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The Lawyers' Social Contract: The Ethical Ties That Bind the Legal Profession

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A "social contract theory" is the view, nearly as old as philosophy itself, that persons' moral or political duties depend upon an agreement among them to form a society in which they live and a concomitant duty to follow the rules of the group. What constitutes a "social contract" can be exemplified by basic concepts of right and wrong, justice and injustice. On the one hand, human nature dictates that if given the opportunity, people will commit injustices against others without fear of reprisal. On the other hand, in an organized society, members typically want to avoid being treated unfairly themselves.

Social contract theory reconciles these two (seemingly) competing ends of the spectrum. What is left when the dust settles is a set of common rules, laws, or principles of a sovereign that rationale parties agree to honor as the quid pro quo for living in a civil society. The social contract as described is thus the framework by which a free society operates—by submitting our individual desires and interests to the collective will of the group, as codified by mutual agreements or promises.

Social contract theory is very much at work when viewed through the lens of the legal profession. Lawyers have always played a significant part in our nation's governance. Indeed, 25 of the 56 signers of the Declaration of Independence, 31 of the 55 members of the Constitutional Convention, and a large percentage of senators and representatives in the first Congress were attorneys. (1)

In the early days, any semblance of a lawyers' social contract was hazy at best. From the start of the Republic until the late 19th century, lawyers' professional conduct was governed by common law "inherent" powers of courts to impose sanctions against those appearing before them—and not

much else. There was no normative body of rules. If there were any social contract aspects to the practice of law at that time, they were not recognized as such.

Starting in the middle of the 19th century, lawyers began to organize, either in bar associations or as the organized bar of a court, and to establish rules setting the requirements for legal study and admission to the profession. After the Civil War, many states started local bar associations. In 1878, the American Bar Association (ABA) was founded to bring together lawyers from around the country. At its first meeting, 75 lawyers from 20 states and the District of Columbia met in a courtroom in Saratoga Springs, New York. [2] The then Section of Patent Law, now the ABA Section of Intellectual Property Law, became the first substantive section of the ABA in 1894. The ABA would go on to hold annual meetings, inviting many of the finest members of the legal profession to give speeches and present papers on matters of interest (a tradition that continues to this day). Some of the ABA's earliest efforts at self-regulation of the profession—the roots of the social contract—focused on, among other things, codifying canons of professional lawyer conduct.

Ethical Rules and Oaths: The Foundation of the Lawyers' Social Contract

In 1887, the social contract of lawyering took a major leap ahead when Alabama adopted the first state code of ethics. Several other states followed suit. However, these early state lawyer codes were advisory only and did not have the force of law. Gradually, those "advisory" codes became fashioned into affirmative statements of law. The transformation did not occur overnight.

In 1908, the ABA adopted Canons of Professional Ethics, which it promoted to state and local bar associations. But this initial body of ethics rules, while intending to improve upon the 1887 Alabama code, still lacked the force of law. These rules were written in terms of governing etiquette and not imposing legal obligations or duties.

In 1970, the ABA took a great leap forward in formalizing the foundation of the lawyers' social contract when it adopted the Model Code of Professional Responsibility (Model Code). The Model Code included some rules that were "aspirational" in nature and other rules that were legally binding standards of conduct. Still, the rules themselves left much to be desired. Soon after they were adopted, efforts were undertaken to create a new and improved set of professional conduct rules.

In 1983, the ABA replaced the Model Code with the Model Rules of Professional Conduct (Model Rules). [3] The Model Rules sought to address many of the shortcomings of the earlier bodies of ethics rules. Most importantly, perhaps, is that the Model Rules removed most of the aspirational goals of the Model Code. What was written instead was intended to set forth, once and for all, an explicit set of professional duties and legal obligations owed by members of the legal profession.

Moreover, unlike the prior versions, the Model Rules were intended to have the force of law—the rules, for the most part, were no longer just aspirational in nature. Compliance was not optional.

