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John R. Boatright^a

^a Loyola University Chicago, Chicago, IL, USA

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Swearing to be Virtuous: The Prospects of a Banker's Oath

John R. Boatright

Loyola University Chicago, Chicago, IL, USA

Abstract In an effort to restore trust in the banking sector, the Advisory Committee on the Future of Banks in the Netherlands made a recommendation, which has since been adopted, that bank executives be required to swear an oath akin to the physician's Hippocratic Oath. This examination of the prospects of the Dutch banker's oath addresses two broad issues. One issue is the efficacy of oaths themselves as instruments for achieving the desired end. A second issue concerns the extent to which this particular oath is a useful guide to ethical banking practice. One conclusion of this study is that it would be difficult for any oath in banking to serve a role that is analogous to the Hippocratic Oath in medicine because of the many dissimilarities involved, most notably the lack in banking of a singular focus on service. Second, the Dutch oath, while admirable in its lofty exhortations, fails to provide a reliable guide through the many difficult judgments that must be made in banking.

Keywords: banker's oath, banking, banking ethics confidentiality, finance, finance ethics, Hippocratic Oath, models, oaths, risk management

Oaths are but words, and words but wind.
Samuel Butler¹

The financial crisis that began in 2007 did more than destroy value; it eroded trust in the individuals and the institutions that form our financial system. The restoration of that trust can be achieved only by comprehensive and far-reaching reforms in all aspects of banking, such as those recommended by the Advisory Committee on the Future of Banks in the Netherlands. Among the 73 recommendations of the Advisory Committee report is 1.13, which states, in part, "Bank executives should sign a statement regarding ethics and morality." The proposed text of such a statement follows. Out of this recommendation has come a

¹ Samuel Butler, *Hudibras*, Part 2, line 107.

requirement that directors of all banks in the Netherlands swear an oath akin to the physician's Hippocratic Oath. Similar initiatives for a banker's Hippocratic-like oath have been put forth in Great Britain (Webb 2010) and the USA² but have not gained much support.

It is easy to be skeptical of a banker's oath and to share the poet Samuel Butler's dismissal of oaths generally as but wind.³ The earnest efforts of the Dutch banking industry, however, deserve a more reflective response. A proper evaluation of the prospects of a banker's oath should address two broad issues. One issue is the effectiveness of oaths themselves as instruments for achieving some desired end, which presupposes, further, some specification of the end in question. We must ask, in other words, what goal is sought by creating a banker's oath, and is the instrument of an oath, as opposed to, say, a conventional code, an effective means for achieving it. A second issue concerns the content of the oath. Would a banker swearing this particular oath and taking it to heart think and act in the desired manner? That is, to what extent is the Dutch banker's oath a useful guide to ethical banking practice? The answer to this question would apply not only to an oath but also to a code, or any other set of specific prescriptions.

The main conclusions of this evaluation of the prospects of the Dutch banker's oath are, first, that it would be difficult for any oath in banking to serve a role that is analogous to the Hippocratic Oath in medicine or to other kinds of oaths due to the many dissimilarities involved, most notably the lack in banking of a singular focus on service to an identifiable party, such as a patient or a client. To put it simply, oaths in their most common uses are largely affirmations of a commitment to service that are embedded in a larger institutional framework that is absent in banking. For a banker's oath to be effective, banking would have to be a very different practice than it is, which is an unlikely prospect.

Second, understood as a code of conduct and not strictly as an oath like the one physicians swear, the Dutch statement, while admirable in its lofty affirmations, fails to provide a reliable guide through the many difficult judgments that must be made in banking. Although ethical banking practice may be guided by a few key principles, their implementation in practice often involves a judicious balancing and nuanced application which no code can fully encompass. Given this result, the Dutch banker's oath can do some harm by diverting attention away from the need for judgment and creating a false sense of confidence that the challenge of ensuring ethical conduct has been met.

2 See <http://www.financialhippocraticoath.org/>

3 The passage continues:

Too feeble implements to bind;
And hold with deeds proportion so
As shadows to a substance do.

OATHS AND OATH TAKING

An oath is an ancient, indeed prehistoric, ritual that today has only a few very specific uses. Most oaths involve a deity, who is appealed to for assistance (“so help me God”) or support (“may God be my witness”) or enforcement (“may God strike me dead”). However, in human evolution, oaths preceded religion and originated in primitive beliefs about the power of a curse to inflict harm on others. This magical destructive effect of words could also be turned on oneself in a self-curse which would guarantee that a promise would be kept or that one’s word could be trusted (Lasch 1908: 3–4; Silving 1959a: 1330). The oath as a self-curse thus originated as a form of magic, and only later did oath taking become closely linked to religion. However, today, oaths have ceased to be associated with either magic or religion but have a secular, more pragmatic basis.

Types of Oaths

Throughout history, oaths have served two broad purposes: to affirm a promise of some kind and to lend credence to one’s words. These two uses have traditionally been termed *promissory* and *assertatory*, a distinction that is apparently due to Puffendorf (Tyler 1834: 262). The occasions requiring an oath to affirm or assert have varied through history. Oaths are ubiquitous in the Bible (Ziegler 2008), and oaths pledging allegiance to a ruler have been common, for example, in ancient Egypt (Wilson 1948) and under feudalism in Europe (Jones 1999). The judicial oath, especially for testimony and admission to practice in a court, is also of ancient origin (Goodman 1967; Silving 1959a). Although a banker’s oath might seem like a new idea, a recorded instance of one dates to 230 BCE, when a banker’s assistant named Semtheus swore to perform his duties accurately and justly (Austin 2006: 555).

Today, assertatory oaths are sworn in situations where testimony is given under pain of perjury, typically in some judicial or legislative investigation or proceeding, where the goal is to ensure truthfulness. Considerable controversy has long existed over the use of oaths for this purpose on many grounds, including its efficacy in securing truth, the intrusion of religion into state activities, and the fairness of compelling testimony under pain of sanction. Both Kant (1797) and Bentham (1817) criticized assertatory oaths,⁴ and many contemporary legal theorists raise serious objections (Silving 1959b). The two main uses of promissory oaths are oaths of office, whereby elected or appointed officials are sworn in, and admission to a profession, which occurs mainly in medicine and law.

