty support if the MPRE assessed these ethical principles. Legal ethics involve not just adherence to the law but also embodying professional aspirations that guide lawyers in navigating moral complexities within the legal system.[280] The challenges exposed by recent events, particularly the attempts to undermine democratic processes during the 2020 presidential election, underscore the critical need to reinforce these principles from the outset of legal education.[281]

The MPRE should be revised to assess these broader foundational ethical principles. This would force PR courses to not merely focus on the Model Rules of Professional Conduct; these courses would then delve deeper into the historical and philosophical foundations of the legal profession's commitment to democracy and the rule of law. This approach would help students understand that their responsibilities as lawyers extend beyond client representation to include upholding the very structures that sustain democratic governance. Incorporating case studies and simulations that present students with real-world ethical dilemmas is essential for bridging the gap between theory and practice.[282] For instance, scenarios based on the legal challenges surrounding the 2020

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[280] *See* Hazard, *supra* note 2, at 574.
[281] *See* Luttig, *supra* note 84, at 2-7.
[282] Robert P. Burns, *Teaching the Basic Ethics Class Through Simulations: The Northwestern Program in Advocacy and Professionalism*, 58 L. & CONTEMP. PROBS. 37, 38 n.4 (1995).

election can be utilized to illustrate the importance of ethical decision-making in preserving democratic integrity.[283] These exercises not only enhance students' critical thinking skills but also instill a deep appreciation for the lawyer's role in safeguarding the rule of law.

Moreover, PR courses could include specialized modules on constitutional ethics, emphasizing the lawyer's duty to uphold constitutional principles even when faced with conflicting pressures.[284] The intersection of legal rules and professional aspirations requires lawyers to navigate complex moral landscapes, where the preservation of democratic institutions often hangs in the balance.[285] Further, guest lectures and workshops featuring practitioners who have confronted significant ethical challenges in their careers can further enrich the learning experience.[286] These interactions provide students with firsthand insights into the real-world implications of ethical practice and the vital role that lawyers play in defending democratic values.

Embedding the principles of the lawyer's oath into PR courses is not just about teaching future lawyers to follow the rules but about cultivating an enduring commitment to the ethical foundations of the legal profession. By doing so, law schools can prepare students to meet the demands of a profession that is integral to the preservation of democracy and the rule of law.[287]

Law schools should also consider incorporating similar learning objectives in courses involving Professional Identity Formation (PIF). The concept of PIF in legal education has gained significant traction in recent years, particularly with the

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[283] *See generally* Luttig, *supra* note 84.
[284] *See Rule of Law in an American Life: A long and Intentional Tradition*, AM. BAR ASS'N., https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-in-american-life--a-long-and-intentional-tradition/ (last visited Aug 12, 2024).
[285] Hazard, *supra* note 2.
[286] Luttig, *supra* note 84.
[287] Hazard, *supra* note 2; *See* Luttig, *supra* note 84, at 16.

American Bar Association's (ABA) adoption of Standard 303(b)(3), which mandates that law schools provide substantial opportunities for students to develop their professional identities.[288] This shift in legal education recognizes that the process of becoming a lawyer involves more than just acquiring knowledge of the law; it also requires the internalization of the values and responsibilities that define the legal profession.[289]

At its core, PIF "focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society."[290] This involves an intentional exploration of the values, guiding principles, and well-being practices that are foundational to successful legal practice.[291] Law schools play a crucial role in shaping these identities by helping students integrate these professional values with their personal values, ultimately fostering a healthy, integrated professional identity.[292]

One of the key challenges in PIF, however, is the concern that the values and obligations of the legal profession are not just taught, but be internalized by students.[293] As noted in the Carnegie Report, legal education constitutes a powerful moral apprenticeship that profoundly shapes students' values, perceptions, and interpretations of the legal world.[294] This underscores the importance of a deliberate and thoughtful approach to PIF, one that acknowledges the transformative impact of legal education on students' professional identities.[295] Through this deliberative process, law students get a better

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[288] Timothy W. Floyd, *Lawyers and Civil Discourse: Respect and Civility as a Matter of Professional Identity*, 76 BAYLOR L. REV. 90, 91-92 (2024).
[289] Kellye Y. Testy & Zachariah J. DeMeola, *Leading the Way: The Power of Professional Identity Formation for Lawyers*, 76 BAYLOR L. REV. 115, 147 (2024).
[290] Floyd, *supra* note 289.
[291] *Id.* at 92.
[292] *See* Testy & DeMeola, *supra* note 290, at 143-49.
[293] SHAILINI GEORGE, THE LAW STUDENT'S GUIDE TO DOING WELL AND BEING WELL (2021).
[294] Floyd, *supra* note 289, at 92.
[295] Testy & DeMeola, *supra* note 290, at 143-49.

understanding of their personal role within the bounds of professional expectations.