Fast-forward to today. Every state in the United States, as well as the District of Columbia, the territories, and other tribunals (such as federal agencies, including the U.S. Patent and Trademark Office (USPTO)), has adopted its own set of ethics rules based on the ABA Model Rules. While the Model Rules are not themselves law, each jurisdiction has created its own jurisdiction-specific set of ethics rules. The ethical duties imposed by each of the states are generally the same in terms of the key elements that define the four corners of the lawyers' social contract. Thus, the Model Rules provide guardrails defining the limits of lawyer behavior. And every jurisdiction, state and federal, has adopted its own disciplinary system to police and enforce the legal profession's adherence to its codes of professional conduct.

In addition to these written codes of professional conduct, every lawyer, as a condition of admission to any state or federal jurisdiction in the United States, must take an oath. While the words of any oath may vary, each state's oath generally imposes three duties that members swear to uphold: (1) to support the Constitution of the United States (and of the state in which they are being licensed); (2) to conduct oneself with integrity and civility; and (3) to faithfully discharge the duties of an attorney. [4] In Maryland, for example, the attorney's oath is:

> I do solemnly (swear) (affirm) that I will at all times demean myself fairly and honorably as an attorney and practitioner at law; that I will bear true allegiance to the State of Maryland, and support the laws and Constitution thereof, and that I will bear true allegiance to the United States, and that I will support, protect and defend the Constitution, laws and government thereof as the supreme law of the land; any law, or ordinance of this or any state to the contrary notwithstanding. [5]

The length and contents of the oath vary by jurisdiction. A lawyer who wishes to become admitted to the bar of the Supreme Court of the United States is required, as the final step in the admissions process, to "solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States." [6]

The "duties" reflected in the attorney oath include, of course, those obligations imposed by the rules of professional conduct of the attorney's licensing jurisdiction. Thus, the attorney becomes bound to the social contract when they take their oath swearing to discharge their duties and follow all applicable laws.

The Social Contract Promises: Duties to Clients, Courts, and Opposing Parties

Upon taking an oath of admission, a lawyer agrees to abide by their jurisdiction's rules of ethics. Each ethics code defines the lawyer's social contract terms based on with whom the lawyer is interacting or dealing. Each state's ethics code is modeled after the ABA Model Rules, which set forth the duties lawyers owe to (1) clients, (2) tribunals, and (3) opposing parties, nonclients, and unrepresented parties. [7] The rules do not solely regulate lawyers' conduct while being a lawyer (that is, while in the process of delivering legal advice or services). Even conduct completely unconnected to the practice of law may be a "breach" of the social contract, as codified in various professional conduct rules. [8] A breach of the ethics rules (and social contract) can have serious consequences for the lawyer: Their right to practice may be suspended for a set or indefinite period of time. And in cases of significant misconduct, the lawyer may face the ultimate punishment of disbarment.

Duties to Clients

Every lawyer owes significant ethical duties to their clients. Two of the most important duties a lawyer owes to their clients are confidentiality and loyalty. [9] The promise of confidentiality promotes the need for lawyers to be able to have full and frank discussions with their clients, which "promote[s] broader public interests in the observance of law and administration of justice." [10] The promise of lawyer loyalty prohibits the lawyer from representing another person either (1) in a matter directly adverse to the lawyer's other client or (2) in a matter in which the lawyer's ability to represent the person may be materially limited by the lawyer's duties to others—including other clients, third parties, or the lawyer's self-interest. The prohibition against conflicting representations (representing a client while simultaneously taking action against that client) implicates both the lawyer's duty of confidentiality and their duty of loyalty.

The need to protect client confidences is so broad that lawyers are generally prohibited from ever representing one client in a matter against a former client—at least where the two matters are the same or "substantially related." [11] Therefore, even long after a representation has ended, a lawyer may still be unable to represent another client against their former client. If the new matter is the same or substantially related to the lawyer's prior representation, courts typically presume that confidential information was communicated to them from the former client.