4 See Kant, *Metaphysics of Morals*, Section 40 “On Acquiring Guarantees by Oath.”

A banker's oath is a promissory oath, and so it is to these two main promissory uses—oaths of office and especially professional admission oaths—that we must look for comparison. In this comparison, two questions are relevant: (1) What conditions are necessary to say that an oath has been taken, whereby the swearer becomes bound? And (2) what gives an oath its binding force, whereby the obligation assumed can become expected, even demanded, conduct? With regard to the first question, anyone can say the words of the Hippocratic Oath, but the effect of uttering them has binding force only on certain persons in specified contexts. Similarly, uttering the words of an oath of office does not give one the duties of a particular public official; otherwise, anyone could become the president of the USA or a Supreme Court justice. In the theory of Austin (1962), taking an oath or promising generally is a *performative utterance*, the success of which depends on the right circumstances. The second question addresses the point that the taking of an oath—that is, making a successful performative utterance—is of little importance unless it has a significant impact on the oath taker's behavior. What is important about the Hippocratic Oath is not that physicians take it (they also all wear white coats) but that it plays a guiding role in medical practice. How is it able to do this?

Necessary Conditions for an Oath

Returning to question (1), taking the Hippocratic Oath is more than expressing an intention or even solemnly promising or committing oneself to act in certain ways. It is an act that is witnessed by a body, specifically the medical profession, and is part of a ritual of entrance into that body, i.e., becoming a physician. (It should be noted, though, that taking the Hippocratic Oath is a fairly recent development and also one not universally practiced, even today; and numerous versions of the oath are currently administered; Miles 2004.) Medicine is more than a job or career that individuals pursue; it is an organized, self-regulating profession that exists within a larger social and legal structure. Also, becoming a member of the bar and becoming an officeholder are to assume particular positions or offices within a certain legal and political order. Furthermore, as one writer observes, “An oath changes who one is.” “It is not merely a commitment to do something or not to do something. It is a commitment to *be* a particular sort of someone” (Sulmasy 1999: 332). Of course, one can be a physician without taking the oath (in this respect the Hippocratic Oath is different from an oath of office or admission to the bar), but in common practice, taking the oath is a mark of *being* a physician; it is part of who a physician *is*.

Another crucial feature of medicine and political office is that these roles involve specific rights, which, following Hohfeld (1923), consist of certain

powers, privileges, duties, liabilities, and immunities. Whether one has the status of a physician, a lawyer, or a public official makes an immense practical difference in the specific rights that one holds. The assumption of these rights occurs at some identifiable moment in which the taking of an oath is instrumental, and the oath concerns mainly the proper use of these newly assumed or conferred rights.

In addition, the Hippocratic Oath involves a pledge not only to the other members of the medical profession, who receive the oath taker into their number, but also to patients, for whom the oath is a critical part of their relationship. Thus, the physician–patient relationship, which is also an artifact of the social and legal structure of medicine, is constituted, in part, by the Hippocratic Oath. Similarly, an oath of office is a commitment to the public that an officeholder is now pledged to serve. Sulmasy (1999: 333) expresses this point as follows: “An oath is inherently interpersonal, creating a new reality between two or more persons. . . . An oath is a commitment to be a certain kind of person *for other persons*” (emphasis added).

This general point—that a person can be said to have taken the Hippocratic Oath only within the context of a larger complex system of medical practice with a recognized professional body and the physician–patient relationship—is even truer in the case of official oaths. Taking the oath of an office presupposes a well-developed political and legal system in which specific offices with enumerated rights and duties are created along with the mechanisms for determining the holders of these offices. Since an oath of office is typically a commitment to perform that office fully and faithfully, as well as a pledge to uphold the system of which it is a part, the defining particulars about that office and that system need to be previously established. A person could not take the oath for the office of the presidency of the United States, for example, were it not for the Constitution, the totality of U.S. law, and the electoral process whereby one assumes that office.

The Effectiveness of an Oath

The second question asks what gives an oath, such as the one taken by physicians and office holders, its effectiveness. Historically, there has been no mystery about this: the fear of misfortune from a self-curse or from divine retribution should be sufficient to compel compliance. Secular-based oaths, however, require less exotic motivation.

One source of effectiveness is surely the high *moral purpose* of an oath, which gives its taking a certain moral gravitas. Oaths are intended to be taken seriously, and this seriousness is often enhanced by the public, ceremonial circumstances in which they are administered. These circumstances not only make an impression on the oath taker but also create expectations on the part of the audience.

A ceremony alone, however, cannot create a high moral purpose. This must come from an understanding and expectation that the calling in question is of high moral worth. Both medicine and public service satisfy these conditions inasmuch as they serve important social goods to which physicians and public servants should be wholly, almost exclusively, committed. To be a physician or a public servant is a high calling.

A second source is the fact that oath taking is typically a means of achieving some significant identifiable transformation. As performative utterances, oaths do more than make a promise or commitment; they usually have more extensive consequences. Typically, the taking of the Hippocratic Oath marks the moment a medical student becomes a physician, and a person elected or appointed to office does not actually assume that office, with its rights and duties, until the oath is taken.⁵ In both cases, the taking of the oath is the means for effectuating a change, and the change, moreover, is a discrete, qualitative event. With the taking of a presidential oath, for example, a new administration begins.

Third, the failure to fulfill an oath generally has significant, reasonably certain *sanctions*, which are typically specified in the social and legal structure within which the oath plays a role. Thus, a physician can be sued for malpractice or lose a license to practice for violations of the Hippocratic Oath, and an office holder can be prosecuted, impeached, recalled, or otherwise expelled from office for violations of an oath. A lying witness can be prosecuted for perjury.⁶ It is worth noting, though, that, in theory, the sanction can be non-legal, as witness the divine sanction invoked in a traditional oath. Indeed, the traditional oath was developed to provide assurances in situations where legal sanctions were unavailable.

Finally, oaths are unlike their close cousins, promises and contracts, by being *unconditional* in that their terms are generally binding despite changes in circumstances or the conditions under which they are sworn. The large philosophical literature on promising addresses mainly instances in which a promise ceases to be a promise or to have binding force (Árdal 1968; Melden 1956; Raz 1977; Scanlon 1990). Of course, contract law deals extensively with the same issues about contracts, such as the conditions under which they become “null and

5 As a vivid illustration of this point, President Barack Obama retook the oath of office after the official inauguration ceremony in 2009 because the Chief Justice of the Supreme Court, who administers the oath, bungled the wording. This retaking was deemed necessary to forestall any charges that Mr Obama had not been duly empowered to assume the office of president.

