

MATER FAMILIAS

SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

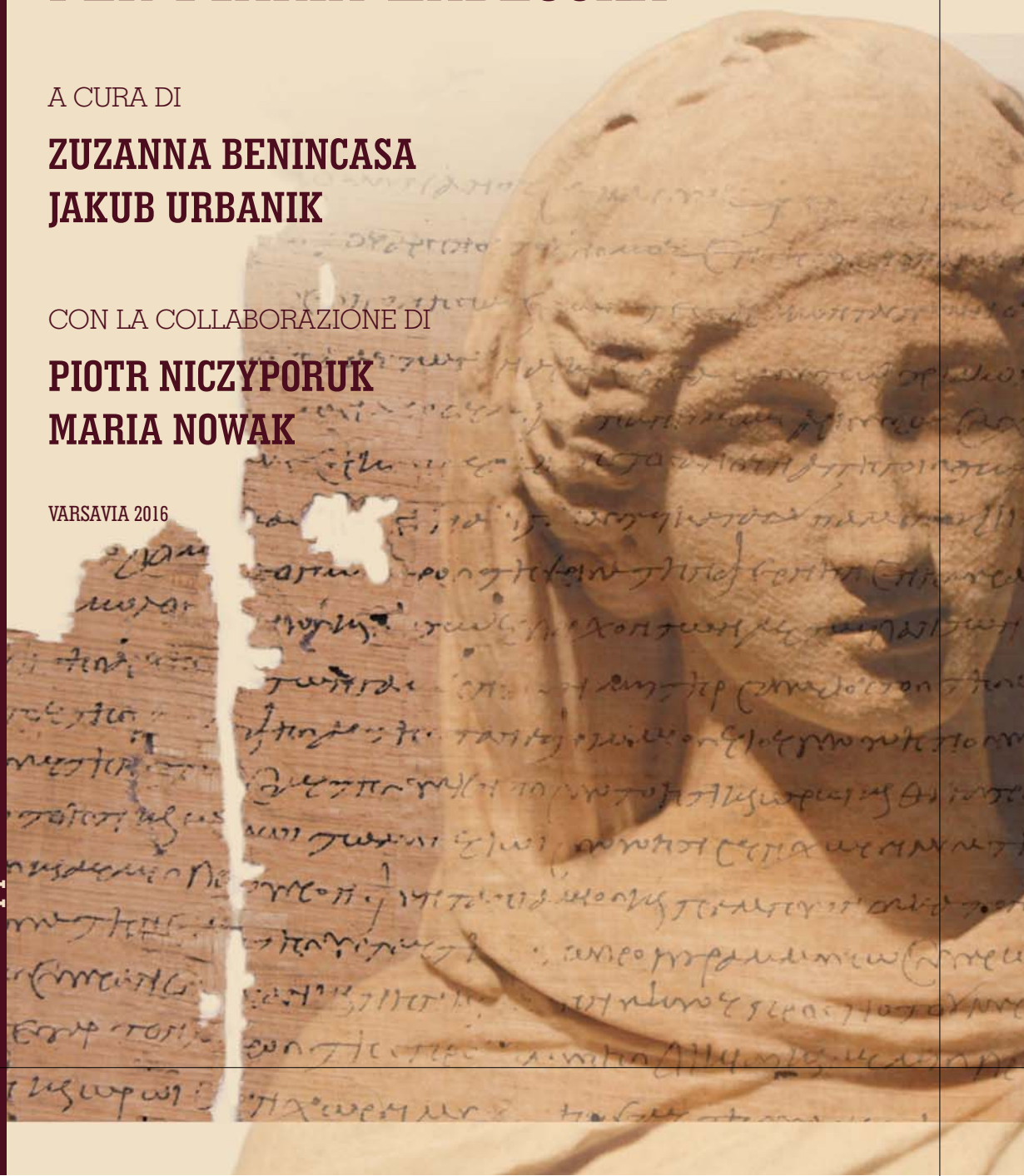
A CURA DI

ZUZANNA BENINCASA
JAKUB URBANIK

CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

VARSAVIA 2016



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Mater Familias
Scritti per Maria Zabłocka

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Paulina Świącicka
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FROM ROMAN ORATOIRES TO MODERN ADVOCATES

SOME REMARKS ON THE FORMATIVE OF LAWYER'S ETHICS IN ANTIQUITY

Advocatos accipere debemus omnes omnino,
qui causis agendis quoquo studio operantur.
D. 50.13.1.11 (Ulp. 8 omn. trib.)

THE AIM OF THE STUDY¹ is an attempt to draw an outline of the influence of Roman law and Roman legal practice as the formative of the lawyers' ethics and their professional conduct rules. The vital impact of Roman law as formative of the European legal culture is unquestionable as contemporary legal science widely accepts its influence on both the medieval *ius commune* and modern private law.² However, despite great number of researchers on such phenomena as the development of the juristsprofession in ancient Rome,³ or the development and

¹ The topic was presented by both the authors, Paulina Świącicka and Łukasz Marzec, at the annual congress of the Société Internationale d'Histoire du Droit 'Fernand de Visscher' in Salzburg in 2013, and by Łukasz Marzec at the Eötvös Loránd University in Budapest in 2015.

² See, only as an example P. G. STEIN, *Roman Law in European Legal History*, Cambridge 2004, pp. 1–2.

³ As remarked above, the literature concerning the ancient jurisprudence is immense. It is, however, worth mentioning some fundamental and complex studies, to start with:

special features of the so-called ‘jurists’ law’,⁴ the complete catalogue of ethical and moral principles made in Antiquity by lawyers themselves or by representatives of other *artes - disciplinae* for lawyers exercising their duties, is still a question awaiting an answer.⁵ The possible influence of such an ‘ancient ethical *corpus*’ on modern codes of professional conduct

P. JÖRS, *Römische Rechtswissenschaft zur Zeit der Republik. Erster Teil: bis auf die Catonen*, Berlin 1888; F. SCHULZ, *History of Roman Legal Science*, Oxford 1953; W. KUNKEL, *Herkunft und soziale Stellung der römischen Juristen*, Graz – Wien – Köln 1967; A. SCHIAVONE, *Cultura aristocratica e pensiero giuridico nella Roma tardo-repubblicana*, Roma – Bari 1976; IDEM, *Giuristi e nobili nella Roma repubblicana*, Napoli 1987; IDEM, ‘Il giurista’, [in:] A. GIARDINA (ed.), *Uomo romano*, Roma – Bari 1989, pp. 81–98; IDEM, *Linee di storia del pensiero giuridico romano*, Torino 1994; IDEM, *Ius. L’invenzione del diritto in Occidente*, Torino 2005; G. NOCERA, *Iurisprudentia. Per una storia del pensiero giuridico romano*, Roma 1973; C. A. CANNATA, *La giurisprudenza romana*, Torino 1974 [= *Per una storia della scienza giuridica europea 1: Dalle origini all’opera di Labeone*, Torino 1997], published also in French: *Histoire de la Jurisprudence Européenne* 1–II, Torino 1989; F. D’IPPOLITO, *I giuristi e la città. Ricerche sulla giurisprudenza romana della Repubblica*, Napoli 1978; IDEM, *Giuristi e sapienti in Roma arcaica*, Roma – Bari 1986; IDEM, *Sulla giurisprudenza medio-repubblicana*, Napoli 1988; IDEM, ‘Il diritto e i cavalieri’, [in:] *La codificazione del diritto dall’antico al moderno. Incontri di studio (Napoli, gennaio–novembre 1996)*, Napoli 1998, pp. 31–49; K. LUIG & D. LIEBS (eds.), *Das Profil des Juristen in der europäischen Tradition. Symposium aus Anlaß des 70. Geburtstages von F. Wieacker*, Ebelsbach 1980; M. BRETONI, *Tecniche e ideologie dei giuristi romani*, Napoli 1982; W. LITEWSKI, *Jurysprudencja rzymska* [The Roman Jurisprudence], Kraków 2000. Cf. also for a good history of jurisprudence founded on the Roman one, J. GORDLEY, *The Jurists. A Critical History*, Oxford 2013.

⁴ See, in particular: L. LOMBARDI, *Saggio sul diritto giurisprudenziale*, Milano 1967; A. A. SCHILLER, ‘A definition of jurists law’, [in:] *Symbolae Iuridicae et Historicae Martino David Dedicatae* 1. *Ius Romanum*, Leiden 1968, pp. 181–200; IDEM, ‘Jurists’ law’, [in:] IDEM, *An American Experience in Roman Law. Writings from Publications in the United States*, Göttingen 1971, pp. 148–160; IDEM, ‘The nature and significance of jurists law’, *ibidem*, pp. 199–219; cf. also various studies by T. GIARO: ‘Dogmatische Wahrheit und Zeitlosigkeit in der römischen Jurisprudenz’, *BIDR* 29 (1987), pp. 1–108; ‘Geltung und Fortgeltung des römischen Juristenrechts’, *ZRG RA* 100 (1994), pp. 66–94, and in part. IDEM, *Römische Rechtswahrheiten. Ein Gedankenexperiment*, Frankfurt am Main 2007, pp. 197–231; IDEM, ‘Diritto come prassi. Vicende del discorso giurisprudenziale’, [in:] *Fides. Humanitas. Ius. Studii L. Labruna* IV, Napoli 2007, pp. 2233–2261; Paulina ŚWIECICKA, ‘*Ius civile, quod sine scripto in sola prudentium interpretatione consistit* – A phenomenon of positivisation of law in dogmatic discourse of Roman jurists’, [in:] *Constans et Perpetua Voluntas. Pocta Petrovi Blahovi k. 75. Narodeninám*, Trnava 2014, pp. 577–590.

⁵ As an exception one may mention a study by J. LAWS, ‘Epilogue: Cicero and the modern advocate’, [in:] J. POWELL & J. PATERSON (eds.), *Cicero. The Advocate*, Oxford 2004, pp. 401–416, in part. about ‘The ethics of the advocate’, cf. pp. 401–408.

is another important theme that still needs further scientific research, which might prove challenging. This study is a preview of in-depth research analysis on rules of the ancient moral and ethical principles for lawyers – advocates, and their influence, *i.e.* the reception, changes or rejection by various modern codes of lawyers' professional conducts.⁶ The authors would like to dedicate this short study to Professor Maria Zabłocka, having in mind Her interest in rules and principles of the 'Ten Commandments', and in legal principles elaborated in relation to Roman law always understood as a *corpus* of *leges et mores*.

2. Tracing back to the first use of the words 'advocate' or 'orator', which had the same meaning as the modern 'advocate',⁷ one might refer to ancient

⁶ It is worth emphasising that modern authors do not usually ask the question about the 'historical *prius*' of principles of lawyers' ethics while treating, sometimes with great accuracy, the issue and the problems of contemporary legal ethics. Cf. e.g., V. LUIZZI, *A Case For Legal Ethics. Legal Ethics as a Source for Universal Ethics*, New York 1993; R. F. COCHRAN & T. L. SHAFFER, *Lawyers, Clients, and Moral Responsibility*, St. Paul 1994; D. NICOLSON & J. S. WEBB, *Professional Legal Ethics: Critical Interrogations*, Oxford 1999; R. O'DAIR, *Legal Ethics: Text and Materials*, Oxford 2001; and studies by Polish authors: Z. KRZEMIŃSKI, *Etyka adwokacka. Teksty, orzecznictwo, komentarz* [The Ethics of Advocacy. Texts, Cases, Commentary], Kraków 2003; R. SARKOWICZ, *Amerykańska etyka prawnicza* [American Legal Ethics], Kraków 2004; R. TOKARCZYK, *Etyka prawnicza* [Legal Ethics], Warszawa 2005; H. IZDEBSKI & P. SKUCZYŃSKI (eds.), *Etyka zawodów prawniczych. Etyka prawnicza* [The Ethics of Legal Professions. Legal Ethics], Warszawa 2006; P. SKUCZYŃSKI, *Status etyki prawniczej* [The Status of Legal Ethics], Warszawa 2010; W. MARCHWICKI & M. NIEDUŻAK, *Odpowiedzialność dyscyplinarna, etyka zawodowa adwokatów i radców prawnych. Orzecznictwo* [Disciplinary Liability, Professional Conduct Rules of the Advocates and Legal Counselors], Warszawa 2011.