A successful PIF program requires law schools to be intentional in their educational practices, ensuring that students are not only aware of the ethical obligations of lawyers but also committed to understanding how these obligations impact their professional lives.[296] This involves creating opportunities for students to engage with the core values of the legal profession—such as honesty, integrity, fairness, and the rule of law—in a way that resonates with their personal experiences and aspirations.[297]

In practical terms, this means incorporating PIF into the curriculum in a way that goes beyond traditional classroom instruction. Experiential learning opportunities, such as clinics and externships, are particularly effective in helping students internalize professional values by providing real-world contexts in which to apply them.[298] These experiences allow students to develop an understanding of the profession's expectation that lawyers balance the interests of client and their obligations to democratic principles.[299]

Professional Identity Formation is a critical component of legal education, one that requires deliberate effort and thoughtful integration into the curriculum. By focusing on the development of a professional identity that is grounded in the core values of the legal profession, law schools can prepare students to not only excel in their legal careers but also to fulfill their roles as ethical leaders in a democratic society.

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[296] *See* Floyd, *supra* note 290, at 92.
[297] *Id.* at 134-35*. See also* Patrick Emery Longan, Daisy Hurst Floyd & Timothy W. Floyd, *A Virtue Ethics Approach to Professional Identity: Lessons for the First Year and beyond Symposium: Professional Identity Formation and Its Pedagogy*, 89 UMKC L. REV. 645, 660 (2020); Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 U. ST. THOMAS L.J. 366, 390-91 (2008).
[298] Testy & DeMeola, *supra* note 291 at 134-35.
[299] Floyd, *supra* note 290.

The development of a lawyer's professional identity should not be confined to the traditional curriculum of doctrinal courses and clinical experiences. To cultivate a well-rounded understanding of the legal profession's role in a democratic society, law schools should offer additional learning opportunities that emphasize the civic obligations of lawyers. These can take the form of specialized courses, seminars, workshops, and speaker series that focus on the intersection of law, democracy, and civic engagement.

Civic-related law courses can also help prepare students to fulfill their roles as public citizens, a concept enshrined in the Preamble to the ABA Model Rules of Professional Conduct.[300] Civic-related courses can equip students with the knowledge and skills they need to navigate these challenges and to advocate for justice and the rule of law in their professional lives.[301] These courses can cover a wide range of topics, including the lawyer's role in democratic institutions, the importance of the rule of law, and the ethical obligations lawyers have to society at large.[302] By exposing students to these broader themes, law schools can help them develop a deeper understanding of how their work as lawyers can contribute to the preservation and enhancement of democratic institutions.

In addition to formal courses, law schools should create opportunities for students to engage with these topics through seminars, workshops, and speaker series. These formats allow for more interactive and in-depth exploration of civic-related issues, fostering a space where students can discuss and reflect on the challenges facing the legal profession and society. For example, workshops on constitutional law and democracy, or speaker series featuring prominent legal scholars and practitioners, can provide students with valuable insights into the complexities of legal practice in a democratic society.[303]

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[300] *Id.* at 94-95.
[301] Luttig, *supra* note 84.
[302] *See* Testy & DeMeola, *supra* note 290.
[303] *See* Floyd, *supra* note 289, at 104.

These opportunities can be particularly effective in helping students understand the importance of civic obligations and public service as integral components of their professional identity. The values of respect, empathy, and commitment to the truth are core to the legal profession and are essential for maintaining a healthy democracy.[304] By integrating these values into civic-related courses and extracurricular opportunities, law schools can encourage students to see their legal careers not just as a means of personal advancement but as a way to contribute to the greater good.[305]

2. Continuing Legal Education

The legal profession's commitment to maintaining high ethical standards and upholding the rule of law requires ongoing education beyond the initial stages of a lawyer's career. Continuing Legal Education (CLE) programs serve a critical role in ensuring that lawyers remain knowledgeable about evolving legal standards, ethical obligations, and professional responsibilities.[306] Democracy themed CLE programs would continually reinforce the profession's obligation to these principles.

CLE programs are particularly crucial in the realm of legal ethical training. Lawyers must continually maintain their competence with regards to professional responsibility.[307] Without continuous education, the evolving nature of ethical considerations could lead to lapses in ethical judgment, resulting in malpractice or disciplinary action.[308] Indeed, CLE is

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[304] *Id.* at 90.
[305] *See* Testy & DeMeola, *supra* note 290.
[306] Randall T. Shepard, *Celebrating Twenty Years of Continuing Legal Education: The Art and Science of Educating Attorneys: The Scope of the Issue: Defining Continuing Legal Education: The "L" in "CLE" Stands for "Legal"*, 40 VAL. U. L. REV. 311, 323-24 (2006).
[307] Marcia L. Proctor, *Legal Education: Continuing Education in Professional Responsibility*, 77 MICH. B. J. 678, 678 (1998).
[308] *Id.*

integral to ensuring that lawyers are not only competent in their legal knowledge but also in their ethical obligations.[309]

To be sure, CLE programs devoted to professional ethics do exist. For example, the ABA provides members hundreds of CLE courses focused solely on ethics.[310] Many states, including Massachusetts, also provide CLE on ethical issues.[311] Notwithstanding these continuing educational opportunities, CLE programs designed specifically to address the issues defined by the recent lapses related to the 2020 U.S. election would emphasize a practicing attorney's continued obligations to these ethical considerations and expectations.