6 Strictly speaking, the sanctions in these cases result from certain proscribed conduct other than the violation of an oath per se, and the conduct would typically result in these sanctions even if an oath were not taken. Similarly, sanctions for committing perjury while under oath are not, strictly speaking, for violating the oath taken but for offering false testimony, which could be made illegal even without the taking of an oath. This assertatory oath becomes merely a means for demarcating the testimony that is subject to sanctions for perjury. Still, such an oath may be effective in deterring the behavior that would lead to sanctions, in part, by reminding a witness of the requirement for truthful testimony.

void” or legally unenforceable. Oaths are more like vows, which are generally for life or some lengthy term and are binding come what may. In addition, traditional oaths are binding even when sworn under duress, a condition which might void a promise or a contract. Part of the unconditionality of oaths arises from their general precepts and idealistic or aspirational nature. It is easier to determine whether a promise or a contract has been broken because the terms are usually more precise, whereas it is often less clear whether oaths and vows have been broken, except in a few “bright line” cases.⁷

A Banker’s Oath

If a banker’s oath is something more than a promise or commitment or, even weaker, merely an acknowledgment of a code, but is an instrument for transforming the swearer’s status, comparable to becoming a physician or assuming an office, then the nature of this transformation must be identified. How is a banker different after swearing the oath? In Austinian terms, as a performative utterance, what act has the utterance of a banker’s oath performed?

First, it is evident that by swearing an oath, one has not, thereby, *become* a banker, and there is no recognizable *body* of bankers that one joins. Being a banker is a distinct, and generally distinguished, job or career that individuals pursue, but it is not a profession that one joins or—with an exception to be considered shortly—an office that one occupies. Banking is rather an activity that one is free to engage in, much like any other commercial activity, such as being a butcher or a baker, who, today, do not take oaths (although they did in medieval times). The activity of banking is an important one that is of great value for society, but the same is true, again, for butchers and bakers and for many other occupations, so the importance of a job or career alone does not create the necessary context for oath taking.

Second, becoming a banker does not, in general, involve the conferring of certain powers, privileges, duties, liabilities, and immunities which collectively constitute the rights that are assumed in becoming, say, a physician or officeholder and that a person swears an oath to exercise properly. The reason for this lack of rights is that banking is largely a commercial or business activity which is constituted by market transactions or contracting. A banker agrees to perform certain services as a market actor, acting like any other market actor as the provider of some good or service that is offered in exchange. Whatever rights are involved in banking are those available to any market actor *qua* market actor and are not assumed or conferred in some special way.

⁷ The marriage vow is violated by adultery and abandonment, but few other acts in a marriage so clearly constitute a violation.

Third, the interpersonal character of an oath, which is inherent in the oath taking of physicians and office holders, is absent in the case of bankers, and for the same reason as the absence of rights. Just as the commercial or business nature of banking makes bankers largely market actors and not occupiers of roles with specific sets of rights, so too does it make bank customers or clients largely market actors as well, as individuals who contract with a bank for certain services. Moreover, citizens are forced to deal with public officials—and patients often have little choice with regard to medical treatment—but people have many options with regard to banker services. As such, bank customers or clients are crucially different from patients and citizens in their relationship with the oath taker. Whereas a physician or office holder commits “to be a certain kind of persons for others” in a physician–patient or officeholder–citizen relationship, a banker can pledge only to observe the contracts made in market contracting. In short, the banker–customer relationship is that of buyer and seller, which has little interpersonal character.

A possible exception to this argument is that officers and directors of banks are officeholders for whom taking an oath on their accession to office would be similar to that of a government official. In addition, banking is not wholly a matter of buyer–seller market transactions or contracting; bankers become fiduciaries in at least some aspects of their business, and they often enter into relationships as trusted advisors and agents. This dual aspect of banking activity is reflected in the uncertainty that exists in banking over whether another party is a *customer* (in a buyer–seller relationship) or a *client* (for whom the banker is a trusted advisor and/or agent).⁸ To compound the uncertainty, a party may be a customer for some purposes and a client for others, or indeed both a customer and a client in the same transaction (for example, when a bank sells a swap to a client and assumes the role of counterparty by taking the other side).

These exceptions do little to provide the conditions necessary for oath taking. It might be appropriate for a bank officer or director to take an oath, but such an oath would be to serve the shareholders⁹ by discharging the duties of the office in their exclusive interest. Furthermore, the rights possessed by a bank officer or director are those conferred by the shareholders for their exclusive benefit; there would be little benefit to non-shareholders from assurances in an oath that these rights would be exercised properly. This oath, if taken, would have a limited audience and would thus fail to establish any relationship with the constituencies that are intended to benefit, for example, from the Dutch banker’s oath. Indeed, it

8 The same distinction may be made between *counterparties* and *principals*. The former are merely market participants, who, if they are “sophisticated investors,” may be assumed to know what they are doing and thus to require no care; the latter are parties who have engaged the bank to act on their behalf so that the bank becomes their agent, with a duty to act in their interest.

9 Or the other partners in cases where the bank is a private partnership.

is the exclusive focus on shareholder interests that the Dutch oath is designed to counter. An oath that is focused on a bank's clients would have a greater effect, and, indeed, much of the content of the Dutch banker's oath would benefit bank clients. However, an oath in which clients are the main audience would still fall short of protecting the broader public, which is certainly a major aim of the Dutch banker's code in its effort to restore trust.

With regard to the matter of effectiveness, the condition for an oath's effectiveness that derives from a commitment to a role with a high moral purpose would, in an ideal world, also be met by banking. In the actual world, bankers have done little to foster the idea that they serve a higher calling.¹⁰ There is no reason in principle why banking and finance generally could not be elevated to a status similar to the roles found in medicine and public service (Shiller 2012), but the banking industry would need to be very different from what it is today. The report *Restoring Trust* expresses the hope that a banker's oath might help improve the reputation of the banking industry, but this hope fails to recognize that the effectiveness of a code depends, in part, on the prior existence of precisely the sense of a high moral purpose that the oath is designed to achieve. An oath alone cannot achieve this.