⁷ Cf. e.g., S. HORNBLLOWER & A. SPAWFORTH (eds.), *The Oxford Classical Dictionary*, Oxford 2003 (3 ed.), s.v. '*advocatus*'. For the difference in terminology: *advocatus*, *patronus*, *orator*, which, however, is not very important, cf. Ps.-Asc. in *Cic. de div.* 4; Ps.-Asc. in *Cic. in Caec.* 11; also Tac. *dial.* 1 1. It is worth indicating, that the literature concerning this legal profession, in comparison to the literature concerning the profession of the jurist, is very scarce. One can mention: A. PIERANTONI, *Gli avvocati di Roma antica*, Bologna 1900; G. L. CANFIELD, 'The Roman lawyer: A sketch', *Michigan Law Review* 7 (1909) 7, pp. 557–569, who, however, confused the occupation of Roman lawyers (*i.e.* the jurists) and Roman orators – advocates; G. TAMASSIA, *Avvocatura e milizia nell'impero romano*, Padova 1917, pp. 52–57 (estratto da: *Atti e memorie della R. Accademia di scienze e lettere in Padova*); G. A. HARRER, 'The profession of law in Rome', *The Classical Journal* 17 (1921–1922),

Greeks, who used the term ‘lawyer’ for *rhetor* (ῥήτωρ) – ‘a speaker’, named also *συνήγορος*,⁸ active in Athens, where the custom to be assisted by ‘a friend’ or ‘a relative’ (Ps.-Arist. *rhet. ad Alex.* 1442b) at the court became extremely popular.⁹ Still, it is worth noticing that ancient Athenian ‘speakers – advocates’ were not granted any money for their help (e.g. Dem. 46 [c. *Steph. II*] 26) on the penalty provided by the *θεσμοθέται*. As a result, they did not manage to establish a separate professional occupation like modern lawyers have done.¹⁰ So it appeared no sooner than in the late Roman Empire that court helpers – *oratores* or *advocati* (*ad voco* – to call as a help at

pp. 305–315; R. TAUBENSCHLAG, ‘The legal profession in Graeco-Roman Egypt’, [in:] *Festschrift F. Schulz I*, Weimar 1951, pp. 188–192; W. NEUHAUSER, ‘*Patronus*’ und *Orator*. Eine Geschichte der Begriffe von ihnen Anfängen bis in die augusteische Zeit, Innsbruck 1958; J.-M. DAVID, *Le patronat judiciaire au dernier siècle de la république romaine*, Rome 1992; J. A. CROOK, *Legal Advocacy in the Roman World*, London 1995; J. CASINOS MORA, ‘El concepto romà d’advocat’, *Revista internauta de práctica jurídica* 1 (1999); IDEM, ‘L’advocatus a Roma: *advocatus* – *officium advocacionis* – *collegia advocatorum*’, *Revista internauta de práctica jurídica* 2 (1999); M. HEATH, ‘Practical advocacy in Roman Egypt’, [in:] M. EDWARDS & C. REID (eds.), *Oratory in Action*, Manchester 2004, pp. 62–82; M. JONAITIS & Inga ŽALĖNIENĖ, ‘The concept of bar and fundamental principles of an advocates activity in Roman law’, *Jurisprudencija / Jurisprudence* 3 (2009), pp. 299–312; and a synthesis by J. A. BRUNDAGE, *Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, Chicago 2008, pp. 9–46: Chapt. “The foundation: The Roman legal profession”; cf. also studies dedicated to some great Roman orators – advocates: W. FORSYTH, *Hortensius, the Advocate. An Historical Essay on the Office and Duties of an Advocate*, Jersey City 1882; F. WIEACKER, *Cicero als Advokat*, Berlin 1965; J. POWELL & J. PATERSON (eds.), *Cicero. The Advocate*, Oxford 2004; Olga TELLEGEN-COUPERUS (ed.), *Quintilian and the Law*, Leuven 2003.

⁸ Cf. Plut. *Cic.* 26.4. In description by Plutarchos, Cicero, while speaking about Greek *συνήγορος*, introduced a word *advocatus*.

⁹ Cf. e.g.: R. J. BONNER, *Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession*, New York 1927; H. J. WOLFF, *Demosthenes als Advokat*, Berlin 1968; and more recently Lene RUBINSTEIN, *Litigation and Co-operation: Supporting Speakers in the Courts of Classical Athens*, Stuttgart 2000; J. POWELL & J. PATERSON, ‘Advocacy ancient and modern’, [in:] *Cicero. The Advocate* (cit. n. 5), pp. 10–18. Cf. also, T. COLE, *The Origins of Rhetoric in Ancient Greece*, Baltimore – London 1991; G. AVEZZÚ, ‘*L’oratoria giudiziaria*’, [in:] G. CAMBIANO, L. CANFORA & D. LANZA (ed.), *Lo spazio letterario della Grecia antica* 1. *La produzione e la circolazione del testo* v 1. *La Polis*, Roma 1992, pp. 397–417.

¹⁰ BONNER, *Lawyers and Litigants in Ancient Athens* (cit. n. 9), pp. 204–209; RUBINSTEIN, *Litigation and Co-operation* (cit. n. 9), 126–127; POWELL & PATERSON, ‘Advocacy ancient and modern’ (cit. n. 9), p. 12.

the court; such helpers or pleaders were at the very beginning of the Republic called *patroni causarum*,¹¹ and distinguished – at least theoretically – from *advocati*: ex Cic. *pro Cluent.* 110; and from legal advisers, *i.e.* jurists) became a professional body and could officially work as those who had the right to participate in the procedure together with the party, or even in lieu of the party. Domitius Ulpianus, a great jurist of the late-classical period, defined the advocate as a person eligible to conduct professionally any court case (*D.* 50.13.1.11 [Ulp. 8 *de omn. trib.*]). Before, at the times of the Republic and Early Empire, the *advocatus* was an assistant who could act, as an assistance to a party, in both stages of the Roman civil procedure, *i.e.* *in iure* and *apud iudicem*,¹² and also before criminal tribunals (*consulere et postulare*). One of the Roman historians, Quintus Asconius Pedianus (9 BC–76 AD; so-called Pseudo-Asconius) explained that the role of the *advocatus* was simply ‘to assist’ as a friend (*amicus*): ‘aut ius suggerit aut praesentiam suam accommodare amico’ (Ps.-Asc. *in Cic. de div.* 4). Finally, at the times of Tacitus the name *orator* was gradually replaced by *advocatus* (e.g. Tac. *dial.* 1 1: ‘horum temporum disertis causidici et advocati et patroni et quidvis potius quam oratores vocantur’).¹³

¹¹ Cf. e.g., *XII Tab.* 6.7 (cf. Liv. XLIV 11–12): ‘Advocati (Verginia) ... postulant, ut (Ap. Claudius) ... lege ab ipso lata vindicias det secundum libertatem’; Ter. *Phorm.* 313 ‘aliquot mihi amicos advocabo’. For more sources see: CH. T. LEWIS & CH. SHORT, *A Latin Dictionary, Founded on Andrews’ Edition of Freund’s Latin Dictionary, Revised, Enlarged and in Great Part Rewritten by Charlton T. Lewis, Ph.D. and Charles Short*, Oxford 1958, Oxford 1958, s.v. ‘advocatus’; M. PLEZIA (red.), *Słownik łacińsko-polski* [The Polish–Latin Dictionary] 1, Warszawa 2007, s.v. ‘advocatus’; P. G. W. GLARE (ed.), *Oxford Latin Dictionary*, Oxford 2012 (2 ed.), p. 66, s.v. ‘advocates’; Cf. A. H. J. GREENDICE, *The Legal Procedure of Cicero’s Time*, Oxford 1901, p. 148; cf. also s.v. ‘patronus’, *Oxford Classical Dictionary* (cit. n. 7); A. W. LINTOTT, s.v. ‘patronus’, *Der Neue Pauly* IX (2000), coll. 421–423, in part. 422–423 and IDEM, s.v. ‘patronus’, C. Patronage in relation to the judicial system’, *Brill’s New Pauly* X (2007), sp. 626–627.

¹² Advocates must be also distinguished from legal representatives. In the earlier civil procedure *per legis actiones*, the parties had, in general to be present in person (*D.* 50.17.123 [Ulp. 14 *ed.*]: ‘Nemo alieno nomine lege agere potest.’); under the formulary procedure they might appoint representatives (*cognitores*, *procuratores*: Gai 4.82–86), but in either case they might also employ services of an advocate.

¹³ Cf. in general: J. W. KUBITSCHKE, s.v. ‘advocatus’, *PWRE* I (1894), sp. 436–438; P. RASI, s.v. ‘Advocati e procuratori (diritto romano)’, *NNDI* I 2 (1958), pp. 1662–1663, in

The first generations of Roman forensic orators – advocates¹⁴ were not trained to know law, although many of them had a basic or even deeper knowledge of this *materia* (e.g., Cic. *de amicit.* I 1; Cic. *Brut.* 306; Cic. *ad Att.* IV 16.3; Cic. *de leg.* I 4.13; Plut. *Cic.* III 1.6–7).

Cic. *Brut.* 306: ego autem iuris civilis studio multum operae dabam Q. Scaevolae Q. f., qui quamquam nemini se ad docendum dabat, tamen consulentibus respondendo studiosos audiendi docebat.

A contrario, advocates were professionally trained in rhetoric,¹⁵ especially from the times of the Late Republic, when the Greek rhetoric was, of course not without obstacles,¹⁶ ‘implanted’ in Roman *curriculum studiorum*.¹⁷

part. p. 1663; s.v. ‘advocatus’, *Der Neue Pauly* (cit. n. 11), sp. 136–137; s.v. ‘advocatus’, *Oxford Classical Dictionary* (cit. n. 7), p. 15; P. FIORELLI, s.v. ‘avvocato (storia; b. diritto romano e intermedio)’, *ED* IV (1959), pp. 646–649, with references to the oldest studies on p. 649; K. DIETZ, s.v. ‘Advocatus’, *Brill’s New Pauly* I (2002), sp. 158–159; s.v. ‘advocatus’ [in:] B. A. GARDNER (ed.), *Black’s Law Dictionary*, St. Paul 2009 (9 ed.), p. 62: ‘a legal advisor who assists clients with cases before judicial tribunals’; and s.v. ‘causidicus’, p. 251: ‘a speaker or pleader who pleads cases orally for others’.

¹⁴ Cf. in general Catherine STEEL, *Roman Oratory*, Cambridge 2006, pp. 14–24; 29–33; 45–61.