CLE programs can provide a critical link between the structured environment of law school and the ad hoc, often uneven, environment of practice. While law school offers a broad overview of professional responsibility, CLE allows for more focused and contextual teaching, concentrating on the ethical issues that arise within specific areas of legal practice.[312] This contextual approach ensures that lawyers can apply their ethical knowledge directly to their practice, making CLE an indispensable tool for ethical competence. This ongoing education helps lawyers avoid the pitfalls of outdated knowledge and reinforces their commitment to ethical practice.[313] By ensuring that lawyers continue to engage with their ethical obligations, the profession can help practicing lawyers recommit to the ethical obligations they promised at the beginning of their careers.

3. Rule and Discipline Reforms

[309] *See* Shepard, *supra* note 307, at 324.
[310] *Free CLE Member Benefit Library*, ABA, https://www.americanbar.org/cle-marketplace/cle-library/search/ (last visited Aug 22, 2024).
[311] *About MBA CLE*, MASSBAR ASS'N, https://massbar.org/education (last visited Aug 22, 2024).
[312] Proctor, *supra* note 308.
[313] Shepard, *supra* note 307, at 317-18.

To address the ethical lapses, it is also important to consider revisions and enhancements to the ABA Model Rules of Professional Conduct (ABA Rules) and the corresponding disciplinary procedures. Disciplining a lawyer for ethical conduct often hinges upon whether the lawyer was acting within their representative role.[314] There is no real debate that lawyers in representative roles should be disciplined for unlawful and unethical conduct.[315]

However, disciplining lawyers for conduct in a nonrepresentative role raises serious constitutional and political concerns.[316] In his chapter on disciplining lawyers related to the 2020 presidential election subversion efforts, Dean Perlman explains that the disciplining lawyers for conduct outside of their representative capacity is more limited.[317] This is true mostly because the rules do not address a lawyer's conduct outside of their professional roles.[318] Dean Perlman notes two important exceptions: (1) conduct so egregious to question fitness or character to practice and (2) conduct involving dishonesty, fraud, deceit or misrepresentation.[319]

It is the significance of these two exceptions that speaks to the principles embedded in the oath. These two exceptions are precisely where the oath can provide support for the enforcement of these principles outside a lawyer's representative role. Conduct by a lawyer that undermines democratic institutions is unethical, regardless of whether the conduct was within a representative capacity, or not. The following proposed changes aim to reinforce the legal profession's commitment to the democratic principles inherent in the lawyer's oath, emphasizing deterrence over punishment. A careful application of these exceptions can help reinforce the importance of ethical conduct whether acting in representative

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[314] Perlman, *supra* note 73, at 2.
[315] *Id.* at 3; Luttig, *supra* note 84.
[316] *See* Perlman, *supra* note 73, at 1, 8.
[317] *Id.* at 10.
[318] *Id.*
[319] *Id.*

capacity or not. Furthermore, simple revisions to the Rules can also capture some conduct of lawyers in non-representative roles.

a. Expanding Rule 8.3: Mandatory Reporting of Misconduct

One area for potential enhancement is Rule 8.3, which currently requires lawyers to report serious professional misconduct by their peers.[320] Broadening this rule to mandate reporting of misconduct that threatens democratic processes, such as attempts to undermine election integrity could prove effective.[321] The adoption of a similar rule by the California Supreme Court, which compels attorneys to report any criminal acts or conduct involving fraud or dishonesty, serves as a precedent for this type of expansion.[322] Enhancing Rule 8.3 to reflect the profession's duty to protect democratic principles could serve promote the principles inherent in the lawyer's oath.[323] Such a revision would underscore the legal profession's role as a guardian of democracy, ensuring that unethical actions related to democratic institutions are reported and addressed.

b. Revising Rule 8.4: Conduct Prejudicial to the Administration of Justice

Another key consideration is revising Rule 8.4, which addresses conduct prejudicial to the administration of justice. Specifically, the rule could be amended to explicitly include actions that undermine democratic institutions, thereby providing clearer grounds for disciplinary action against