A more serious obstacle to the effectiveness of a banker's oath is that there is no change or transformation that such an oath can effectuate. The taking of the oath leaves an oath taker in the same status or position as before, as a banker. As a performative utterance, the oath is merely a promise or commitment to act in certain ways, but it does not perform any act beyond this. The reason for this lack of change is related to a banker's role, which, as previously noted, involves a fairly routine commercial or business activity. There is nothing to change *into*.

In addition, the effectiveness of a banker's oath is currently limited by the lack of any significant, reasonably certain sanction for any violation, except, of course, for illegal acts, which could be prosecuted in the absence of an oath. A lawyer can be disbarred; a physician, lose a license to practice; an officeholder, be impeached; but, at the present time, a violator of a banker's oath is not prevented by similar means from participating in the banking industry. The absence of a sanction also deprives a banker's oath of any meaningful sense of unconditionality: if an oath taker cannot be held to account for any violations, then it cannot be meaningfully said that he or she is still bound by the oath. What does it mean to say that one is bound by an oath that one can violate with impunity, except that one has broken a promise or a commitment? (Eternal damnation might restore the binding force of an oath, but that, alas, is no longer feared by most bankers!) The distinction

10 Evidence of this is the derision that occurred when Lloyd Blankfein, CEO of Goldman Sachs, was quoted in the *Times of London* as saying that he is just a banker "doing God's work." A spokesperson for the bank later admitted that Mr Blankfein did not intend his remark to be taken seriously (Weil 2011).

between an oath or a vow on the one hand and a mere promise or commitment on the other breaks down in the absence of any significant consequences.

The unconditional nature of oaths derives from the transformation that oaths effectuate and, especially, from the sanctions imposed for violations. A transformation can be reversed or altered only by some other act comparable to taking an oath. For example, a physician or an attorney ceases to be bound by the oath taken only by leaving the profession, say in the event of license revocation or disbarment. Sanctions for violations of an oath reflect the fact that an oath is binding indefinitely or for some fixed term, without regard for the intent of the oath taker. One cannot alter the binding force of an oath on one's own; the existence of sanctions puts that power in the hands of others. Consequently, a banker's oath could not be said to be unconditional in the absence of some transformation or sanctions.

The conclusion to be drawn, then, is that the conditions under which a banker's oath would be taken are not comparable to those of professional oaths, such as in medicine and law, or oaths of office. A banker's oath would not be fully like the physician's Hippocratic Oath, for example. The reasons that lead to this conclusion derive from a common feature, which is that these oaths occur in a larger institutional setting in which an individual assumes a certain role with distinct rights or powers and also certain responsibilities. An oath serves the function of marking the assumption of this role and of committing the holder to exercise these rights and powers of this role responsibly for the benefit of others. This element of benefit or service, which is essential to a profession and to public office, provides much of the motivation or rationale for taking an oath, since such oath taking assures others that a role with its rights or powers will be filled responsibly.

Despite this negative conclusion, a banker's oath, even if it is not fully comparable to the physician's Hippocratic Oath, could still be a kind of promise or commitment which might be effective in influencing behavior and would be worth adopting for that reason. In this case, it is not the oath *taking* itself that is significant but the *content* of the oath, which would function not like a typical oath but more like a code. The performative utterance in question would be a promise or commitment to abide by this code. With regard to such an oath as a code, the main question is the adequacy of its prescriptions to serve as a guide to conduct. Is it a code that would serve well in banking?

THE DUTCH BANKER'S OATH

Virtually all banks have a code of conduct for their employees, and so a separate banker's oath—which would be inevitably briefer and less specific—might seem redundant. Individual bankers are typically required to sign a statement acknowledging a code, often annually, and an oath would add little to this ritual,

except perhaps an element of solemnity. It would be easy, therefore, but also unhelpful, to criticize the Dutch banker's oath for its lack of specificity and motivating force. A more important question, though, is whether any code in banking, no matter how specific and well enforced, could provide the kind of guidance that would enable a banker who followed it to act ethically. Could a conscientious banker find in, say, the Dutch banker's oath a reliable guide through the ethical situations that commonly arise in banking?

The Dutch banker's oath is used as an example here because it is the only Hippocratic-like oath that has been officially adopted, but the results of this examination apply to any banking code, of which there are many. The aim, however, is not to criticize this particular oath but to examine the inherent limitations of all oaths and codes in banking. Furthermore, the aim here is not to consider the effectiveness of oaths or codes themselves as instruments of control but to focus instead on code content and, in particular, the practical guidance provided by the Dutch banker's oath and other similar codes.

Before doing so, it may be helpful to acknowledge the considerable research on codes and their effectiveness (Coady and Bloch 1996; Dobson 2003; Gilman 2005). In addition to this research specifically on codes, investigations by social psychologists into moral decision making and conduct show that any such guidance tends to be ineffective inasmuch as wrongdoers often fail to see any ethical issue present in a situation or else have rationalized their behavior so as to deny any ethical lapse (Bazerman and Tenbrunsel 2011; Messick and Bazerman 1996). Other social psychology research suggests that moral decision making is largely an intuitive response that involves little rational reflection which could be influenced by an oath or a code (Haidt 2012).

Finally, as Messick and Bazerman (1996) argue, much wrongdoing is also simply bad business decision making caused by psychological traits to which we are all prone. Such mistakes are unlikely to be deterred by ethical thinking. In a related vein, Hanlon's razor advises, "Never attribute to malice that which can be adequately explained by stupidity." To this, Hubbard (2009: 55) has added: "Never attribute to malice or stupidity that which can be explained by moderately rational individuals following incentives in a complex system of interactions." These psychological causes of wrongdoing also show the limitations of an oath or a code in preventing misconduct of the kind that occurred in the recent financial crisis.

Examples of Oaths

The Dutch banker's oath reads:

- I declare that I will perform my duties as a banker with integrity and care.

- I will carefully consider all the interests involved in the bank, i.e., those of the clients, the shareholders, the employees, and the society in which the bank operates.
- In this consideration, I will give paramount importance to the client's interests and inform the client to the best of my ability.
- I will comply with the laws, regulations, and codes of conduct applicable to me as a banker.
- I will observe secrecy in respect of matters entrusted to me.
- I will not abuse my banking knowledge.
- I will act in an open and assessable manner and I know my responsibility toward society.
- I will endeavor to maintain and promote confidence in the banking sector.
- In this way, I will uphold the reputation of the banking profession.