¹⁵ Cf. in part.: G. A. KENNEDY, ‘The rhetoric of advocacy in Greece and Rome’, *American Journal of Philology* 89 (1968), pp. 419–436; STEEL, *Roman Oratory* (cit. n. 14), pp. 63–77; J. M. MAY, ‘The rhetoric of advocacy and patron–client identification: variation on a theme’, *American Journal of Philology* 102 (1981), pp. 308–315; IDEM, ‘Ciceronian oratory in context’, [in:] IDEM (ed.), *Brill’s Companion to Cicero. Oratory and Rhetoric*, Leiden – Boston – Köln 2002, pp. 49–70, in part. pp. 52–53.

¹⁶ Cf. the *s.c. de philosophis et rhetoribus* [in:] *FIRA* (Bruns), p. 170, nr. 38; Suet. *de rhet.* 25–26; and the *edictum censorum adversus Latinos rhetores* [in:] *fIRA* (Bruns), p. 239, n. 67; Suet. *de rhet.* 1; Gell. xv 11.1–2. See: M. L. CLARKE, *Rhetoric at Rome. A Historical Survey*, London 1968, pp. 10–22 (‘Rhetoric at Rome under the Republic’); A. MANFREDINI, ‘Editto de coercendis rhetoribus latinis del 92 a.C.’, *SDHI* 42 (1976), pp. 99–148; Paulina ŚWIECICKA, ‘Latinitas i greckie humaniora. O sceptycyzmie Rzymian okresu republikańskiego wobec greckich obyczajów, myśli naukowej i kultury słowa’ [*Latinitas and Greek humaniora. On the Roman Republican times scepticism regarding Greek customs, scientific thoughts and language culture*], [in:] K. AMIELAŃCZYK, A. DĘBIŃSKI & D. SŁAPEK (eds.), *Ochrona bezpieczeństwa i porządku publicznego w prawie rzymskim* [The Protection of the Security and Public Order in the Roman Law], Lublin 2010, pp. 247–261.

¹⁷ Cf., A. GWYNN, *Roman Education from Cicero to Quintilian*, Oxford 1926; H.-I. MARROU, *Histoire de l’éducation dans l’Antiquité*, Paris 1950 (2 éd.), pp. 243–256; 340–344; J. J. EYRE,

Only later advocates started to be professional (and financially rewarded) aid for court matters if the plaintiff or defendant could not carry on the case personally what was granted in a praetor's edict (cf. *D.* 3.1.1.3–4, *Ulp.* 6 *ed.*). Therefore, the intervention of the *advocatus* was considered in classical times necessary according to the ancient and modern principle that a citizen had the right to representation (help) in court.

The formative period of the 'Roman bar' is plainly divided from the appearance and development of secular and professional jurisprudence – the great phenomenon of the ancient world.¹⁸ In Antiquity it was a unique Roman practice to have a body of professional lawyers (*iuris consulti, iuris periti, iuris prudentes*),¹⁹ consulting on legal problems or unclari- ties in legal interpretation (e.g. *Cic. de orat.* III 33.132–134).

Cic. de orat. I 48.212: sin autem quaereretur quisnam iuris consultus vere nominaretur, eum dicerem, qui legum et consuetudinis eius, qua privati in civitate uterentur, et ad respondendum et ad agendum et ad cavendum peritus esset.

Cic. de orat. I 45.200: est enim sine dubio domus iurisconsulti totius oraculum civitatis.

Cic. Phil. 9.10: paene divina eius in legibus interpretandis, aequitate explicanda scientia.

'Roman education in the late Republic and early Empire', *Greece & Rome* 10 (1963) 1, pp. 47–59; E. S. GRUEN, *Studies in Greek Culture and Roman Policy*, Leiden 1990, p. 188–191; K. M. T. ATKINSON, 'The education of the lawyer in ancient Rome', *SALJ* 87 (1970), pp. 31–52; Paulina ŚWIECICKA, 'Dyskursywnie dialektyczne poznanie i rozwój prawa w Rzymie republikańskim (Przyczynek do dalszych rozważań)' [Discursive dialectic cognition and the development of law in the Roman republic. An outline], [in:] *Consul est iuris et patriae defensor. Księga Pamiątkowa dedykowana pamięci Doktora Andrzeja Kremera* [*Consul est iuris et patriae defensor. Book in Memory of Dr. Andrzej Kremer*], Warszawa 2012, pp. 217–229; EADEM, '*Iurisconsultus et auditores*. Dialektyczna formuła poznania i rozwoju prawa w Rzymie republikańskim' [*Iurisconsultus et Auditores*. dialectic formula of the cognition and the development of law in the Roman republic], *Krakowskie Studia z Historii Państwa i Prawa* 6 (2013), pp. 193–227.

¹⁸ E.g. R. WESTBROOK, 'The early history of law: A theoretical essay', *ZRG RA* 127 (2010), p. 10.

¹⁹ E.g.: *Cic. de orat.* I 209–213; I 234–236; cf. *ibidem* I 198–201; III 132–136. All these terms emphasised the professionalisms of Roman jurists.

It must be emphasised that the exceptionally high level of moral requirements expected by the society from Roman jurists, as well as the great *auctoritas iuris scientia* (e.g., *D.* 1.2.2.42, Pomp. *l.s. enchir.: praecipua, maxima auctoritas*; 44: *plurimum auctoritatis*; 51: *plurimum auctoritatis*; 52: *maior auctoritatis*) augmented by the introduction under the Augustus' reign of the *ius respondendi* privilege, and a particular 'sacralisation' of *iurisprudentia* (cf. *D.* 1.1.1.1, Ulp. 1 *inst.*; *D.* 50.13.1.5, Ulp. 8 *de omn. trib.: res sanctissima civilis sapientia*), had to influence, in a certain way, the formation of professional demands also aimed at advocates.

D. 1.1.1.1 (Ulp. 1 *inst.*): Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.

3. The particular connection between those separated 'legal groups', *i.e.* aforementioned jurists and advocates, can be noticed due to the official disallowance of payment for their duties,²⁰ the rule passed in *lex*

²⁰ On the problem of permissibility of payment for legal assistance and legal advices, cf. an old study by H. MASSOL, 'Des honoraires des avocats en droit français et en droit romain', *Recueil de l'Académie de législation de Toulouse* 27 (1878 / 1879), pp. 37–85; and more recently: K. VISKY, 'Retribuzione per il lavoro giuridico nelle fonti del diritto romano', *IURA* 15 (1964), pp. 1–31, in part. p. 14–23; 29–30; IDEM, 'Osservazioni sulle *artes liberales*', [in:] *Synthese V. Arangio-Ruiz* 11, Napoli 1964, pp. 1068–1074, in part. pp. 1068–1069; 1073–1074; Giovanna COPPOLA, *Cultura e potere. Il lavoro intellettuale nel mondo romano*, Milano 1994, pp. 58–72; 73–100; 187–209; 374–389; L. RODRIGUEZ ENNES, 'Reflexion en torno al origen de los honorarios de los *advocati*', *SDHI* 60 (1994), pp. 361–365; IDEM, 'Honorarios de los abogados en Roma', Ponencia presentada en el XIV Congreso Latinoamericano de Derecho romano: <http://www.edictum.com.ar/miWeb4/ponencias_14.htm>; BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 35–38. Cf. also, A. DELL'ORO, 'Retribuzioni dei docenti di diritto ed *auctoritas principis*', [in:] *Studi E. Volterra* 11, Milano 1971, pp. 49–52, in part. pp. 51–52; and A. PALMA, '*Civile, incivile, civiliter, inciviliter* nelle fonti giuridiche', [in:] IDEM, *Benignior interpretatio. Benignitas nella giurisprudenza e nella normazione da Adriano ai Severi (Corso di lezioni)*, Torino 1997, pp. 151–205, in part. pp. 177–179 [= '*Civile, incivile, inciviliter*. Contributo allo studio del lessico giuridico romano', *Index* 12 (1983–1984), pp. 256–281], who emphasised that the acceptance of payment for legal help was regarded as acting 'incivile'.

Cincia de donis et muneribus as early as 204 BC.²¹ In 17 BC Augustus reviewed the statute but the aforementioned provision was maintained with an additional fiscal penalty of *quadruplum* (Tac. *ann.* 11 5.3. 'lex Cincia qua cavetur antiquitus ne quis ob causam orandam pecuniam donumve accipiat'). This restriction on receiving fees was finally rejected by the emperor Claudius, who accepted advocates as a separate profession, able to run law offices and get fees regulated by the law (no more than 10,000 sesterces), but – from the times of the emperor Traianus – not before the case was over (s.c. *Claudianum* 47 AD; s.c. *de advocatibus* 55 AD; Tac. *ann.* 11 5–7; 13.42; Liv. xxxiv 4; Suet. *Nero* 17; Plin. *NH* v 14.21; Dio Cass. LIV 18.2).²² This can be regarded as the beginning of the general demand for honesty and accuracy in advocates duties.²³

The same disallowance of payment came from the contract of commission – the rules of *mandatum*, with its main principle: *mandatum nisi gratuitum nullum est* (D. 17.1.1.3, Paul. 32 *ed.*; *IJust.* 3.26.13; cf. however D. 17.1.6 *pr.*, Ulp. 31 *ed.*: 'si remunerandi gratia honor intervenit, erit mandati actio'), because the activity before the tribunals (oratory, advocacy: Lat.: *causas agere, dicere*; afterwards, in the Late Empire: *opera togata*) as the intellectual one was regarded as an example of the ancient *artes liberales* (cf. Cic. *de off.* 1 150–151; Sen. *ep.* 88; Quint. xii 7 *proem.* 1; comp. D. 50.13.1 *pr.*, Ulp. 8 *de omn. trib.*; Cf. 11.19, in part. Cf. 11.19.1.4).²⁴ It was, however, accepted, as some jurists, e.g. Proculus or Gaius declared, in the classical period to grant the payment on the base of the agreement between the lawyer and the customer, or to allow the acceptance of the payment offered willingly by the customer as the *remuneratio* (cf. D. 17.1.6 *pr.*, cit. *retro*).

²¹ Cf. G. ROTONDI, *Leges publicae populi romani. Elenco cronologico con una introduzione sull'attività legislativa dei comizi romani*, Darmstadt 1962, pp. 261–263; comp. *FIRA* (BRUNS) 47, and M. H. CRAWFORD (ed.) *Roman Statutes* 11, London 1996, pp. 741–744, who did not mention this rule in his reconstructions.

²² Cf. CROOK, *Legal Advocacy* (cit. n. 7), pp. 129–131; STEEL, *Roman Oratory* (cit. n. 14), pp. 55–56.

²³ Cf. LAWS, 'Epilogue' (cit. n. 5), pp. 403–404.

²⁴ Cf. more: VISKY, 'Retribuzione per il lavoro giuridico nelle fonti del diritto romano' (cit. n. 20), pp. 10–23; 29–31 (with some doubts if such a qualification is possible); IDEM, 'Osservazioni sulle *artes liberales*' (cit. n. 20), pp. 1068–1074, in part. pp. 1069; 1073; COPPOLA, *Cultura e potere* (cit. n. 20), *passim*; DELL'ORO, 'Retribuzioni dei docenti di diritto ed *auctoritas principis*' (cit. n. 20), p. 49; 51–52.