[320] MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N. 2024).
[321] *See* Rosen, *supra* note 89.
[322] Balassone, *supra* note 322.
[323] *See* Luttig, *supra* note 84, at 15; Rosen, *supra* note 89, at 158.

lawyers involved in activities like election subversion.[324] The complex ethical challenges faced by government lawyers suggests that existing rules may be inadequate for addressing these challenges, further supporting the need for such a revision.[325] By expanding Rule 8.4 to cover conduct that threatens democracy, the legal profession would reaffirm its commitment to safeguarding the institutions that are vital to democracy.

c. Improving the Disciplinary Process

In addition to rule enhancements, improvements to the disciplinary process itself are essential to ensure that unethical conduct is addressed promptly and effectively. These improvements should focus on increasing the efficiency, transparency, and deterrent effect of disciplinary proceedings.[326]

The current disciplinary processes are too slow and lenient, which can erode public trust in the justice system.[327] To address this, the ABA should consider implementing reforms that streamline the process, particularly in cases involving significant ethical violations like those related to the 2020 election. A more efficient process would not only ensure timely accountability but also serve as a stronger deterrent against future misconduct. Indeed, a more effective disciplinary process could play a crucial role in preserving the rule of law.[328]

Transparency in disciplinary proceedings also is crucial for maintaining public confidence in the legal profession. Consideration should be given to mandating that disciplinary

[324] *See* Podgers, *supra* note 275. *See generally* Luttig, *supra* note 84.
[325] Susan Saab Fortney, *Ethical Quagmires for Government Lawyers: Lessons for Legal Education*, 69 WASH. U. J.L. & Pol'y 17 (2022).
[326] Podgers, *supra* note 275.
[327] *Id.*
[328] *Id. See generally* Luttig, *supra* note 84.

actions, especially those involving significant ethical violations, be made public whenever possible.[329] Publicizing sanctions could reinforce the profession's commitment to ethical behavior and serve as a powerful deterrent to future misconduct.[330] Moreover, increased transparency in the disciplinary process would help restore public trust in the legal system, particularly in cases where lawyers' actions have had a direct impact on democratic processes.[331]

To ensure that cases involving election-related misconduct are handled with the necessary expertise and seriousness, the establishment of specialized oversight bodies should be considered. These bodies would focus exclusively on cases that involve attempts to undermine democratic processes, ensuring that such cases receive the attention and resources they warrant.[332] Specialized oversight could improve the consistency and rigor of disciplinary actions in these cases, reinforcing the legal profession's role in protecting the integrity of democratic institutions.

The proposed revisions and enhancements to the ABA Model Rules of Professional Conduct and state disciplinary procedures are some steps toward reinforcing the legal profession's commitment to the democratic ideals enshrined in the lawyer's oath. By expanding reporting obligations, revising existing rules to address democratic integrity, and improving the disciplinary process through increased efficiency, transparency, and specialized oversight, the legal profession can better deter unethical behavior and uphold the values that are fundamental to a functioning democracy.

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[329] Goldstein, *supra* note 70, at 769.
[330] Jon J. Lee, *Private Sanction, Public Harm?*, 48 BYU L. REV. 1255, 1324-25, 1337-39 (2023).
[331] *See* Luttig, *supra* note 84.
[332] Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 HOFSTRA L. REV. 275 (2007); Luttig, *supra* note 84; Fortney, *supra* note 235.

CONCLUSION

The lawyer's oath is not just a relic of tradition. It is a pledge that embodies the core values of a legal profession in a democratic society — honesty, integrity, and a steadfast commitment to the rule of law. As we have seen, this oath has evolved over centuries, reflecting the moral and ethical standards that society expects from its legal practitioners. Yet, the events of recent years, particularly those surrounding the 2020 presidential election, exposed critical weaknesses in how these standards are upheld. Lawyers, who should be the guardians of democratic integrity, have instead, in some cases, become the very instruments of its erosion.

The proposals outlined herein are not a cure-all, but offer a roadmap for a recommitment to the principles inherent in the lawyer's oath. By modernizing the language of the oath, integrating the principles of the lawyer's oath more deeply into legal education, revising the ABA Model Rules of Professional Conduct, and enhancing disciplinary procedures, the legal profession can renew its dedication to democracy. These measures expressly recommend a recommitment to democratic principles as a vital professional obligation.

In conclusion, the lawyer's oath is more than just the words — it is a covenant with a democratic society, a promise that lawyers will uphold the highest ethical standards in the service of justice. In a time when the very fabric of democracy is under strain, the legal profession must look inward, recommit to these values, and ensure that the oath remains a powerful and relevant guide for all who enter the profession. By doing so, the profession reinforces its role as a bulwark of democracy.

KEYNOTE SPEECH

THE OATH OF OFFICE: A PILLAR OF THE RULE OF LAW

JUDGE WENDY BEETLESTONE†

Thank you for inviting me to be the keynote speaker at the *University of Pennsylvania Law Review*'s Annual Banquet—a banquet which I attended thirty-two years ago when I was an Articles Editor for the *Law Review*.