Other proposed oaths are the USA "Financial Hippocratic Oath," which reads in part,

I pledge:

- To act with integrity, competence, respect, and objectivity.
- To observe all laws in letter and spirit.
- To place the interests of my clients, colleagues, and community ahead of my own.
- To disclose conflicts of interest.
- To seek fair fees and appropriate compensation.
- To respect client confidentiality and trust.
- To use all information appropriately.

And from the UK:

I hereby swear . . . I will treat my clients at all times as I would wish to be treated. I will not allow the pursuit of personal gain to cloud my fiduciary role. I will strive to achieve, through hard work, sober analysis and sound judgment, the best risk-adjusted return for my clients possible. I will not, however, pursue these returns to the extent that my actions will knowingly harm others. (Thomas and Barnes 2010)

In the following discussion of these oaths, three main areas are identified for examination: the treatment of clients, the handling of confidential information, and issues connected with risk. The main conclusion in each case is that determining the ethical course of conduct about these matters requires considerable judgment and is not easily reduced to any simple guidelines or rules.

Clients, Customers, and Counterparties

A key feature of virtually every banking oath and code is service to *clients*. The first of Goldman Sachs's Business Principles is "Our clients' interests always come first." However, Lloyd Blankfein, the head of Goldman, responded in a congressional hearing to allegations that the firm had bet against securities it had packaged by saying that the buyers were "sophisticated investors" who had wanted to assume this risk and should be allowed to do so (Story 2010). This response suggests that the buyers were not clients at all or else were clients, or perhaps just customers, who were not owed a high level of care. Their interests certainly did not "come first" in this instance.¹¹ Although Mr Blankfein's comments and those of his colleagues were received scornfully, they point up one of the most difficult issues in banking ethics, namely determining who is a client and what a client is owed. Neither Goldman's first principle nor the Dutch oath's commitment to give "paramount importance to the client's interests" provides much help in addressing this issue.

This issue is not merely one of making a proper distinction but involves more complex judgment. In banking, the same party may be a client in one transaction, merely a customer in a buyer–seller relationship in another, and a counterparty with opposed interests in yet a third, possibly at the same time. Thus, the parties with which a banker is dealing must be categorized for each transaction.

For example, a commercial bank that offers demand checking and savings accounts to the public is a fiduciary for customers in the handling of deposits, with a fiduciary duty to ensure that the funds are safeguarded and available for withdrawal. This duty extends to prudent lending practices inasmuch as the depositors' money is placed at risk in the loan process (although the risk is mitigated by the bank's own capital and by deposit insurance). However, the accounts offered by the bank are themselves conventional consumer products that may be offered for "sale" in a standard buyer–seller relationship. A bank is not a fiduciary in the sale of these products and owes nothing to its customers beyond the obligations of any seller (which may still be extensive).

This feature of banking became an issue in the USA when banks, in an effort to recover lost income due to the Dodd-Frank Act, attempted to increase the return from fees for overdrafts from debit cards.¹² Among the means employed was the debiting of daily charges in each category from the largest to the smallest. As a result, a large charge at the end of a day, when debited first, could result in

11 The case in question concerns a security called ABACUS 2007-AC1. For details, see the complaint of the Securities and Exchange Commission, United States District Court, Southern District of New York, *Securities and Exchange Commission v. Goldman Sachs & Co. and Fabrice Tourne*, 10-CV-3229.

12 See, e.g., *In Re: Checking Account Overdraft Litigation*, United States District Court, Southern District of Florida, Miami Division, Case No. 1:09-MD-02036-JLK.

multiple overdrafts, and hence multiple overdraft fees, for charges incurred earlier, at which time a user's account may have had sufficient funds. The banks contended that this method of debiting was in the customers' interest since larger charges tended to be more important ones which the customer would want honored, but ample evidence exists that the main, if not sole, purpose of this method was to increase overdraft fees, which surely shows little regard for the customers' interests.

It could be argued in the banks' defense that they have no duty to consider the customers' interests in the sale of a product. A bank's customers should be allowed to decide whether the product is one they want and, as long as the terms are fully disclosed, they can protect their own interests in making a choice. Whatever level of care is owed to a bank's customers in the sale of a product, it falls far below the fiduciary duty owed for the care of their deposits. The two relationships—of fiduciary guardian and seller of a product—give rise to different moral obligations. The weakness of the banks' defense lies not in any alleged duty to consider the customers' interests in the sale of a product but in the disclosures made—or not made. In several cases, the banks in question failed to adequately explain, among other details, the crediting method and the option to refuse overdraft protection.

To complicate matters further, a bank and a client can have different relationships within the same transaction, and indeed such cases are common and unavoidable in banking. For example, when a client is seeking a swap, such as an interest-rate or a currency swap, the bank may find a counterparty (in which case the bank is a pure intermediary between the two sides), or else it may take the other side itself and become a counterparty of the client. As a counterparty, the bank may either hedge the risk or else assume it, but in either case the bank must price the risk (including the cost of any hedge). A bank typically assures a client that it is selling the swap (and assuming the risk of the other side) at a fair market price. Indeed, a client may be relying on the expertise of the bank when the price of the swap is not easily determined.

However, the client is still treated by the bank as a counterparty with no fiduciary duty to act solely in the client's interest. To expect a fiduciary duty to the client in this situation would be unreasonable since the bank is also a counterparty to the transaction that the client has sought from the bank. However, a bank that is selling a swap is not in a pure buyer–seller relationship either (as in the checking account customer example) because the bank is offering to put its expertise at the service of the client. As a result, the client is not merely a customer but a party to which the bank owes some level of care. But what level?

The point may be generalized by saying that the clients of a bank do not all fall into one category, as parties whose interests “always come first” or come with any

single level of priority. The relationships between a bank and any given client may range widely depending on the particular transaction. A bank's relationships with all its clients fall on a continuum from a very strong fiduciary duty to act solely in a client's interests in some matters to pure arm's-length transactions with counterparties, who may be regarded as "sophisticated investors" whose mistakes may be ruthlessly exploited as trading opportunities. Where a client in a particular transaction falls on this continuum cannot be determined by any simple guide, such as "I will give paramount importance to the client's interests."