D. 17.1.4 (Proc./Gai. 2 rer. cott.): sed Proculus recte eum usque ad pretium statutum acturum existimat, quae sententia sane benignior est.

When allowed by *senatusconsulta* (47–55 AD) and afterwards by the *rescripta* issued by Antoninus Pius (*D. 50.13.4, Paul. 4 Plaut.*) and subsequent *imperatores* (e.g. the *rescriptum* by Septimius Severus and Antoninus: *Cf. 4.35.1*), the payment was not regarded as *merces* or *pretium*, but rather as *honorarium* (i.e. a freely offered fee or *palmarium*,²⁵ if, exceptionally a bonus-payment was conditional on the case being won.²⁶ In general, it was due no matter whether the case had been won or lost (what is an important reference to modern times), and if a dispute arose on its amount, it was decided by the judge – exclusively in the *extraordinaria cognitio* (cf. *D. 50.13.1 pr.–15, Ulp. 8 de omn. trib.*) – who considered the difficulty of the case and the scope of the advocate's accuracy ('pro modo litis proque advocati facundia et fori consuetudine'), which may be seen as the beginning of the ethical principle of the fair and accurate handling of the client's case.

D. 50.13.1.9 (Ulp. 8 omn. trib.): Sed et adversus ipsos omnes cognoscere praeses debet, quia ut adversus advocatus adeantur, Divi Fratres rescripserunt.

D. 50.13.1.10 (Ulp. 8 omn. trib.): In honorariis advocatorum ita versari iudex debet, ut pro modo litis proque advocati facundia et fori consuetudine et iudicii, in quo erat acturus, aestimationem adhibeat, dummodo licitum honorarium quantitas non egrediatur: ita enim rescripto imperatoris nostri et patris eius continetur. Verba rescripti ita se habent: 'si Iulius Maternus, quem patronum causae tuae esse voluisti, fidem susceptam exhibere paratus est, eam dumtaxat pecuniam, quae modum legitimum egressa est, repetere debes'.

²⁵ *Iuv. sat. VII 117–118. Cf. B. EMMINGHAUS, 'Vom Palmarium', Archiv für praktische Rechtswissenschaft 2 (1865), pp. 227–252. According to BRUNDAGE, Medieval Origins of the Legal Profession (cit. n. 7), p. 37, n. 137: '[t]he term palmarium presumably refers to the practice of decorating the staircase of a victorious advocate with palms'.*

²⁶ *Cf. F. KLINGMÜLLER, s.v. 'Honorarium', PWRE VIII 2 (1913), coll. 2270–2275, in part. 2273–2274. Cf. also A. BERNARD, La rémunération des professions libérales en droit romain classique, Paris 1936, pp. 118–123; and, in general BRUNDAGE, Medieval Origins of the Legal Profession (cit. n. 7), pp. 36–38.*

Finally, the constitution of emperor Anastasius issued in 506 AD, which described the profession of the lawyer – advocate as necessary and worth high regard, also mentioned that performance of such duties had to be rewarded with the highest payment (*‘maxime principalibus praemiis oportet remunerari’*).

Cf. 2.7.23 *pr.* Imperator Anastasius: Laudabile vitaeque hominum necessarium advocacionis officium maxime principalibus praemiis oportet remunerari. (506 AD)

4. As early as in the late classical period jurists, *e.g.* Macer, mentioned the civil liability of the advocates in the case of undue care while representing his customer at the court, or acting expressly against him, or by revealing confidential information (*praevaricatio*).²⁷ If this happened, the advocate had to suspend his activity until accusations were proven to be untrue. Macer expressly stated that in such case the trial against the advocate who deceived his client or miscarried his duties had not to be judged according to the public criminal procedure, no matter what the type of the case was (public or private one).

D. 47.15.3.2 (Macer 1 *publ. iudic.*): Quod si advocato praevaricationis crimen intendatur, publicum iudicium non est: nec interest, publico an privato iudicio praevaricatus dicatur.

D. 50.2.3.1 (Ulp. 3 *off. procons.*): Sed si quis ob falsam causam vel aliam de gravioribus non ad tempus sit relegatus, sed ad tempus ordine motus, in ea est causa, ut possit in ordinem redire. Imperator enim Antoninus edicto proposito statuit, ut cuicumque aut quacumque causa ad tempus ordine vel advocacionibus vel quo alio officio fuisset interdictum, completo tempore nihilo minus fungi honore vel officio possit. et hoc recte: neque enim exaggeranda fuit sententia, quae modum interdictioni fecerat.

From the times of the Republic penalties, sometimes even savage ones, were also imposed on those who undertook mischievous prosecu-

²⁷ *Cf.* G. WESENBERG, *s.v.* ‘*Praevaricatio*’, *PWRE* XXII 2 (1954), coll. 1680–1685, in part.. 1683; *cf.* also BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 30–31.

tions. At least in theory, a prosecutor (who was, however, always a private person) found guilty of *calumniā* lost his civil rights and was branded on the forehead with the letter κ.²⁸

5. Although it is widely accepted that advocates were separated from *iuris prudentes*, the latter appeared occasionally in courts and such activity was referred to as *agere* by ancient Romans (Cic. *de orat.* I 212). One of the most famous cases is a well-known *causa Curiana* (Cic. *de orat.* I 180; I 242–244; II 24; II 140–141; II 220–221; Cic. *de inv.* II 122–123; Cic. *Brut.* 144–145; 193–198; 256; Cic. *Top.* 42–44; Cic. *pro Caec.* 53; 67; Quint. VII 5.9–10),²⁹ where one of the litigants was represented by Quintus Mucius Scaevola pontifex, one of the famous jurists of the late republican period. Later, some other jurists were also advocates and developed rhetorical skills: Titius Aristo, Opellius Macrinus, Iulius Paulus or Papinianus – to name but a few.³⁰

This, however, had to lead to a kind of professional competition focused on court litigation. Despite far wider knowledge of law of *iuris prudentes* (*ars iurisprudentiae*) better results were usually ascribed to advocates as qualified in the art of court speeches (*ars oratoria*).

Cic. *Brut.* 145: ita enim multa tum contra scriptum pro aequo et bono dixit, ut hominem acutissimum Q. Scaevolam et in iure, in quo illa causa vertebatur, paratissimum obrueret argumentorum exemplorumque copia; atque ita tum ab his patronis aequalibus et iam consularibus causa illa dicta est, cum uterque ex contraria parte ius civile defenderet, ut eloquentium iuris peritissimus Crassus, iuris peritorum eloquentissimus Scaevola putaretur. qui quidem cum peracutus esset ad excogitandum quid in iure aut in aequo verum aut esset aut non esset, tum verbis erat ad rem cum summa brevitate mirabiliter aptus.

²⁸ DAVID, *Le patronat judiciaire* (cit. n. 7), pp. 101–105; STEEL, *Roman Oratory* (cit. n. 14), pp. 56–57; POWELL & PATERSON, 'Advocacy ancient and modern' (cit. n. 9), p. 12, n. 49. Cf. also P. CERAMI, 'Accusatores populares, delatores, indices. Tipologia dei "collaboratori di giustizia" nell'antica Roma', *AUPA* 45.1 (1998), pp. 141–179.

²⁹ Cf., e.g., F. WIEACKER, *Römische Rechtsgeschichte* I. *Quellenkunde, Rechtsbildung, Jurisprudenz. Rechtsliteratur*, München 1988, p. 581 and n. 45; cf. also J. W. TELLEGEN, 'Oratores, iuris prudentes and the *causa Curiana*', *RIDA* 30 (1983), pp. 293–311.

³⁰ KUNKEL, *Herkunft* (cit. n. 3), p. 326.

Cic. *Brut.* 151: ... de Servio autem et tu probe dicis et ego dicam quod sentio. non enim facile quem dixerim plus studi quam illum et ad dicendum et ad omnes bonarum rerum disciplinas adhibuisse. nam et in isdem exercitationibus ineunte aetate fuimus et postea una Rhodum ille etiam profectus est, quo melior esset et doctior; et inde ut rediit, videtur mihi in secunda arte primus esse maluisse quam in prima secundus. atque haud scio an par principibus esse potuisset; sed fortasse maluit, id quod est adeptus, longe omnium non eiusdem modo aetatis sed eorum etiam qui fuissent in iure civili esse princeps.

This jurisprudential distant reservation about forensic *rhetorica* (which, however, cannot be absolutised, because many *iuris prudentes* studied it as a part of their standard noble education,³¹ as in Antiquity the knowledge had a unitary character), *i.e.* reasoning and speech ability, typical for *iuris prudentes*, had its roots in their belief that advocates, just as orators – even though they were described as *vires boni dicendi periti* (e.g., Sen. *contr.* 1 *pr.* 9; Quint. XII 1.1) – made improper use of their skills, with the only aim to win the case, sometimes in a theatrical way, sometimes overusing – normally moderately admissible – emotional tricks, sometimes even employing the invectives, or, in general, taking advantage of every possible trick in order to achieve the victory (*per fas et nefas*).³² As *iuris prudentes* declared, *ius est ars boni et aequi* (D. 1.1.1 *pr.*, Ulp. 1 *inst.*)³³

³¹ E.g. M. BREONE, *Storia del diritto romano*, Roma – Bari 2000 (7 ed.), p. 156: ‘Come professione aristocratica, la giurisprudenza può avvicinarsi all’oratoria, con la quale non di rado si trova congiunta.’ Cf. also *ibidem*, p. 167: ‘La giurisprudenza e senza dubbio una disciplina specialistica; ma la ‘specializzazione’ non vuol dire isolamento ...’.

³² Cf. e.g., Ch. CRAIG, ‘Audience expectations, invective, and proof’, [in:] *Cicero. The Advocate* (cit. n. 5), pp. 187–213; STEEL, *Roman Oratory* (cit. n. 14), pp. 3–14; 49–52, 68–70; cf. also, Ida MASTROROSA, ‘Quintilian and the judges. Rhetorical rules and psychological strategies in the 4th book of the *Institutio oratoria*’, [in:] TELLEGEN-COUPERUS (ed.), *Quintilian and the Law* (cit. n. 7), pp. 67–80; J. A. E. BONS & R. T. LANE, ‘Quintilian VI 2: On Emotions’, *ibidem*, pp. 129–144; R. A. KATULA, ‘Emotions in the courtroom. Quintilian’s judge – Then and now’, *ibidem*, pp. 145–156; J.-D. RODRÍGUEZ MARTÍN, ‘Moving the judge. A legal commentary on book VI of Quintilian’s *Institutio oratoria*’, *ibidem*, pp. 157–167.