Tonight, I would like to focus on a rite of passage that may appear, at first blush, to be somewhat prosaic, but which in fact carries deep meaning and bears tremendous weight; and which—if ignored or minimized—can have consequences that send shock waves through the ether. What I speak of are the oaths we take in life. Let me repeat that: the oaths we take in life.

And let me be clear: I am not talking about the use of the word *oath* as it concerns strong words to express large emotions often attributed to cartoon characters.[1] For example, "dag nabbit," "sufferin succotash," or "doh!"

Tonight, I focus on the other usage of the word: a solemn promise regarding one's future action or behavior usually concerning one's service to society.[2]

For example:

> Hear my words and bear witness to my vow . . . . Night gathers, and now my watch begins. It shall not end until my death. I shall take no wife, hold no

† District Judge of the United States District Court for the Eastern District of Pennsylvania. Judge Beetlestone delivered these remarks on March 20, 2025, as the keynote speaker at the annual banquet of the *University of Pennsylvania Law Review*, Volume 173.

1 *Oath*, OXFORD ENG. DICTIONARY (2004), https://www.oed.com/dictionary/oath_n?tab=meaning_and_use#34040894 [https://perma.cc/LM4L-U5ZL]; *Minced Oath*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/minced-oath [https://perma.cc/M78N-NF3Y] (last visited Apr. 2, 2025).

2 *Oath*, *supra* note 1.

> lands, father no children. I shall wear no crowns and win no glory. I shall live and die at my post. I am the sword in the darkness. I am the watcher on the walls. I am . . . the shield that guards the realms of men. I pledge my life and honor to the Night's Watch, for this night and all the nights to come.[3]

We now all understand that "[y]ou know nothing, Jon Snow."[4] Nevertheless, his is the kind of oath I am talking about.

Perhaps, at this early stage in your career, you may not have taken any oaths. But if you have not yet, you will soon. That is because, as a young lawyer, you will face a sea of oaths—to become admitted to practice in any state, to become a member of a particular court, to take a government position or a job as a law clerk for a judge. The first thing you will have to do before you start work is to swear an oath.

The specific words found in the oaths you take will vary. But there are throughlines. They will speak of professionalism, integrity, and service to justice. They will talk of the highest ethical standards and of advocating for clients with diligence and honesty. They will underscore your duty, as a lawyer, to the courts, and of candor to your clients and your adversaries. They will focus your attention on ensuring fairness and the proper administration of justice while respecting the rights of all parties. And often, they will remind you of the need for civility and of the normative mandate to contribute to the legal profession and to the broader community through pro bono service and public interest work.

Throughout human history, oaths have been a key link in the chain that connects groups of people together. In ancient Greece, for example, oaths were sworn to the Gods—usually Zeus, the great overseer of all oaths. If you broke an oath, the punishment—exacted swiftly by the witnessing Gods—was death or extinction of your family line.[5] It was common advice not to sail on the same ship with perjurers (oath breakers by definition) for fear that the ship would be wrecked even at the cost of innocent lives. See also (and Executive Editors, note the proper Bluebook usage, I hope, of "see also") see also *The Odyssey*: Odysseus's starving men break their oath not to kill and eat any of Hyperion' cattle.[6] Zeus exacts swift punishment by sinking their ship, saving only Odysseus.[7]

Likewise, when Socrates was on trial for his life, he refused to beg for mercy from his jury because they had sworn an oath to render judgment based

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3 GEORGE R.R. MARTIN, A GAME OF THRONES 522 (2011).

4 GEORGE R.R. MARTIN, A STORM OF SWORDS 213 (2011).

5 Hesiod, *Theogony*, *in* THE POEMS OF HESIOD 31, 45 & n.188 (Barry B. Powell, trans., 2017); HERODOTUS, THE HISTORIES 383 (Robin Waterfield, trans., 2008).

6 HOMER, THE ODYSSEY 135-38 (Samuel Butler, trans., 2011).

7 *Id.* at 138.

purely on the laws and not on their own pleasure.[8] Socrates, a good Athenian, believed that the only proper way to defend himself was by convincing the jurors that he was innocent, not by persuading them with an appeal to their emotions.[9] If he had done the latter, he may have saved his own skin in the short term, but he would have condemned both himself and the jury to death for oath breaking.[10]

I am fairly certain, having seen them in action, that the trial lawyers of today do not share Socrates' compunction. They do everything they can to appeal to the jury's emotions and leave to me the job of making sure the jury follows the law in coming to a verdict.