While the ethics rules provide multiple guardrails defining lawyers' duties to their clients, those rules are not the only affirmative sources of law. The lawyer owes duties to their client under basic principles of contact and tort law. Their contract obligations to their clients, while generally informed by the ethics rules, are more expressly set forth in their client engagement agreements, which typically define the scope of the representation, the lawyer's fees, when the representation ends, and other important aspects of the lawyer-client relationship. And tort law principles apply to the lawyer—lawyers may be sued by their clients for breach of fiduciary duty, legal malpractice, and similar claims.

Duties to Tribunals

Lawyers also are bound by ethical obligations to those courts and other tribunals before whom they appear. Not surprisingly, a lawyer is prohibited from "knowingly" making a false statement of fact or law to a tribunal or from failing to correct a previous false statement of fact or law. (12) Even though clients may wish to take every advantage possible of their adversary, lawyers must answer to a higher authority—their code of ethics. Lawyers cannot offer evidence they know to be false.

Lawyers' duties to a tribunal also are informed by other sources of law. One duty is the lawyer's obligation, pursuant to Rule 11 of the Federal Rules of Civil Procedure and similar state court rules, to conduct a reasonable inquiry prior to filing an action. (13) The lawyer's signature on a pleading is a certification that the paper is not being filed for an improper basis, the asserted facts have evidentiary support, and the asserted law has legal support. While some clients might prefer a lawyer to sue first and learn if they have a case later (or use the tools of discovery to develop the case they hope they might find), the threat of sanctions under Rule 11 and other sources of courts' authority to regulate the conduct of those who appear before them provides a significant deterrent to unlawful or inappropriate lawyer behavior.

The social contract at its very core is illustrated by the events surrounding the 2020 election results and subsequent efforts to deny the results of the election, suppress votes, and influence officials to refuse to count votes, as well as other efforts designed to prevent the transfer of power from one president to the next. Many lawyers, including former mayor Rudy Giuliani, have lost their law licenses as a result of their efforts. (14) Courts have imposed significant sanctions under Rule 11, and bar organizations have likewise imposed significant licensing suspensions or disbarments for the lawyers involved in failing to conduct a reasonable prefiling investigation.

These duties underscore an important component of the social contract of lawyering: the clients are not the only beneficiaries of the duties and obligations burdening the lawyer. Lawyers must also deal forthright with any tribunal in which they are representing a client's interest. Honoring the lawyer's separate legal duty to the tribunal could cost the client their case. Nonetheless, the social contract of lawyering does not prioritize fidelity to the client above all other considerations.

Duties to Nonclients

Lawyers' communications with nonclients and nontribunals are also caught in the web of the lawyers' social-ethical contract obligations. In the course of representing a client, a lawyer may not knowingly make a false statement of fact or law to a third person or fail to disclose to a third person a material fact when disclosure is required to avoid assisting in a crime or fraud. A lawyer is generally not even permitted to communicate with a person regarding a matter where the lawyer knows the

person is represented by counsel. And when representing a client, a lawyer must not use means that have no substantial purpose other than to embarrass, delay, or burden the third person. [15]

An example of a duty to nonclients occurs in the case of the misdirected email or letter. "Finders keepers" is not the rule in the world of the lawyers' social contract. Where a lawyer receives a clearly misdirected communication—one perhaps intended for their opposing party—the social contract of lawyering dovetails with the lawyer's ethical and legal responsibilities to others and creates a duty to the recipient. While a lawyer may wish to know the secrets of their opposing parties, when a lawyer receives something that plainly appears misdirected, they must consult the ethics rules applicable in their jurisdiction. Each state has its own guidance on what the lawyer may and may not do when receiving a misdirected communication. In many jurisdictions, the lawyer who receives the misdirected communication may have an affirmative duty to communicate with the sender and to take other actions (such as to delete or destroy, and not to disseminate or maintain copies of, the misdirected communication). [16]