³³ Cf. remarks by P. BONFANTE, *Istituzioni di diritto Romano*, Milano 1987, p. 9: ‘La scienza del diritto, *ars iuris* o *iurisprudentia* o anche semplicemente *ius*, è definita dal giurista Celso come *ars boni et aequi*; il che ne esprime il concetto in tutta la sua ampiezza, cioè non ne restringe il compito alla mera interpretazione del diritto positivo. Del resto alla

and these techniques, regarded as close to *sofisma*, *cavillationes* and eristic arguments, could not be accepted and gave rise to negative attitude.³⁴

While discussing a formation period of the advocate's professional conduct rules, it is particularly important to focus on three famous Roman *oratores* of the Late Republic and early Principate times – a period of deep social, political, financial and cultural changes.³⁵ It was Cicero (106 BC–43 BC), Hortensius (114 BC–50 BC) and, afterwards, Quintilianus (35 AD–100 AD) who postulated that legal studies were necessary for being a good *advocatus* (e.g.: Cic. *de orat.* I 36.166–167; Quint. *inst.* XII 3.1–12)³⁶ and that the fidelity towards ethical principles was necessary in oratory practice³⁷ and in process of building the *auctoritas* which derived properly from the *ῥῆθoς* of the orator, and his professional profile.³⁸

evoluzione del diritto i giureconsulti romani non cooperavano solo teoricamente, ma altresì praticamente, in quanto la loro interpretazione trascendeva fino a un certo segno i limiti della interpretazione vera e propria e creava nuovo diritto.' On these words by Celsus, cf. also, P. CERAMI, 'La concezione celsina del *ius*. Presupposti culturali e implicazioni metodologiche', *AUPA* 38 (1985), pp. 7–23; F. GALLO, 'Sulla definizione del diritto', *Atti dell'Accademia di Scienze di Torino* 123 (1989), pp. 15–34 [= *Rivista di diritto civile* 36.1 (1990) pp. 23–43]; cit. after IDEM, *Opuscula selecta*, Milano 1999, pp. 667–693; IDEM, 'Sulla definizione celsina del diritto', *SDHI* 53 (1987), pp. 7–52, cit. after *Opuscula selecta*, pp. 551–604; IDEM, 'Diritto e giustizia nel titolo primo del Digesto', *SDHI* 54 (1988), pp. 1–36, cit. after *Opuscula selecta*, pp. 605–648.

³⁴ Cf., however, Tessa G. LEESEN, *Gaius Meets Cicero. Law and Rhetoric in the School Controversies*, Leiden – Boston 2010, p. 328, who explained the controversies between Sabinians and Proculians *via* rhetorical *instrumentarium*, and concluded that jurists used this rhetoric argumentation to make their response convincing. Cf. also a study by A. WATSON, 'Two studies in textual history. 2. Tricks of advocacy in the *Libri disputationum*', *TR* 30 (1962), pp. 226–242.

³⁵ Cf., e.g., L. AMIRANTE, *Una storia giuridica di Roma* (11th ed.), Napoli 1993, pp. 219–231; F. R. COWELL, *Cicero and the Roman Republic*, London 1948, *passim*; W. V. HARRIS, 'The late Republic', [in:] W. SCHEIDEL, J. MORRIS & R. SALLER (eds.), *The Cambridge Economic History of the Greco-Roman World*, Cambridge 2007, pp. 511–539.

³⁶ Cf., e.g., W. J. WITTEVEEN, 'The jurisprudence of Quintilian', [in:] TELLEGEN-COUPERUS (ed.), *Quintilian and the Law* (cit. n. 7), pp. 303–317.

³⁷ Cf. POWELL & PATERSON, 'Cicero and the Morality of Advocacy', [in:] *Cicero. The Advocate* (cit. n. 5), pp. 19–29; cf. also J. WISSE, 'De oratore: rhetoric, philosophy, and the making of the ideal orator', [in:] *Brill's Companion to Cicero* (cit. n. 15), pp. 375–400; E. NARDUCCI, 'Orator and the definition of the ideal orator', *ibidem*, pp. 427–443.

³⁸ Cf. e.g., J. FERNÁNDEZ LÓPEZ, 'The concept of authority in the *Institutio oratoria*, book 1', [in:] TELLEGEN-COUPERUS (ed.), *Quintilian and the Law* (cit. n. 7), pp. 28–36. Cf. also,

Cic. *de orat.* I 166–167: potes igitur, ‘inquit Crassus’ ut alia omittam innumerabilia et immensa et ad ipsum tuum ius civile veniam, oratores putare eos, quos multas horas expectavit, cum in campum properaret, et ridens et stomachans P. Scaevola, cum Hypsaeus maxima voce? Plurimis verbis a M. Crasso praetore contenderet, ut ei, quem defendebat, causa cadere liceret, Cn. autem Octavius, homo consularis, non minus longa oratione recusaret, ne adversarius causa caderet ac ne is, pro quo ipse diceret, turpi tutelae iudicio atque omni molestia stultitia adversarii liberaretur?’ 167. ‘Ego vero istos’, inquit – ‘memini enim mihi narrare Mucium – non modo oratoris nomine sed ne foro quidem dignos vix putarim’. ‘Atqui non defuit illis patronis’ inquit Crassus ‘eloquentia neque dicendi ratio aut copia, sed iuris civilis scientia: quod alter plus lege agendo petebat, quam quantum lex in XII tabulis permiserat, quod cum impetrasset, causa caderet; alter iniquum putabat plus secum agi, quam quod erat in actione; neque intellegebat, si ita esset actum, litem adversarium perditurum.’

Cic. *orat.* 42.143: ‘at alterum factitatum est, alterum novum’. Fateor; sed utriusque rei causa est. alteros enim respondentes audire sat erat, ut ei qui docerent nullum sibi ad eam rem tempus ipsi seponerent, sed eodem tempore et discipulis satis facerent et consulentibus; alteri, cum domesticum tempus in cognoscendis componendisque causis, forense in agendis, reliquum in sese ipsis reficiendis omne consumerent, quem habebant instituendi aut docendi locum? Atque haud scio an plerique nostrorum oratorum [contra atque nos] ingenio plus valuerint quam doctrina; itaque illi dicere melius quam praecipere, nos contra fortasse possumus.

Quint. *inst.* I *pr.* 9: Oratorem autem instituimus illum perfectum, qui esse nisi vir bonus non potest, ideoque non dicendi modo eximiam in eo facultatem sed omnis animi virtutes exigimus.

Quint. XII 3.1–2: Iuris quoque civilis necessaria huic viro scientia est et morum ac religionum eius rei publicae quam capesset. nam qualis esse suator in consiliis publicis privatisve poterit tot rerum quibus praecipue civitas continetur ignarus? Quo autem modo patronum se causarum non falso dixerit qui quod est in causis potentissimum sit ab altero petiturus, paene non dissimilis iis qui poetarum scripta pronuntiant? Nam quodam modo

M. WINTERBOTTOM, ‘Quintilian and the *vir bonus*’, *JRS* 54 (1964), pp. 90–97; IDEM, ‘Quintilian the moralist’, [in:] T. ALBALADEJI [et. al.] (eds.), *Quintiliano: Historia y Actualidad de la Retórica* I, Logroño 1998, pp. 317–334.

mandata perferet, et ea quae sibi a iudice credi postulaturus est aliena fide dicet, et ipse litigantium auxiliator egebit auxilio. 2. Quod ut fieri nonnumquam minore incommodo possit cum domi praecepta et composita et sicut cetera quae in causa sunt in discendo cognita ad iudicem perfert: quid fiet in iis quaestionibus quae subito inter ipsas actiones nasci solent? Non deformiter respectet et inter subsellia minores advocatos interroget.

Quint. XII 3.9–10: Quod si plerique desperata facultate agendi ad discendum ius declinaverunt, quam id scire facile est oratori quod discunt qui sua quoque confessione oratores esse non possunt! Verum et M. Cato cum in dicendo praestantissimus, tum iuris idem fuit peritissimus, et Scaevolae Servioque Sulpicio concessa est etiam facundiae virtus, 10. et M. Tullius non modo inter agendum numquam est destitutus scientia iuris, sed etiam componere aliqua de eo coeperat, ut appareat posse oratorem non discendo tantum iuri vacare sed etiam docendo.

Quint. II 17.36–40: Ponuntur hae quoque in secundo Ciceronis ‘De oratore libro’ contradictiones: artem earum rerum esse quae sciuntur: oratoris omnem actionem opinione, non scientia contineri, quia et apud eos dicat qui nesciant, et ipse dicat aliquando 37. quod nesciat. Ex his alterum, id est an sciat iudex de quo dicatur, nihil ad oratoris artem; alteri respondendum. ‘ars earum rerum est quae sciuntur’. Rhetorice ars est bene 38. dicendi, bene autem dicere scit orator. ‘sed nescit an verum sit quod dicit.’ Ne ii quidem qui ignem aut aquam aut quattuor elementa aut corpora insecabilia esse ex quibus res omnes initium duxerint tradunt, nec qui intervalla siderum et mensuras solis ac terrae colligunt: disciplinam tamen suam artem vocant. quodsi ratio efficit ut haec non opinari sed propter vim probationum scire videantur, eadem ratio 39. idem praestare oratori potest. ‘sed an causa vera sit nescit.’ Ne medicus quidem an dolorem capitis habeat qui hoc se pati dicet: curabit tamen tamquam id verum sit, et erit ars medicina. Quid quod rhetorice non utique propositum habet semper vera dicendi, sed semper veri similia? scit autem 40. esse veri similia quae dicit. Adiciunt his qui contra sentiunt quod saepe, quae in aliis litibus inpugnarunt actores causarum, eadem in aliis defendant. quod non artis sed hominis est vitium. haec sunt praecipua quae contra rhetoricen dicantur.

Cic. *de inv.* I 1: ... ac me quidem diu cogitantem ratio ipsa in hanc potissimum sententiam ducit, ut existimem sapientiam sine eloquentia parum prodesse civitatibus, eloquentiam vero sine sapientia nimium obesse plerumque, prodesse numquam. quare si quis omissis rectissimis atque

honestissimis studiis rationis et officii consumit omnem operam in exercitatione dicendi, is inutilis sibi, perniciosus patriae civis alitur; qui vero ita sese armat eloquentia, ut non oppugnare commoda patriae, sed pro his propugnare possit, is mihi vir et suis et publicis rationibus utilissimus atque amicissimus civis fore videtur.

The same conclusions were drawn stated by Seneca,³⁹ Martialis,⁴⁰ and Juvenalis.⁴¹ How unsuccessful they were may be seen from the critic by Ammianus Marcellinus,⁴² Ausonius,⁴³ Libanius,⁴⁴ and finally, contemporary to the late classical jurist Modestinus, Gregory Thaumaturgus,⁴⁵ who himself studied law in order to become an advocate.

6. From the times of the emperor Hadrian 'bar regulations' tended to become more bureaucratic, along with a kind of compulsory presence by advocates before courts during the fiscal cases (cf. *SHA* Hadr. xx 6;

³⁹ E.g., *Apocolocyntosis Divi Claudii* 12: '... omnes laeti, hilares: populus Romanus ambulabat tanquam liber, agatho et pauci causidici plorabant, sed plane ex animo. iurisconsulti e tenebris procedebant, pallidi, graciles, vix animam habentes, tanquam qui tum maxime reviviscerent. ... o causidici, venale genus. | vosque poetae lugete novi, | vosque in primis qui concusso | magna parastis lucra fritillo'.

⁴⁰ E.g., *epigr.* II 13: 'Et iudex petit et petit patronus: | solvas censeo, Sexte, creditori!'. Cf. also x 37.1-2.

⁴¹ E.g., *sat.* III 29; IV 49-50; VIII 44-50; VII 135-138; XIV 191-209. SCHULZ, *History of Roman Legal Science* (cit. n. 3), p. 109 observed that 'the vices of advocates are an undying topic for satirists.' Cf. also an old study by E. HENRIOT, *Moeurs juridiques et judiciaires de l'ancienne Rome d'après les poètes latins* I-III, Paris 1965; and general remarks about the criticism of advocacy by Ancient authors: BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 33-34.