Nevertheless, the point is that oaths matter. They were in ancient Greece the warp and weft of the fabric of society. And to this day they matter. Here I turn to the central point of my remarks today. Specifically, I want to focus on the oaths of office taken by judges and military personnel. They are a solemn and foundational aspect of our democratic system. These oaths are not merely ceremonial formalities; they are a profound commitment to uphold the principles that underpin our society. Central among these principles is the Rule of Law, which ensures that every individual and institution is subject to and accountable under the law.

The tradition of taking an oath before entering a judicial role dates back to colonial times when American officials swore allegiance to the British king. Then, as now, the oath served as a personal vow to perform one's duties with integrity and fidelity.

In the United States, the framers of the Constitution recognized the importance of such commitments. Article VI mandates that all executive, legislative, and judicial officers, both at the federal and state levels, "shall be bound by Oath or Affirmation, to support this Constitution[.]"[11] This requirement was designed to ensure that those entrusted with power would remain faithful to the nations' foundational document—the Constitution, the unifying force of the nation which sets out a tripartite system of government, each branch exquisitely balanced to provide checks and balances to the other. This document embodies the ideals and aspirations not only of people who are currently American citizens, but also serves as a beacon to those who seek to bring their talent, drive, and dreams to remake their homes in the United States.

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8 Plato, *The Apology of Socrates*, *in* PLATO'S APOLOGY, CRITO AND PHAEDO OF SOCRATES 10, 40-45 (Henry Cray, trans., 2013).

9 *Id.*

10 *Id.*

11 U.S. CONST. art. VI, cl. 3.

The judicial oath has, of course, changed over time. In its first iteration, it read simply, "I do solemnly swear (or affirm) that I will support the Constitution of the United States."[12] Now, federal judges are required to take two oaths before assuming their duties. The first is the general oath to support the Constitution, as outlined in 5 U.S.C. § 3331:

> I, [name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

The second is the judicial oath specified in 28 U.S.C. § 453:

> I, [name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [title] under the Constitution and laws of the United States. So help me God.

These dual oaths carry profound significance. They emphasize a judge's duty to uphold the Constitution and to administer justice impartially, ensuring that personal biases or external pressures do not influence their decisions. They also make it crystal clear that a judge's loyalty runs to the Constitution—and none other.

Similarly, members of the U.S. Armed Forces take an oath that underscores their allegiance to the Constitution. Commissioned officers "solemnly swear . . . [to] support and defend the Constitution of the United States against all enemies, foreign and domestic[.]"[13] Enlisted personnel take a similar oath, with the addition that they also swear to obey the orders of the President and the officers appointed over them.[14] These oaths bind military leaders to the Constitution, reinforcing that their ultimate loyalty is to the nation's laws and principles, rather than to individual leaders or transient policies.

As an illustration of the power of their words, I draw your attention to the oath taken by state officials in Germany *before* Hitler took power: "I swear loyalty to the Constitution, obedience to the law, and conscientious

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12 OFF. OF THE CURATOR, SUP. CT. OF THE U.S., TEXT OF THE OATHS OF OFFICE FOR SUPREME COURT JUSTICES (2009), https://www.supremecourt.gov/about/oath/textoftheoathsofoffice08-10-2009.pdf [https://perma.cc/3AK4-DBRM].

13 5 U.S.C. § 3331.

14 10 U.S.C. § 502.

fulfillment of the duties of my office, so help me God."[15] Compare that to the oath required by Hitler *after* he took power: "I swear I will be true and obedient to the Führer of the German Reich and people, Adolf Hitler, observe the law, and conscientiously fulfill the duties of my office, so help me God."[16]

It cannot be emphasized enough that the oaths taken by judges and military personnel are intrinsically linked to the Rule of Law. By swearing allegiance to the Constitution, these individuals affirm that their actions and decisions will be guided by established legal frameworks, not by personal whims or external influences. This commitment ensures consistency, fairness, and justice within our society.

For judges, the oaths underpin our duty to defend the constitution and interpret and apply the law impartially. Our sworn commitment to "administer justice without respect to persons" ensures that every individual, regardless of status or wealth, receives equal treatment under the law. This impartiality is crucial for maintaining public trust in the judicial system and for upholding the legitimacy of legal rulings.

In the military context, the oath reinforces the principle that service members are defenders of the Constitution and its values. This allegiance ensures that military actions are conducted within the bounds of the law and that orders are evaluated based on their legality. It prevents the misuse of military power and safeguards democratic governance by affirming that the Armed Forces serve the nation and its constitutional principles, not any individual leader.