Lawyers also are required to adhere to the ethical rules regarding lawyer advertising and solicitation —two aspects of the social contract that have undergone significant changes over the years. A century ago, lawyers were prohibited from any form of advertising beyond a simple line in a telephone book. Attorney regulators of days past believed that advertising was inconsistent with the practice of law as a profession. But those rules fell after *Bates v. State Bar of Arizona*, which struck down an Arizona bar rule that prohibited a newspaper advertisement, which included a statement about the lawyer's "reasonable" prices, and found the advertisement to be commercial speech entitled to protection by the First Amendment. [17]

Today, lawyers are permitted to advertise, subject to the commonsense limitation that a lawyer shall not make a false or misleading communication about the lawyer or their services. The advertising rules still prohibit lawyers from paying referral fees as compensation for recommending the lawyer's services. [18]

The Social Contract Applies to Nonlawyering Misconduct

The scope of the lawyers' social contract—and the ethical obligations underlying that contract—is not limited to actions undertaken in the course of representation. This prohibition on even personal misconduct unrelated to lawyering is written into the ABA Model Rules and is part of the bar's broad prohibitions on other lawyer "misconduct."

According to their social contract, as refined by their ethical duties, it is grounds for "professional misconduct" if a lawyer:

- commits a criminal act that reflects adversely on their honesty, trustworthiness, or fitness to practice;
- engages in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- engages in conduct prejudicial to the administration of justice; or
- engages in conduct that the lawyer knows, or should know, is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. [19]

While often these rule violations arise when a lawyer is delivering legal services, a lawyer may run afoul of these rules in their "private" lives as well. A lawyer takes an oath to uphold and follow the law —if they engage in certain criminal conduct, then they may need to answer to the appropriate state or federal bar for consideration of whether their criminal conduct reflects adversely on their honesty and candor as well as the public's perception of the legal profession. Similarly, the rules prohibiting lawyers from engaging in conduct that is "dishonest" or involves a "misrepresentation" may trigger ethical liability even when the conduct is unrelated to the lawyer's legal practice.

Public Service and the Lawyers' Social Contract

We live in a world where most people do not expect to get something for nothing. But many clients or prospective clients simply cannot afford basic legal services. And while there are over 1.2 million licensed attorneys in this country, that number provides little comfort to someone who lacks the funds typically required even for the simplest or most basic legal services.

The lawyers' social contract thus includes a promise that the lawyer will do something to benefit others in need. This ideal is codified in the ABA Model Rules. Though not a command or an affirmative legal duty, the organized bar recognizes a strong need for lawyers to provide free or reduced cost legal services. The Model Rules provide that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" and "should aspire to render at least 50 hours of pro bono publico legal services per year" to persons of limited needs or to charitable, religious, civic, community, governmental, or educational organizations. [20] The Model Rules also state that "a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited needs." [21]

The ABA and other voluntary and involuntary bar organizations have long attempted to fill the justice gap. Thousands of ABA members dedicate their time to numerous activities, including the popular ABA Free Legal Answers online virtual legal clinic. [22] Lawyers are encouraged by their state courts and bar organizations to provide legal services to those unable to pay. Many pro bono

referral organizations also provide malpractice coverage. Providing free legal services is one of the most rewarding professional experiences a lawyer can enjoy.

In addition to free or reduced cost legal services, lawyers can fulfill their pro bono commitments by engaging in other activities for the betterment of the law, the legal system, or the legal profession. Lawyers can fulfill their expectation to "give back" in many ways that do not involve providing free or reduced fee legal services. For example, lawyers may give of their time by taking an active role in any number of local, state, or national bar organizations; teaching; giving continuing legal education courses; or publishing. Today, there is no shortage of opportunities for lawyers to engage in some form of volunteerism.

With Great Power Comes Great Responsibility

This popular adage (23) is, at its essence, the consideration of the lawyers' social contract. Members of the legal profession are empowered to change laws, represent clients before courts, and affect changes in their clients' legal rights and relationships. Lawyers are given wide latitude to exercise their professional discretion and independent judgment to serve the needs of their clients. But lawyers' powers are not limitless. The social contract of lawyering—defined by ethics rules and other affirmative sources of law—places significant guardrails designed to protect clients, the courts, the public, and the profession itself. The societal benefits of such lawyer-restricting behavior provide recourse for those who may be harmed, notice to the regulated bar regarding the metes and bounds of permissible and prohibited behavior, and a deterrent for lawyers who refuse or are unable to conduct themselves as professionals.