⁴² E.g., xxx 4.2-10; xxx 4.21-22. Cf. also Matilde CALTABIANO, 'Studium iudicandi e iudicium advocatorumque pravitas nelle *Res gestae* di Ammiano Marcellino', *AARC* XI (= *Convegno Internazionale in onore di F.B.J. Wubbe*), Perugia 1996, pp. 465-484.

⁴³ In part. R. PEIPER (ed.), *Commemoratio professorum Burdigalensium*, Lipsia 1886; cf. e.g., II 7.17; XXXIII 2; XXIII 7; XXVI 4.

⁴⁴ In part. *Epistulae and Orationes*, [in:] R. FOERSTER (ed.), *Libani Opera*, Leipzig 1903-1927; cf. e.g., *orat.* II 44; XVIII 288; LXII 21.

⁴⁵ In part. *Panegyricus ad Origenem. Des Gregorios Thaumaturgos Dankrede an Origenes*, ed. P. KOETSCHAU, Freiburg - Leipzig 1894; cf. e.g., v 58-60; 62.

D. 49.14.7, *Ulp.* 54 *ed.*).⁴⁶ This growth of the bar position was accompanied by the decrease of *iuris prudentes* and the end of creative jurisprudence.⁴⁷ Also professional organisation of advocates appeared⁴⁸ which signified that this occupational group assumed a corporate identity. Roman advocates from the emperor Constantine's reign onwards increasingly belonged to occupational associations (*collegia advocatorum*) scattered throughout the Empire (e.g. *CTh.* 2.10.4, AD 326), licensed and controlled – as, in general other *collegia* – by the authorities (cf. *D.* 3.4.1 *pr.*–1, *Gai.* 3 *ad ed. prov.*; *D.* 47.22.3 *pr.*–1, *Marcian.* 2 *iud. publ.*), and enrolled on the list (*matricula*) of qualified practitioners maintained by the judges before whom they performed their activities (cf. *CTh.* 2.10.2, AD 319; *CJ.* 2.7.13 *pr.*, 468 AD). Each *collegium* was attached to the courts in its own city or region, and its members were responsible to the judges of those courts (e.g. *CJ.* 2.7.13, 468 AD). Advocates' *collegia* occasionally also played a role in proposing or advising on legislation (e.g. *CJ.* 2.6.8, AD 468; *CJ.* 1.51.14.3, AD 529).

The situation changed even more in the times of the Late Empire.⁴⁹ In the Eastern part of the Empire, as early as from 380 AD, advocates

⁴⁶ About *advocati fisci* – the fiscal attorneys, cf. e.g. Paola LAMBRINI, 'In tema di *advocatus fisci*', *SDHI* 59 (1993), pp. 325–336 with considerable literature.

⁴⁷ E.g. CANNATA, *Lineamenti* 1 (cit. n. 3), p. 97. For some remarks about Western late-classical jurists cf. also, D. LIEBS, *Die Jurisprudenz im spätantiken Italien* (260–640 n. Chr.), Berlin 1987; IDEM, 'Nichtliterarische römische Juristen der Kaiserzeit', [in:] *Das Profil des Juristen* (cit. n. 3), pp. 123–198; IDEM, 'Die Juristenwelt bei Sidonius Apollinaris. Römische Juristen 420 bis 500 n. Chr. im südlichen Gallien', [in:] *Mélanges Magdelain*, Paris 1998, pp. 259–273.

⁴⁸ About the *collegia advocatorum* cf. M. TRAVERS, *Les corporations d'avocats sous l'empire romain envisagées au point de vue de l'administration judiciaire*, Paris 1891, *passim*; and more recently: J. ARIAS RAMOS, 'Advocati y *collegia advocatorum* en la actividad legislativa Justiniana', [in:] *Homenaje a D. Nicolás Pérez Serrano* 1, Madrid 1959, pp. 47–61; BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 26–27.

⁴⁹ For a general description of the legal culture in this period, see, e.g.: SCHULZ, *History of Roman Legal Science* (cit. n. 3), pp. 268–272; F. WIEACKER, *Römische Rechtsgeschichte* 11 (ed. by J. G. WOLF), München 2006, pp. 219–227, in part. pp. 222–223 (for organisation and tasks of advocacy), 241–244; 263–286; for more detailed remarks see: W. E. VOSS, 'Juristen und Rhetoren als Schöpfer der Novellen Theodosius 11', [in:] *Das Profil des Juristen* (cit. n. 3), pp. 199–256; H. WIELING, 'Advokaten im spätantiken Rom', *AARC* 11 (cit. n. 42), pp. 419–463; and BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 26–45.

besides the obligatory rhetoric had to study law ('eloquentia romana seu graeca, philosophia et ius'), which was linked with the creation of state-organised and state-financed (*CTh.* 13.3.1.2; *Cf.* 11.19.1.4, 425 AD; *Nov. App.* 7.22) legal education in this part of the Empire, with Berytus being the most prominent centre of teaching of law.⁵⁰ Emperors Valentinianus and Leon ordered would-be advocates to get a degree in law (first in AD 442, and next in AD 460: *Cf.* 2.7.11.2: 'peritia iuris instructum'; *Nov. Val.* 2.2.1-2: 'ut ... inprimis studia requirantur'; also *Nov. Val.* 2.3.1; *Cf.* 2.7.22.4; *Cf.* 2.7.24.4). From that time one can find source references calling them *scholastici* (*CTh.* 1.1.5: 'appellem virum disertissimum scholasticum'; cf. also, 1.29.3; 8.10.2), *togati* (*CTh.* 6.2.26; 7.8.10.16; 12.1.152; *Cf.* 1.4.15 = 2.6.8; 2.7.3; 2.7.5-7; 2.7.9; 2.7.11; 2.7.26; 2.7.29; 3.2.3; 3.1.13.9)⁵¹ and even *iuris periti* (νομικοί or *doctores iuris* (*CTh.* 1.1.6.2: 'vir spectabilis ex vicariis, iuris doctor').⁵² It was also the time when advocates (in Greek *συνήγρος*: e.g. *Nov.* 158) pointed out their knowledge of law (*iuris sapientia*) as well as of *rhetorica* (*eloquentia*) and made attempts to remove ordinary *causidices* (unskilled court speakers, in Greek named *δικολόγοι*, cf. e.g., *Nov. Val.* 35.2) from the

⁵⁰ Cf. L. WENGER, *Die Quellen des römischen Rechts*, Wien 1953, pp. 619-632; T. GIARO, s.v. 'Law schools', *Brill's New Pauly* VII (2005), sp. 326; H. WIELING, 'Rechtsstudium in der Spätantike', [in:] *A bonis bone discere. Festschrift f. Zlinszky zum 70. Geburtstag*, Miskolc 1998, pp. 513-531; WIEACKER, *Römische Rechtsgeschichte* II (cit. n. 48), pp. 223-227; 266-280; CANNATA, *Lineamenti* I (cit. n. 3), pp. 98-100; cfr. also, for the methodology of these schools M. KASER, *Zur Methodologie der römischen Rechtsquellenforschung*, Wien 1972, pp. 71-79.

⁵¹ For the symbolic meaning of this term – *togatus* as 'the man in the robe', referring to symbolic Roman name *gens togata*, see: Antonija SMODLAKA KOTUR, 'Avvocati nell'antica Salona', [in:] *Atti dell'Accademia Romanistica Constantiniana* (cit. n. 42), pp. 397-418, in part. pp. 402-405, with source material.

⁵² For an exemplary analysis of the importance of *iuris periti* in legal procedure in the previous, i.e. early classical period cf. e.g. G. PURPURA, 'Il giurista e l'avvocato: *nomikoi* e *rhetoires* in CPR I, 18', *Minima Epigraphica et Papyrologica* 7/8 (2004-2005) 9-10, pp. 269-278; for the period of the Empire in general cf. R. TAUBENSCHLAG, 'The legal profession in Greco-Roman Egypt', (cit. n. 7) pp. 188-192 (= *Opera Minora*, pp. 159-165); KUNKEL, *Herkunft* (cit. n. 3), pp. 267-270; 354-365; SMODLAKA KOTUR, 'Avvocati nell'antica Salona' (cit. n. 51), pp. 397-418; C. JONES, 'Juristes romains dans l'Orient grec', *Comptes rendus des séances de l'Académie des Inscriptions et Belles-Lettres* 151 (2007), pp. 1331-1359; and the most recently J. L. ALONSO, 'The status of peregrine law in Egypt: "Customary law" and legal pluralism in the Roman Empire', *JfurP* 43 (2013), pp. 351-404, in part. p. 354.

bar and to establish first binding rules of professional conduct.⁵³ Judges were empowered to penalise breaches of these norms and clients had the right to bring legal actions to recover damages that arose from a lawyer's violation of these ethical obligations. Other customary and usual practices of the profession were simply standard procedures, such as admissibility of an action against litigants who brought groundless lawsuits to harass their opponents (Gai 4.171; 174–181), replaced in the classical times by the calumny oath which was maintained in Justinian's law (*Cf.* 2.58[59]. 2 *pr.*; *Ijust.* 4.16.1; *D.* 50.16.233 *pr.*, Gai. 1 *ad l. XII tab.*).⁵⁴

Cf. 2.58.2 *pr.* Justinianus: Cum et iudices non aliter causas dirimere concessimus nisi Sacrosanctis Evangeliiis propositis et patronos causarum in omni orbe terrarum, qui romano imperio suppositus est, prius iurare et ita perferre causas disposuimus: necessarium duximus et praesentem legem ponere, per quam sancimus in omnibus litibus, quae fuerint post praesentem legem inchoatae, non aliter neque actorem neque fugientem in primordio litis exercere certamina, nisi post narrationem et responsionem, antequam utriusque partis advocati sacramentum legitimum praestent, ipsae principales personae subeant iusiurandum. Et actor quidem iuret non calumniandi animo litem movisse, sed existimando bonam causam habere: reus autem non aliter suis adlegationibus utatur, nisi prius et ipse iuraverit, quod putans se bona instantia uti ad reluctandum pervenerit: et postea utriusque partis viros disertissimos advocatos, quod iam dispositum est a nobis, iusiurandum praestare, Sacrosanctis videlicet Evangeliiis ante iudicem positis. (AD 531).

In its developed form the oath (*iuramentum*) outlined the basic elements of the advocate's professional responsibilities.⁵⁵ He had to swear that he would faithfully and wholeheartedly strive to present his client's

⁵³ E.g. SCHULZ, *History of Roman Legal Science* (cit. n. 3), p. 269; BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 28–45; cf. also A.-H. CHROUST, 'The Emergence of professional standards and the rise of the legal profession: the Graeco-Roman period', *Boston University Law Review* 36 (1956), pp. 587–598.

⁵⁴ BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), p. 28.

⁵⁵ BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 28–39; cf. also E. J. MORIARTY, *Oaths in Ecclesiastical Courts: An Historical Synopsis and Commentary*, Washington 1937, in part. pp. 9–10.

case justly and truthfully, that he would do so with all his strength and resources ('omni quidem virtute sua omnique ope quod iustum et verum existimaverint clientibus suis inferre procurent, nihil studii relinquentes, quod sibi possibile est'), that he would not present any case that he considered desperate, groundless or based on untruths ('non autem credita sibi causa cognita, quod improba sit vel penitus desperata et ex mendacibus adlegationibus composita'), and that, if approached to act in such a case, he would refuse. He also pledged that he would resign from any case that he discovered to be baseless after he had undertaken it and that he would see to it that no other advocate took it on.