Behind this point lies an essential difference between banking and professions, such as medicine and law, and between banking and public service. Physicians and attorneys have relatively singular, uniform relationships with those they serve as patients or clients, and they typically have one set of skills that they employ repeatedly. Patients and law clients, moreover, each have a narrow range of interests to be served. Furthermore, these relationships involve a commitment to exclusive, dedicated service for one end, to benefit the patient or client. In these relationships, professionals give up virtually all right to pursue their self-interest—though they are usually well compensated for doing so. Similarly, citizens and public servants have a relationship in which the interests of the former and the duties of the latter are fairly limited and defined. Consequently, it is easy to understand—and to express in an oath or a code—what it means for professionals and public officials to serve others.

Bankers, by contrast, provide many different kinds of services for multiple clients, often with diverse and competing interests, and they do so with differing understandings of the services being offered. Unlike the professions, in which the terms of the relationship are relatively fixed by tradition and practice, bankers' relationships with clients are contractual in character and can vary considerably depending on the contracts formed. Moreover, banking is a business or commercial endeavor in which self-interest is a legitimate and ever-present factor. Consequently, a banker, unlike a professional, must constantly seek to balance the care owed to a client's interest with the appropriateness of self-interest. The proper balance between these two may depend, further, on the contracts in question. Thus, one bank may position itself as a client-focused servant whereas another may foster a reputation for aggressive proprietary trading. As long as a bank is honest in its representations to clients and abides by all contracts made, any balance can be proper; there is no single right balance.

In summary, although clients' interests are central to banking, they are not always paramount or first in priority, nor should they be. And the task of discerning exactly what is owed to any given client is a matter for highly nuanced judgment based on the particular transaction and the contractual relationship that has been established. The roles of bankers and the relationships they have with

clients are very different in several crucial ways from those of professionals, and so the kind of oath or code that provides sound guidance in medicine and law, for example, cannot function as effectively in banking.

Use and Abuse of Information

After a concern for clients, issues involving *information* receive the greatest attention in both the bankers' oaths and bank codes of conduct. This is to be expected given, first, the need to guard against insider trading and other illegal uses of information and, second, the need to protect valuable information of the bank and its clients from disclosure to others. As in medicine and law, it is necessary for those who receive services to disclose a great deal of sensitive information, and they are willing to do so only on the condition that this information be kept confidential and be used only for the purpose for which it was provided. Not only could the knowledge of such information by others harm the client, but the information may also have value that the client has a right to protect as a kind of property.

This rationale for a duty not to disclose confidential information to unauthorized parties applies with equal force in the professions and in banking. The more problematic issues concern the *use* of information *within* a bank. The strong principle, which applies in the professions, is that no information may be used for other than its intended purpose for the benefit of the patient or client who has provided it except with that party's knowledge and consent.¹³

This strong principle is generally recognized in banking for some uses. An example of improper use of information is front running, in which a brokerage firm uses knowledge of a client's trading to make trades before the client's orders are executed. This practice enables the firm to benefit from any price rise due to the client's trading, but it may also raise the price for the client's trades. In addition, the bank is benefiting from the client's trading strategy, which may be proprietary and represent an investment of resources. Another impermissible use of information occurs when a business seeking funds from the commercial loan department of a bank discloses information that, if known by others, could reduce the value of its securities, some of which might be held by the bank's own trust department. Although the knowledge of such information by the trust department

13 Less clear is the duty of confidentiality for information about a patient or client that has been acquired from some other source. If that source is public, then there is no duty of confidentiality, and if non-public information is acquired from some source other than the patient or client under a pledge of confidentiality, then a duty of confidentiality still exists to this other source. In other cases, it might be argued that a professional has a duty not to disclose non-public information that might harm a patient or client but that this duty results not from a duty of confidentiality but from a more general duty to act in that person's interest.

would certainly benefit the trust clients—and perhaps the bank’s shareholders—its disclosure outside the commercial loan department is considered by most banks to be improper, and “Chinese walls” are usually erected to prevent even the internal sharing of such information.

Beyond these easily handled examples, in which the use, rather than the disclosure, of information is at issue, lie difficulties. Most of these difficulties occur in issuing and trading securities and other financial instruments, which require banks to determine prices very accurately. For example, a bank is able to price an initial public offering only after ascertaining the demand from its clients. Or consider banks which serve as primary dealers in Treasury securities auctions. They submit sealed bids on behalf of their clients and themselves at prices that must be very carefully calibrated. Primary dealers also function as market makers by standing ready to buy back any securities from clients at any time, but at a price that is determined by the bank. Banks have similar price discovery roles in derivative transactions—selling swaps, options, and other such products to clients.

As a result of these activities, a bank must be able at any point in time to put a market price on any particular security or other financial instrument. This task requires a great deal of information, not to mention information-processing capability. Much of the information itself comes from knowledge derived from dealings with a bank’s own clients, and the larger the number of such clients and the volume of their business, the greater this information. Thus, a primary dealer in Treasury securities is able to determine the demand, and hence the price, for any given issue from its own clients’ orders, and a bank’s success as a primary dealer is crucially dependent on this information. Although the use of this information helps a bank serve clients and thereby provides a benefit, the information is not used *solely* in pursuit of the clients’ interests. Nor is the information always used with the client’s knowledge and consent. The bank is using it to advance its own interests in its various functions, as well as to engage in its own proprietary trading.

In addition to the information needed for pricing securities and other financial instruments where market prices are not readily available, clients provide a great deal of other information that may be said to constitute a bank’s knowledge of the business world, on which its success is built. Banking is a knowledge-intensive industry, in which close, wide-ranging contact with businesses is essential. Consequently, a strong principle of confidentiality that would restrict or prohibit any use of client information for other than its intended use would make many of a bank’s core activities impossible.

Since some uses of client information are unethical—as in the examples previously cited—it is necessary to find some principle for making a distinction. Under what conditions is it ethical to use information obtained from clients for

other than its intended use without their knowledge and consent? Such simple guides as “I will observe secrecy in respect of matters entrusted to me” and “I will not abuse my banking knowledge” do not answer this question.

An answer is provided by the manner in which client information is used or by the process involved. The duty of confidentiality owed by a professional, and also a fiduciary, typically addresses the use of single, discrete pieces of information that are of use by themselves. A public accountant, for example, would be barred by a duty of confidentiality from using a piece of confidential information acquired during the course of an audit of one client in the audit of another, especially if the first client would be harmed by so doing.¹⁴ By contrast, the client information typically used by a bank for purposes of determining prices consists of masses of small bits of data derived from many clients, which is combined together along with a substantial amount of its own proprietary information and public information to produce some estimation of a market price. Sometimes this combining is done through formal modeling; at other times it forms a basis for intuitive judgments. Moreover, in this process, the link of the information with specific clients is not taken into account, and the outcome often involves an extrapolation from the information that constitutes a significant addition.