Endnotes

1. 2 Anton-Hermann Chroust, The Rise of the Legal Profession in America 4 (1965).

2. W. Thomas Kemp & Joseph R. Taylor, *The American Bar Association: Its Organization, History and Achievements*, 3 Wash. L. Rev. 65, 65–67 (1928).

3. 1 Geoffrey C. Hazard et al., The Law of Lawyering § 1.14 (3d ed. 2014).

4. *See* Robert Anthony Gottfried, *The Anatomy of Our Oath*, A.B.A. Young Laws. Div. (Jan. 8, 2021), https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/professional-development/anatomy-of-our-oath.

5. Md. Code Ann., Bus. Occ. & Prof. § 10-212.

6. Rules of the Sup. Ct. of the U.S. r. 5.4.

7. *See* Model Rules of Pro. Conduct rr. 1.1–1.18 (duties to clients), 3.1–3.9 (duties to tribunals), 4.1–4.4 (duties to opposing parties and nonclients) (Am. Bar. Ass'n 2024); *see, e.g.*, Ill. Rules of Pro. Conduct rr. 1.1–1.18 (duties to clients), 3.1–3.9 (duties to tribunals), 4.1–4.4 (duties to third parties and unrepresented persons).

8. One instance where a lawyer's personal and professional obligations may intersect is if the lawyer is convicted of certain crimes or even engages in a "criminal act" though not necessarily ending in a conviction. It is "professional misconduct" for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Model Rules of Pro. Conduct r. 8.4(b); Cal. Rules of Pro. Conduct r. 8.4(b) (same). Every jurisdiction follows some version of ABA Model Rule 8.4(c), which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." *See, e.g.*, 37 C.F.R. § 11.804(c) (applicable to USPTO practitioners, including registered patent practitioners and anyone engaged in "practice before the Office" in patent or trademark matters).

9. Model Rules of Pro. Conduct rr. 1.6, 1.7–1.9.

10. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

11. Model Rules of Pro. Conduct r. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client . . . ."); *see, e.g.*, Ala. Rules of Pro. Conduct r. 1.9(a) (same); Fla. Rules of Pro. Conduct r. 4-1.9(a) (same); Ohio Rules of Pro. Conduct r. 1.9(a) (same).

12. Model Rules of Pro. Conduct r. 3.3.

13. Fed. R. Civ. P. 11(b).

14. *In re* Giuliani, 146 N.Y.S.3d 266, 268 (App. Div. 2021) (immediately suspending the respondent from the practice of law based on claimed violations of ethics rules in connection with "demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump").

15. Model Rules of Pro. Conduct rr. 4.1, 4.2, 4.3.

16. *See, e.g.*, *id.* at r. 4.4(b) ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."); Neb. Rules of Pro. Conduct r. 3-504.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."); N.J. Rules of Pro. Conduct r. 4.4(b) ("A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.").

17. 433 U.S. 350 (1977).

18. Model Rules of Pro. Conduct rr. 7.1, 7.2.

19. *Id.* at r. 8.4(b), (c), (d), (g).

20. *Id.* at r. 6.1.

21. *Id.*; *see also* D.C. Rules of Pro. Conduct r. 6.1; Ga. Rules of Pro. Conduct r. 6.1; Va. Rules of Pro. Conduct r. 6.1.

22. *ABA Free Legal Answers*, A.B.A. Standing Comm. on Pro Bono & Pub. Serv., https://www.americanbar.org/groups/probono_public_service/projects_awards/free-legal-answers (last visited May 1, 2024).

23. While popularized in the 20th century by the Spider-Man comic book, the proverb "with great power comes great responsibility" has roots almost as far back as recorded time. In the "Parable of the Faithful Servant" in the Bible, it is written: "For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more." *Luke* 12:48 (King James).

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