Cf. 3.1.14.4 Justinianus: Patroni autem causarum, qui utrique parti suum praestantes ingrediuntur auxilium, cum lis fuerit contestata, post narrationem propositam et contradictionem obiectam in qualicumque iudicio maiore seu minore vel apud arbitros sive ex compromisso vel aliter datos vel electos Sacrosanctis Evangeliiis tactis iuramentum praestent, quod omni quidem virtute sua omnique ope quod iustum et verum existimaverint clientibus suis inferre procurent, nihil studii relinquentes, quod sibi possibile est, non autem credita sibi causa cognita, quod improba sit vel penitus desperata et ex mendacibus adlegationibus composita, ipsi scientes prudentesque mala conscientia liti patrocinantur, sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causa recedant ab huiusmodi communione sese penitus separantes: hocque subsecuto nulla licentia concedatur spreto litigatori ad alterius advocati patrocinium convolare, ne melioribus contemptis improba advocatio subrogetur. (AD 530).

Therefore, as Fritz Schulz stated: 'By the fourth century things had changed in the eastern Empire: advocates now were really jurists',⁵⁶ and their *officium* (*cf.* *Cf.* 2.7.22 *pr.*) was regarded as 'tam magnum, tam necessarium, et tam sanctum' (*cf.* *Nov. Val.* 2: *Constitutio de postulando* [AD 442]).

There is a number of sources displaying this attitude to the late Roman bar. From the beginning of the fifth century a state-organised professional body (*schola, consortium togatorum*), was compared, as professional jurists before (*cf.* *Cic. pro Mur.* 9.19: 'urbana militia respondendi, scribendi, cavendi'), with soldiers as described by Cassiodorus (*Variae* VI

⁵⁶ SCHULZ, *History of Roman Legal Science* (cit. n. 3), p. 268.

4.6: ‘advocati tibi militant’) and in imperial constitutions (*milites*: *CTh.* 1.29.14; *Cf.* 2.7.14), as to the importance of their mission for the society (*Cf.* 2.7.14; *Cf.* 2.7.23),⁵⁷ with the restricted entry for newcomers obliged to pay as much as 100 golden solids for the professional licence.

Cf. 2.7.14 Leo, Anthemius: Advocati, qui dirimunt ambigua fata causarum suaeque defensionis viribus in rebus saepe publicis ac privatis lapsa erigunt, fatigata reparant, non minus provident humano generi, quam si proeliis atque vulneribus patriam parentesque salvarent. nec enim solos nostro imperio militare credimus illos, qui gladiis clupeis et thoracibus nituntur, sed etiam advocatos: militant namque causarum patroni, qui gloriosae vocis confisi munimine laborantium spem vitam et posteros defendunt. (AD 469).

To sum up, at the end of Antiquity the Roman bar was a well-organised professional body with a strictly restricted admission (*numerus clausus*: *Nov. Theod.* x 1 § 1-3 [43 AD]: ‘nulli post Kal. Ian. concessa licentia ad forum et cotidianas advocaciones ius principale deferre vel litis instrumenta componere, nisi ex his videlicet libris, qui in nostri nominis vocabulum transierunt et sacris habentur in scriniis’) and assured exclusive right of audience (*Cf.* 6.48.1). On the other hand, maximal fees had to be obeyed (*Ed. Diocl. de pretiis rerum venalium* [301 AD]: fr. 7.72-73: ‘advocato sive iuris perito mercedis in postulatione 250, [73] in cognitione 1000 [denari]’;⁵⁸ since Justinian the *honorarium* was limited to 100 *aurei*) as well as the professional responsibility for breaking the rules of conduct, like unfairness, unnecessary delays or abandoning the case was introduced.

⁵⁷ Cf. Carla MASI DORIA, *Modelli giuridici, prassi di scambio e medium linguistico. Un itinerario dell'espansionismo Romano*, Napoli 2012, p. 93: for the *cognitio* ‘l'importanza degli “advocati” è centrale.’ Cf. the *Code of Professional Ethics for Lawyers of the European Union*, where, in the preamble is stated that the role of a lawyer in the society is special, as well as that he has to serve the interests of equity and those whose rights and freedom he is entrusted to implement and to protect: <http://www.ccbe.eu/fileadmin/user_upload/document/statuts/statutes_en.pdf>.

⁵⁸ *CIL* III 831; S. LAUFFER, *Diokletians Preisedikt. Texte und Kommentare*, Berlin 1971. Cf. also C. ST. TOMULESCU, ‘Les avocats dans l'édit du maximum’, *AARC: Atti del II Convegno Internazionale: Spello – Isola Polvese sul Trasimeno – Montefalco (18–20 settembre 1975)*, Perugia 1976, pp. 293–298.

Cf. 4.6.11 Diocletianus, Maximianus: Advocationis causa datam pecuniam, si per eos qui acceperant, quominus susceptam fidem impleant, stetisse probetur, restituendam esse convenit. (294 AD).

Cf. 2.6.6.1 Valentinianus, Valens: Ante omnia autem universi advocati ita praebeant patrocinia iurgantibus, ut non ultra, quam litium poscit utilitas, in licentiam conviciandi et maledicendi temeritatem prorumpant: agant, quod causa desiderat: temperent ab iniuria. nam si quis adeo procax fuerit, ut non ratione, sed probris putet esse certandum, opinionis suae imminutione quatietur. Nec enim coniventia commodanda est, ut quisquam negotio derelicto in adversarii sui contumeliam aut palam pergat aut subdole. (AD 368).

Cf. 2.6.6.5 Valentinianus, Valens: Apud urbem autem Romam etiam honoratis, qui hoc putaverint eligendum, eo usque liceat orare, quousque maluerint, videlicet ut non ad turpe compendium stipemque deformem haec adripiatur occasio, sed laudis per eam augmenta quaerantur. nam si lucro pecuniaque capiantur, veluti abiecti atque degeneres inter vilissimos numerabuntur. (AD 368).

It was also established that the advocate's mistake had not to cause any damage to plaintiff or defendant.

Cf. 2.9.3 Diocletianus, Maximianus: Sententiis finita negotia rescriptis revocari non oportet. nec enim quae constituta sunt, ut advocatorum error litigatoribus non noceat, tibi etiam opitulari possunt, cum te praesentem neque causae palam ex continenti, id est triduo proximo, contradixisse neque post sententiam appellationis remedio, si tibi haec displicebat, usam proponas. (AD 294).⁵⁹

Additionally, it was declared that all pleas and procedural actions performed by an advocate in the court in presence of the party were considered as if the party performed them on their own.

⁵⁹ *Cf. CTb.* 2.11.1 (Constantinus a. Furio Felici.): 'Advocatorum errores in competenti iudicio litigatoribus non praeiudicant. Interpretatio. advocatus, si in suscepti causa aliquid in praeiudicium per errorem dixerit, praeiudicare ei, a quo adhibitus est, nullatenus debet: si continuo de ipso errore fuerit reclamatum'.

Cf. 2.9.1 Alexander Severus: Ea, quae advocati praesentibus his quorum causae aguntur adlegant, perinde habenda sunt, ac si ab ipsis dominis litium proferantur. (AD 227).

7. This order, accepted in the Justinian compilation⁶⁰ became the source for generations of professional lawyers performing *professio advocatorum*⁶¹ before tribunals of Medieval Europe and of subsequent periods of the *ius commune*. After the dark times, before the Roman law had been rediscovered, when it was almost impossible to find any lawyer,⁶² there was a real renaissance of legal professions⁶³ – now called *doctores iuris v.*

⁶⁰ Cf. 2.7: *De advocatis diversorum iudiciorum*; Cf. 2.8: *De advocatis fisci*; Cf. 2.9: *De errore advocatorum vel libellos seu preces concipientium*; Cf. 2.10: *Ut quae desunt advocacioni partium iudex suppleat*; Cf. 2.12: *De procuratoribus*.

⁶¹ Cf. remarks by: R. POUND, *The Lawyer from Antiquity to Modern Times*, St. Paul 1953, *passim*; IDEM, 'What is a profession? The rise of the legal profession in antiquity', *Notre Dame Lawyer* 19 (1944), pp. 203–228; Cf. W. J. GOODE, 'Community within a community: the professions', *American Sociological Review* 22 (1957), pp. 194–200, repr. in: D. W. MINAR & S. GREER (eds.), *The Concept of Community: Readings With Interpretations*, Chicago 2007, pp. 152–162. Cf. also a definition of 'professional lawyer' proposed by J. A. BRUNDAGE, 'The rise of the professional jurist in the thirteenth century', *Syracuse Journal of International Law and Commerce* 20 (1994), pp. 185–190, in part. p. 185: 'I take the term profession or professional to mean a highly skilled, terminal occupation that can only be entered through some kind of formal admission. These practitioners undertake to abide by a set of ethical standards, and enjoy in return a publicly sanctioned monopoly on the practice of their trade and a measure of authority resulting from their peculiar skills, coupled with high social status and esteem'. In the same way IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 1–3 and n. 4, 6. Cf. also Susan REYNOLDS, 'The emergence of professional law in the long twelfth century', *Law and History Review* 21 (2003), pp. 346–366.

⁶² Cf. BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 46–74: Chapt.: 'Law without Lawyers: The Early Middle Ages'.

⁶³ Cf. in part.: J. A. BRUNDAGE, 'The medieval advocate's profession', *Law and History Review* 6.2 (1988), pp. 439–464, who emphasised, however (p. 442), that there was no institutional continuity between the practice of law in ancient Rome and in the development of the legal profession in medieval Europe; IDEM, 'The rise' (cit. n. 61), pp. 185–190 and 'The profits of the law: legal fees of university-trained advocates', *The American Journal of Legal History* 32 (1988), pp. 1–15; and, above all, IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 46–74; 75–125; 126–163; for some general observation see: C. A. CANNATA, *Lineamenti di storia della giurisprudenza europea 11: Dal medioevo all'epoca moderna*, 2 ed., Torino 1976, pp. 13–14 (for West-European reality), pp. 57–59 (for the English advocacy).

legis, advocati or *togati* – which was associated with the flourishing of the medieval university education,⁶⁴ and with the process of reshaping of canon law connected to the development of the Church jurisdiction and profesionalisation of law.⁶⁵ The law faculties trained medieval advocates in an intellectual tradition common to all members of the profession, so that they formed a sort of homogenous elite.⁶⁶ The law faculties also certified their graduates' competence in law, and such certification served as essential basis for the advocate's activities in church and royal courts, as well as their claim to monopolisation of such activities.

Soon after the new regulations of liability of bar professionals were introduced along with the previously adopted formal requirements.⁶⁷ Among the new rules the calumny oath (*iuramentum de calumnia vitanda*)⁶⁸

Cf. also, mostly for the Italian medieval advocacy: FIORELLI, 'Avvocato (storia)' (cit. n. 13), pp. 647–649; and P. RASI, s.v. 'Avvocati e procuratori (diritto intermedio)', *NNDI* 1 2 (cit. n. 13), pp. 1663–1666.