Thus, the knowledge gained by a bank from the totality of its dealings with clients depends crucially on information provided by clients, but it does so in a way that the bank is not using any specific piece of information as the sole basis for a decision, which is the typical case that is prohibited by the duty of confidentiality in the professions. Moreover, the information from any one client is combined with a great deal of other information, both propriety and public, with the addition of a bank’s information-processing ability, to yield a distinct, separable outcome that a bank is entitled to claim as proprietary. In this way, the information provided by clients ultimately becomes the bank’s own. Although this distinction is clear in many cases, a large gray area still exists where the ownership and hence the duty of confidentiality are uncertain and must be determined by careful judgment. In this gray area, an oath’s admonition to “observe secrecy” or “not abuse my banking knowledge” is not very helpful.

Managing Risk

The Dutch banker’s oath and virtually all other oaths and codes in banking make no mention of risk. This omission is surprising given J. P. Morgan’s quip, “The

14 Observing this duty, though, may bring the accountant into conflict with a duty of candor to disclose all relevant information to a client. See, e.g., *Fund of Funds, Ltd v. Arthur Andersen & Co.*, 545 F. Supp. 1314 (1982), in which an accounting firm was successfully sued for failing to disclose a fraud against the plaintiff by another client using information that the firm had gained from auditing that other client.

fact is that bankers are in the business of managing risk. Pure and simple, that is the business of banking” (Buder 2009: 143). Compounding this surprise is the prominent role that a failure of risk management played in the recent financial crisis (Jorion 2009). Two explanations suggest themselves: either risk management is regarded as outside the role of a typical banker, belonging instead to specialized risk managers or to the top management of a bank, or else risk management is not a matter of ethics at all but something ethically neutral. The first explanation has some plausibility, but not the denial of risk management’s ethical aspects in view of the way in which risk was imposed on unwitting homeowners, naïve investors, and indeed almost everyone in the recent financial crisis. Also, the moral hazard inherent in the banking system, especially in banks deemed “too big to fail,” which encourages excessive risk, is an obvious ethical matter.

The risks that banks manage can be classified into three groups: the risk to the bank itself, the risks faced by clients for which they seek a bank’s services, and the risk that a bank poses to third parties and, indeed, the whole society. A bank, like any business, obtains a return from the risks it takes with its own capital. The aim in this business is not to avoid as much risk as possible but to obtain the highest return within the bank’s risk tolerance. As Morgan Stanley states in its *Business Principles*, “Embrace risk but manage it aggressively.” In responding to client needs, banks face the tasks of advising clients about their risks and of creating and selling loans, securities, derivatives, and other financial products that both create and reduce risk. Through their various services to clients, banks have a strong influence on the risks that clients take, as well as the returns they receive from taking these risks. An example of the risk that banks create for others is risky mortgages, such as those involved in the financial crisis. These toxic products not only increased risk for homeowners, leading in many cases to personal bankruptcy, but also resulted in a drop in home prices and a reduction of home equity that affected virtually all homeowners, even those without mortgages. In addition, the mortgage-backed securities that banks packaged from these risky mortgages ended up in the mutual and retirement funds of investors worldwide, resulting in an immense loss of wealth.

Without doubt, mistakes by banks in the management of risk—their own risk and that of others—occurred in the recent financial crisis. Whatever these mistakes might be, though, a lack of attention to risk management was not among them. Indeed, the opposite is true: the financial crisis was due in large measure to an overreliance on and misplaced confidence in the sophisticated risk management tools that have been developed in recent years. In particular, statistical models played a large role in causing the crisis.

The deficiencies in risk management generally and statistical modeling in particular are well known and need not be enumerated here (Bernstein 1966;

Danielsson 2002; Jorion 2009; Rebonato 2007; Stulz 2008, 2009; Taleb et al. 2009). These deficiencies may have also been exacerbated by greed (Partnoy 2003) or complexity (Bookstaber 2007). In any event, it is challenging to identify how an oath or a code might give some guidance in the managing of risk, especially in the development and use of statistical models. The faulty decision making in the crisis might be attributed simply to a lack of prudence, as one writer suggests (Scordis 2012). Although prudence is an ethical virtue, it is too vague in content to provide much guidance.

Into this void have stepped two distinguished insiders of the modeling community, Derman and Wilmott (2009), with a manifesto and “The Modelers’ Hippocratic Oath,” which reads:

- I will remember that I didn’t make the world, and it doesn’t satisfy my equations.
- Though I will use models boldly to estimate value, I will not be overly impressed by mathematics.
- I will never sacrifice reality for elegance without explaining why I have done so.
- Nor will I give the people who use my model false comfort about its accuracy. Instead, I will make explicit its assumptions and oversights.
- I understand that my work may have enormous effects on society and the economy, many of them beyond my comprehension.¹⁵

This oath expresses, first, an awareness that models are attempts to understand human behavior, which cannot be reduced to laws like those in science, and, second, a commitment to be modest and transparent in the use of models, especially in communication with non-specialists. Further, models cannot be relied upon exclusively. They write in their manifesto, “You must start with models and overlay them with common sense and experience.”

Like the Dutch bankers’ oath, “The Modelers’ Hippocratic Oath” provides modest guidance at best. One obvious shortcoming is the difficulty of questioning models when they support activities that are so profitable for banks. It’s hard to argue with success, which creates confidence in the models by the apparent confirmation and also puts a burden of proof on those who would act differently. Moreover, the results of models must be interpreted to serve as a basis for action, and there is a strong temptation to interpret them in ways that support profitable activities. As an example of bankers resisting this temptation, Nocera (2009) cites a decision by Goldman Sachs to reduce the firm’s exposure to mortgage-backed securities when value-at-risk (VaR) numbers were changing but still within

¹⁵ Available at <http://www.wilmott.com/blogs/eman/index.cfm/2009/1/8/The-Financial-Modelers-Manifesto>.

acceptable limits. VaR, which is a common measure of risk for banks' portfolios, led many banks to maintain and even increase their exposure to the housing market, and Goldman could have continued to do this as well. However, the managers at Goldman interpreted the VaR numbers—fortunately, as events developed—to suggest dangers.