You may ask, "what is 'the Rule of Law?'" You will find that there is nothing in the Constitution of the United States or indeed in any specific statute that describes the term. But to borrow from Justice Stewart: "I shall not to[night] attempt [fully] to define [what] I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."[17]

Indeed, while there are some arguments on the margins, the Rule of Law is generally recognized in democratic societies across the globe as encompassing a few core principles. Here, I dip into an excellent book written by Tom Bingham, at one time a Lord Chief Justice and Senior Law Lord in Britain:

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15 *Oathes of Loyalty for All State Officials*, HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/oaths-of-loyalty-for-all-state-officials#:~:text=%E2%80%9CI%20swear%20loyalty%20to%20the,1419%2D1420.%5D [https://perma.cc/HY4W-4U79] (last visited Mar. 26, 2025).

16 *Id.*

17 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

- The law must be accessible to all and, so far as is possible, clear and predictable.[18]
- Questions of legal rights and liabilities should be resolved by application of the law and not the untrammeled exercise of discretion.[19]
- Laws should apply equally to all, and adjudicative procedures should be fair to all.[20]
- The law must provide adequate protection to human right—though there is a lot of debate about what should or should not be included under the rubric of "human rights."[21]
- Public officers—judges, legislators and the executive—must exercise the powers conferred on them fairly, in good faith, and for the purpose for which the powers were conferred, without exceeding the limits of such powers or exercising them unreasonably.[22]

I would venture—without risk of any real challenge—that all my colleagues on the bench subscribe to these principles as key components of the Rule of Law. They are, in my view, instantiated in our oaths of office.

But while our oaths provide clear directives, adhering to them can present challenges. Judges may face public, political, or personal pressure to rule in a particular way. Nevertheless, our oaths oblige us to base our decisions solely on the law and the facts presented and to put aside any fear of reprisal.

Military brass might encounter unlawful orders. Obviously, there is some difficulty in the heat of action to determine whether an order is or is not lawful. But as retired U.S. Navy Admiral and former NATO Supreme Allied Commander James Stavridis recently explained to a Philadelphia audience, the oath requires military officers (if they choose to continue to serve) to uphold the Constitution, even if it means refusing such directives.[23]

These scenarios underscore the courage and integrity required to honor the commitments fully. The oaths of office taken by judges and military personnel are more than mere words; they are solemn promises that fortify the Rule of Law in our nation. By pledging to support and defend the Constitution, judges and military personnel commit to a standard of conduct that ensures justice, equality, and the preservation of our democratic principles. It is through the unwavering adherence to these oaths that the

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18 *See* TOM BINGHAM, THE RULE OF LAW 37-47 (2010).

19 *See id.* at 48-54.

20 *See id.* at 55-59.

21 *See id.* at 66-84.

22 *See id.* at 60-65.

23 Admiral James Stavridis, NATO Supreme Allied Commander, Philadelphia Speakers Series Address at the Kimmel Center for Performing Arts (Feb. 25, 2025).

fabric of our society remains strong and that the Rule of Law continues to prevail.

To conclude, when you take your first oath as you enter into this wonderful profession of ours, I urge you to consider carefully the words you state. Think on their meaning; carry their intent with you. If you do so, your oath will sustain you as a guardian of the Rule of Law, a patriot of our country, and a good lawyer to boot.

Thank you.

PENNSYLVANIA BAR ASSOCIATION

CIVILITY IN THE PROFESSION COMMITTEE

Recommendation

The Pennsylvania Bar Association Civility in the Profession Committee recommends that the PBA Board of Governors and House of Delegates urge the Supreme Court of Pennsylvania to amend the Pennsylvania Bar Admission Rules by adopting revised language for the oath of office that incorporates elements of civility and professionalism, as follows:

"I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity, as well to the court as to the client, that I will use no falsehood, nor delay the cause of any person for lucre or malice. I will endeavor to conduct myself with civility, dignity, integrity and professionalism to opposing parties and their counsel, the court, and all participants in the legal process."

Report

Over ten years ago, the PBA Bar Leadership Institute Class of 2014-2015 conducted a survey on civility and professionalism in the legal profession. More than half of the 1,571 Pennsylvania lawyers and judges surveyed agreed that civility and professionalism was a problem at that time.[1] In 2019, amidst ongoing concerns about the steady decline in courtesy and respect within the bench and bar, Anne N. John, the 125th President of the Pennsylvania Bar Association, called for the creation of the Civility in the Profession Committee to bring civility to the forefront of the Association's discussions and initiatives. The Committee's mission resonated with PBA members and in the intervening years, its membership grew rapidly to nearly 130 members. The Committee has engaged in various initiatives to instill, promote and enhance professionalism and civility within the legal profession, including through planning and presenting continuing legal education programs in collaboration with other committees and sections. Promoting civility and professionalism was considered of such importance to the legal profession that the PBA Board of Governors and House of Delegates approved an amendment to the Association's Bylaws in 2021 to establish the Committee as a permanent committee.