⁶⁴ BRUNDAGE, 'The medieval advocate's profession' (cit. n. 63), p. 440: 'The relationship between the university and the professions was crucial in the early history of the learned professions. University certification of competence enabled members of these professions to claim that only persons who received that certification were fully competent to practice'. *Cf.* also IDEM, 'Universities and the *ius commune* in Medieval Europe', *RIDC* 11 (2000), pp. 237–253 (repr. in: IDEM, *The Profession and Practice of Medieval Canon Law*, Aldershot 2004, no. VIII); IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 80–94; 219–282 (Chapt. 'The formation of an educated elite: law schools and universities'), in part: p. 219: 'Universities were indispensable for the development of the medieval legal professions'.

⁶⁵ BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 94–125; 126–163; 164–218; *cf.* also IDEM, 'The rise of professional canonists and development of the *ius commune*', [in:] IDEM, *The Profession and Practice of Medieval Canon Law* (cit. n. 64), pp. 26–63.

⁶⁶ *E.g.* P. G. STEIN, 'Judge and jurist in the civil law: An historical interpretation', *Louisiana Law Review* 46 (1985), pp. 243–252, in part: p. 244.

⁶⁷ BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 283–292; 305–308; 309–316; 338–343; *cf.* also IDEM, 'The lawyer as his client's judge: The medieval advocate's duty to the court', [in:] *Cristianita ed Europa. Miscellanea di studi in onore di Luigi Prosdocimi* 1, Rome 1994, pp. 591–607.

⁶⁸ BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 292–295; *cf.* also IDEM, 'The calumny oath and ethical ideals of canonical advocates', [in:] P. LANDAU & J. MÜLLER (eds.), *Proceedings of the Ninth International Congress of Medieval Canon Law*, Città di Vaticano 1997, pp. 793–805 [= IDEM, *The Profession and Practice of Medieval Canon Law*, (cit. n. 64), pp. 793–805.

and the oath of admission⁶⁹ were of the main importance: in France as early as in 1231 advocates had to swear before being granted the right of audience at the bishop's court, what was demanded also for the royal courts from 1274;⁷⁰ the same standard was adopted for London courts (from the Legatine Council of London of 1237, the so-called Cardinal Otto's Canon),⁷¹ and for the Kingdom of Sicily as ordered by emperor Frederick II for the state's civil courts (1231: *Liber Augustialis*).⁷² The Second Council of Lyon (1274: The *Constitutio Properandum*) forced every ecclesiastical court to demand an advocate's swearing – in the special oath of admission he had to promise to represent his client fairly, to deal honestly with him, to observe the church's standards of professional conduct, to avoid various types of conflict of interests as well as to refrain from switching sides during a case.⁷³ It was in 1275 (*Statute of Westminster* I, as a supplement to the *Magna Carta* of 1215 with its particular requirements that 'judges must know the law') when the English

⁶⁹ BRUNDAGE, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 295–305, in part.: p. 296: 'The oaths of admission that began to come into use in thirteenth century ecclesiastical courts, unlike those prescribed earlier at Pisa [sc. The Statute of 1162 – P. Ś.], drew a substantial part of their content from Justinian's version of the calumny oath'. Cf. also a remark in n. 44 p. 296: 'A mnemonic verse that encapsulated the contents of the oath was circulating among law students by 1227 and appears in Accursius's *Glos. ord.* to *Auth. coll.* 9 c. 5 (= Nov. 124.1) in Cod. 2.58(59).2 v. *existimat*: "Istud iuretur, quod lis sibi iusta videtur, | Et si quaeritur, verum non inficietur; | Nil promittetur, nec falso probatio detur, | Ut lis tardetur, dilatio nulla petetur". Cf. also other versions of such an oath adopted in various countries: pp. 297–299.

⁷⁰ BRUNDAGE, 'The medieval advocate's profession' (cit. n. 63), pp. 446–447; IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 296–297: the Rouen Canon of 1231; p. 304: The *Constitutio Properandum* of 1274; cf. also Lucien KARPIK, *French Lawyers: A Study in Collective Action, 1274 to 1994*, trans. N. SCOTT, Oxford 1999, pp. 21–23.

⁷¹ BRUNDAGE, 'The rise of the professional jurist' (cit. n. 61), p. 188; IDEM, 'The medieval advocate's profession' (cit. n. 63), p. 450; IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 299–300.

⁷² BRUNDAGE, 'The rise of the professional jurist' (cit. n. 61), pp. 188–189; IDEM, 'The medieval advocate's profession' (cit. n. 63), p. 449; IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 298–299.

⁷³ BRUNDAGE, 'The rise of the professional jurist' (cit. n. 61), p. 189; IDEM, 'The medieval advocate's profession' (cit. n. 63), pp. 450–451; IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 301–304.

statute on fines for cheating lawyers, and in 1280 (*The London Ordinance*) on obligatory swearing before a lawyer might access the court proceedings, were passed.⁷⁴ Finally, in 1345, the French crown issued a royal ordinance which enumerated 24 rules governing advocates, in particular 12 of them were integrated into the aforementioned oath to be taken by the professionalists.⁷⁵

Yet, medieval lawyers – advocates were often a subject of criticism because they were regarded as moral lepers comparable to usurers or adulterers.⁷⁶ Therefore, a question of their legal ethics – as the ethics of the professionalists possessing special knowledge and exercised authority – and the existence of ‘the common code of professional rules’, appeared open,⁷⁷ especially that medieval advocates were also vituperatively called ‘tongue-renters’, ‘fathers of errors’, ‘greed-bags’ or ‘robed vultures’.⁷⁸ But, as James

⁷⁴ BRUNDAGE, ‘The medieval advocate’s profession’ (cit. n. 63), pp. 447–448; IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 304–305; cf. also, J. ROSE, ‘The legal profession in medieval England: A history of regulation’, *Syracuse Law Review* 48 (1998), pp. 1–137, in part. pp. 49–57; 63–70; 131–132; IDEM, ‘Medieval attitudes toward the legal profession: The past as prologue’, *Stetson Law Review* 28 (1998), pp. 345–369, in part. pp. 347–348 and n. 6; 351–354.

⁷⁵ KARPIK, *French Lawyers* (cit. n. 70), p. 21

⁷⁶ BRUNDAGE, ‘The medieval advocate’s profession’ (cit. n. 63), pp. 444; 454; IDEM, ‘The ethics of the legal profession: medieval canonists and their clients’, *The Jurist* 33 (1973), pp. 237–248; IDEM, ‘The ambidextrous advocate: A study in the history of legal ethics’, [in:] *Ins Wasser geworfen und Ozeane durchquert. Festschrift K. W. Nörr*, Cologne 2003, pp. 39–56; IDEM, ‘Vultures, whores, and hypocrites: Images of lawyers in medieval literature’, *The Roman Law Tradition* 1 (2002), pp. 56–103; IDEM, *Medieval Origins of the Legal Profession* (cit. n. 7), pp. 181–191, 191–203; 308–309; 316–328; 338–343; cf. also J. A. YUNCK, ‘The venal tongue: lawyers and the medieval satirists’, *American Bar Association Journal* 46 (1960), pp. 267–270; J. W. BALDWIN, ‘Critics of the legal profession: Peter the Chanter and his circle’, [in:] S. KUTTNER & J. J. RYAN (eds.) *Proceedings of the Second International Congress of Medieval Canon Law*, Città di Vaticano 1965, pp. 246–259; R. H. HELMHOLZ, ‘Ethical standards for advocates and proctors in theory and practice’, [in:] S. KUTTNER (ed.) *Proceedings of the Fourth International Congress of Medieval Canon Law*, Città di Vaticano 1976, pp. 284–293; Amelia J. UELMEN, ‘A view of the legal profession from a mid-twelfth-century monastery’, *Fordham Law Review* 71 (2003) 4, pp. 1517–1541.

⁷⁷ Cf. some remarks on the formative of medieval lawyer’s professional standards, by BRUNDAGE, ‘The medieval advocate’s profession’ (cit. n. 63), pp. 449–453; see also A.-H. CHROUST, ‘The emergence of professional standards and the rise of the legal profession’, *Boston University Law Review* 36 (1956), pp. 587–598; and C. R. ANDREWS, ‘Standards of conduct for lawyers: An 800-year evolution’, *Southern Methodist University Law Review* 57 (2005), pp. 1385–1458.

⁷⁸ BRUNDAGE, ‘The medieval advocate’s profession’ (cit. n. 63), p. 444.

A. Brundage pointed out: 'Every society that has an identifiable group of professional lawyers has complained about their behaviour, frequently in terms of righteous indignation. [...] Anyone who reads at all widely in medieval literature will repeatedly run across passages in which the manners, morals, and even the very existence of lawyers will be deplored.'⁷⁹

The medieval legal professions which appeared in the 12th century survived largely intact on the Continent until the late 18th century, despite some relatively superficial changes. Just in the 19th century, after the French Revolution legal professions started to revive many of the characteristics of their medieval predecessors, in particular some principles of their professional ethos.

8. Ethical problems of lawyers referred to by ancient authors are still a challenge for modern generations:⁸⁰ Should the advocate agree to represent his client in an unfair and unjust case? Should we have professional responsibility and liability for mistakes and negligence, going far beyond the scope of commission, the contractual base for relations between the lawyer and the customer? Should every client and the case be accepted by the chosen lawyer, according to the so-called modern cab-rank rule (which is not still a principle in Poland)? The rule is, however, often criticised due to the increasing competition between lawyers. The Cab-rank rule is now the 'source of pride of the English Bar', as put in words by the The Lord Irvine of Lairg, then the Lord Chancellor in his Parliamentary speech:

The 'cab rank' rule is one of the glories of the Bar. It underscores that every member of the Bar is obliged, without fear or favour, to represent clients who offer themselves, regardless of how unpopular they may be in the community or elsewhere.⁸¹

Yet, it was Quintilianus who alerted advocates to be sceptic about their clients: many of them lie, what they want is often the revenge, not the justice.

⁷⁹ BRUNDAGE, 'The ethics of the legal profession' (cit. n. 76), p. 237. Cf. also ROSE, 'Medieval attitudes' (cit. n. 74), pp. 345–369, e.g. p. 346: 'The fundamental point is that since the profession emerged in the thirteenth century, there has been a persistent hostility toward lawyers. The image problem has existed as long as there has been a profession.'

⁸⁰ See, e.g., D. PANNICK, *Advocates*, Oxford 1992, pp. 127–169.

⁸¹ <<www.publications.parliament.uk/pa/ld199899/ldhansrd/v0990128/text/90128-06.htm>>.

Quint. XII 8.9: plurimi [*s.c.* litigatores] enim mentiuntur, et tamquam non doceant causam sed agant non ut cum patrono sed ut cum iudice locuntur. quapropter numquam satis credendum est, sed agitandus omnibus modis et turbandus et evocandus.



It is undisputable that the advocacy is a feature of well-developed contemporary legal systems. It also played a noticeable role in the legal order of ancient Rome. When comparing the modern advocacy and, in particular, its code of professional conduct rules with 'the Roman court-speakers phenomenon' and its characteristics and peculiarities as the first 'professional corporation', it is noticeable that many modern rules of professional conduct refer to their ancient Roman roots, even if the Roman courts worked on principles quite different from the developed legal procedural systems of modern times, and the styles of acting of the ancient advocacy and of the modern one are divers, as conditioned by the constraints and expectations of a particular system. Still, the well-known words written by Marc Bloch years ago, are true: We learn history in order to know our today's day.⁸²

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⁸² M. BLOCH, *Apologie pour l'histoire ou Métier d'historien*, Paris 1949, p. 11 ss. (Chapt. VI: 'Comprendre le présent par le passé').