Second, the use of models produces complacency when all market participants use the same models, with the same assumptions and data, since a consensus develops that is reflected in and reinforced by their similar trading activity. When everyone pursues the same strategies, the resulting price rises seem to confirm the wisdom of those strategies—until the momentum flags. Moreover, the modelers themselves have an incentive to do what others are doing so as to avoid blame for any errors. This safety in following others is the basis for the witty quip, attributed to John Maynard Keynes, that a prudent banker is one who goes broke when everyone else does. This kind of herd behavior not only creates bubbles, as the prices of assets are artificially boosted, but it also increases the losses when so many banks, holding the same positions, try to dump them at the same time. One lesson from this point is that modelers must take into account the impacts from others using the same tools.

Third, the more caution with which models are used, the greater the confidence users may have that risks are well managed. This may create a greater tolerance or appetite for risk with bankers feeling that they can take greater risks because they are so precisely measured. This problem is compounded by the fact that the models typically do not take account of the herd behavior that occurs when a crisis develops and everyone is trying to sell in a so-called “Minsky Moment.” Daniélsson (2002: 1274) observes, “The basic statistical properties of market data are not the same in crisis as they are during stable periods; therefore, most risk models provide very little guidance during crisis periods.” Since crises are periods when the greatest loss is incurred, this is a major drawback in relying on models to manage risk. They have been compared to an airbag that always works except in crashes (Einhorn and Brown 2008: 12).

Fourth, models can help manage risk only in conjunction with other safeguards, and their value is diminished as these safeguards are removed or degraded, as occurred in the recent financial crisis. These safeguards are quite diverse, including as they do fraud detection, rating agency monitoring, government regulation, management controls, and the like. The prevalence of fraud in mortgage origination is well known, as are the failures of the rating agencies and government regulators. As an example of management factors, Bhidé (2010a, 2010b) argues that statistical models have replaced individual judgment in too much of financial activity and that modern finance requires a more judicious balance between expert systems and human decision making. In the run-

up to the financial crisis, managers who voiced opposition were often moved out of the way. Rajan (2010: 141) reports that after expressing surprise that a group of bankers he was speaking to were not alarmed about risks in the housing market, one of them explained privately, “You must understand, anyone who was worried was fired long ago and is not in this room.”

Finally, a Hippocratic Oath for modelers cannot be expected to address the powerful and often perverse incentive systems within which they are employed. To the extent that models are able to incorporate incentives, they are apt to exacerbate the problem. One perverse incentive is the moral hazard that is present in banks that are deemed “too big to fail,” but moral hazard is present in many other ways, as when the risk from faulty mortgage lending is shifted both to borrowers and to the ultimate investors in mortgage-back securities. The short-term focus of most incentive plans also insulates most participants in the recent financial crisis from the longer-term losses that their actions caused. This focus led to the cynical acronym IBGYBG (“I’ll be gone, you’ll be gone”), which prompted many participants to engage in actions that they knew at the time would result in losses for someone—but not themselves.

Although a banker’s oath should give some attention to risk management—perhaps even incorporating the Modeler’s Hippocratic Oath—the challenges of risk management in banking suggest the limited effectiveness of any guidance that an oath could give on this matter. Like the problems involving the treatment of clients and the use of information, the situations that an oath or a code must address require considerable judgment that cannot be easily reduced to a few simple admonitions.

CONCLUSION

The adoption of a banker’s Hippocratic-like oath is an attempt to restore trust in an industry whose reputation was tarnished by the recent financial crisis. Part of the appeal is, no doubt, to benefit from the trust created by oath taking in medicine, law, and public service. If the resemblance is to be more than superficial, then banking would have to be like a profession or public office in which individuals assume certain rights and powers and pledge to exercise these responsibly. Since banking lacks the relevant characteristics of a profession or public office and could not reasonably be expected to acquire them, a banker’s oath is incapable of serving the role of oaths in these other contexts. In Austin’s terms, it could not be a performative utterance.

This result alone need not lead us to reject the Dutch banker’s oath. The recommendation of the Advisory Committee on the Future of Banks in the Netherlands was merely that bankers “should sign a statement regarding ethics

and morality”—an oath is not mentioned. If the idea of an oath like that taken by physicians and others is dropped, then the statement adopted becomes more like a code that bankers are asked to pledge or promise to observe. Since virtually all banks have codes of conduct that members are often asked to sign in acknowledgment, an oath would add only an element of solemnity, which may nevertheless be constructive.

However, banking is different from the professions and public service in another crucial respect: The almost exclusive focus in these fields on selfless service to others—be they patients, clients, or citizens—creates strong, relatively well-defined duties or obligations that can be expressed in a succinct statement, whereas the commercial nature of banking, in which self-interest plays a large and legitimate role, does not permit the easy formulation of a precise statement of rules. Put simply, the professions and public service have many bright lines, while banking is full of gray areas. Even very lengthy, legalistic bank codes are incapable of giving unambiguous guidance on some of the most ethically problematic situations that arise in banking.

Consequently, sound ethical judgment will always be required in banking, and an oath or a code can provide only a starting point for developing this capacity. However, the kind of judgment required can be facilitated by many factors, including the culture of an organization, the legal and regulatory environment, and the design of practices and institutions. The recent financial crisis, which exhibited much unethical behavior, was due, in part, to changes in all of these factors over many years. Ultimately, the conduct of bankers is a reflection of the whole banking system, and it is this system that must be reformed if we are to avoid more crises.

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NOTES ON CONTRIBUTOR

John R. Boatright is the Raymond C. Baumhart, S.J., Professor of Business Ethics in the Quinlan School of Business at Loyola University Chicago, and the Director of the Baumhart Center for Social Enterprise and Responsibility. He has served as the Executive Director of the Society for Business Ethics, and is a former president of the Society. He is the author of the books *Ethics and the Conduct of Business* and *Ethics in Finance*, and the editor of *Finance Ethics: Critical Issues*

in Theory and Practice. He has contributed chapters to many books, and has published widely in major journals. He serves on the editorial boards of *Business Ethics Quarterly*, *Journal of Business Ethics*, and *Business and Society Review*. He received his PhD in philosophy from the University of Chicago.