Since its inception, the Pennsylvania Bar Association has consistently worked to promote civility and professionalism among lawyers and judges. The PBA's Working Rules of Professionalism reinforce the aspirational tenets of the Pennsylvania Code of Civility, which will mark its 25th-year anniversary in December of this year, representing a quarter century of encouraging lawyers to cultivate courtesy, respect and cordial discourse within the bench and bar. Despite the PBA's continuing efforts, many lawyers in the Commonwealth lament of having been the target of discourteous, disrespectful, demeaning, or acrimonious conduct, resulting not only in the erosion of the legal profession's status as a noble calling, but also a factor in the decline of lawyers' mental health and well-being, which may ultimately adversely impact client representation.

[1] https://www.pabar.org/pdf/2020/BLISURVEY.pdf

This phenomenon of course is not unique to Pennsylvania lawyers but remains a troubling issue for lawyers throughout the nation. In response, various jurisdictions have incorporated into their lawyer's oath of admission, a promise to practice with civility. For example, Hawaii includes the following statement in its oath, "I will conduct myself with dignity and civility towards judicial officers, court staff, and my fellow professionals." West Virginia recently added new civility language to its lawyer's oath which states, "I will conduct myself with integrity, dignity and civility and show respect toward judges, court staff, clients, fellow professionals and all other persons." The lawyer's oath in Texas requires new admittees to promise "to conduct oneself with integrity and civility in dealing and communicating with the court and all parties."

By contrast, the Lawyer's Oath of Office in Pennsylvania has remained unchanged since its codification by the General Assembly in 1976 and contains no mention of civility or professionalism.[2] It states:

> I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity, as well to the court as to the client, that I will use no falsehood, nor delay the cause of any person for lucre or malice.[3]

Rule 231(a)(2) of the Pennsylvania Bar Admission Rules requires that all Motions for Admission include or be accompanied by the oath of office required by 42 Pa.C.S. §2522. A copy of 42 Pa.C.S. §2522 is attached as Exhibit A. A copy of Pa.B.A.R. 231 is attached as Exhibit B. The Committee recommends that the Court revise Bar Admission Rule 231(a)(2) to require lawyers to take an oath of office that also encourages civility and professionalism.

While incorporating elements of civility and professionalism into the lawyer's oath as required by the Bar Admission Rules may not immediately or dramatically stem the ongoing problem of lawyers behaving poorly, an effort to instill into the minds of new admittees traditional principles of civility and professionalism is not only a worthy starting point, but also a timely nod to the Code of Civility. Moreover, requiring lawyers at the outset of their legal careers to endeavor to treat lawyers, clients, the Court and related parties with dignity and respect is consistent with the mission of PBA's Young Lawyer's Division to work toward "the betterment of the profession," and to "improv[e] the quality of the legal system."

The Committee therefore proposes that the following amendments be made to Rule 231 of the Pennsylvania Bar Admission Rules:

Rule 231. Motions for Admission

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[2] The Franklin County Bar Association took the initiative to add civility language to the Oath of Office for new admittees at the annual swearing-in ceremony, at which time more seasoned practitioners are also invited to stand and retake the oath as a reminder to maintain civility and integrity within the legal profession.

> I, NAME, do swear that I will support the Constitution of the United States of America and the Constitution of the Commonwealth of Pennsylvania, that I will conduct myself with integrity, dignity and civility and show respect toward judges, court staff, clients, fellow professionals and all other persons; and that I will conduct myself in the office of attorney-at-law within this court to the best of my ability and with all fidelity, to the court as well as to the client, and that I will use no falsehood nor delay any person's cause for lucre or malice.

[3] 42 Pa. Cons. Stat. Sec. 2522. Oath of Office.

(a) General Rule. Motions for admission to the bar of this Commonwealth shall be made by filing one copy thereof with the Prothonotary. The motion shall be in writing on a form prescribed by the Board and shall include or be accompanied by:

. . .

(2) ~~The oath of office required by statute.~~ The following oath:

"I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity, as well to the court as to the client, that I will use no falsehood, nor delay the cause of any person for lucre or malice. I will endeavor to conduct myself with civility, dignity, integrity and professionalism to opposing parties and their counsel, the court, and all participants in the legal process."

. . .

Conclusion

In conclusion, the PBA Civility in the Profession Committee believes that amending the Pennsylvania Bar Admission Rules by requiring lawyers to take an oath of office that encourages lawyers to be civil and professional to opposing parties and their counsel, the court, and all participants in the legal process will help impress upon lawyers entering the legal profession the importance of demonstrating these qualities in the practice of law. Therefore, the Committee recommends that the PBA authorize the PBA President to convey its position on this issue to the Supreme Court of Pennsylvania.

Respectfully submitted,

PBA CIVILITY IN THE PROFESSION COMMITTEE

Hon. Cheryl Austin, Co-Chair

Michael P. Pierce, Esq., Co-Chair

Hon. William C. Mackrides, Vice-Chair

March 25, 2025