

Considering The A.B.A.'s 1908 Canons of Ethics*

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Introduction

Nearly 100 years ago, the American Bar Association (“A.B.A.”) promulgated the first national code of legal ethics in this country. From its adoption in 1908,¹ until it was superseded by the A.B.A.’s Model Code of Professional Responsibility (“Model Code”) in 1970,² the Canons of Ethics³ (“Canons”) were the authoritative norms regarding lawyer conduct in the United States.⁴ By 1910, twenty-two

*This article is part of the Symposium, *The Legal Profession: Looking Backward*, begun in Issue 4 of the current volume of the *Fordham Law Review*. See 71 *FORDHAM L. REV.* 1181, 1181–1668 (2003). Copyright (c) 2003 Fordham Law Review; James M. Altman. Reprinted with permission.

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1. See Discussion Upon Canons of Ethics, 33 *A.B.A. Rep.* 55–86 (1908).

2. Although adopted at the A.B.A.’s annual meeting on August 12, 1969, Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 *ARK. L. REV.* 1, 1 (1970), the Model Code became effective on January 1, 1970. Report of Special Committee on Evaluation of Ethical Standards, 94 *A.B.A. Rep.* 728, 728 (1969).

3. Although they were often referred to, and popularly known as, the “Canons of Professional Ethics,” see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 241 n.7 (1992) [hereinafter, Pearce, *Republican Origins*] (citing, e.g., HENRY S. DRINKER, *LEGAL ETHICS* 309 (1953)), their proper title was the “Canons of Ethics.” See *infra* App. The 1908 Canons of Ethics, as finalized by the Committee and distributed to the A.B.A. Members, is reprinted in an appendix to this article. All citations herein to the text of the Canons refer to the appendix.

4. Throughout this article, I use the terms “norm” and “normative” with respect to lawyer conduct to refer generally to prescriptions about what lawyer conduct should be. Codes of ethics, such as the Canons, are one type of norm regarding lawyer conduct; they are not, however, the only type. Indeed, as other scholars have observed, the nature of the A.B.A.’s norms regarding lawyer conduct has changed in the years since the Canons were adopted. See Richard L. Abel, *Why Does The A.B.A. Promulgate Ethical Rules?*, 59 *TEX. L. REV.* 639, 686–87, 686 n.257 (1981) (noting decreasing ethical content in the A.B.A.’s normative statements regarding lawyer conduct); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE L.J.* 1239, 1249–60 (1991) (describing the “legalization” of “fraternal norms issuing from an autonomous professional society . . . into a body of judicially enforced regulations”); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark*

state bar associations had adopted them;⁵ by 1914, thirty-one state bar associations had adopted the Canons “with little or no change”;⁶ and by 1924, the Canons had been adopted, with minor modifications, by “almost all of the state and local bar associations of the country.”⁷ Although ultimately fifteen new Canons were added,⁸ only seven of the original thirty-two Canons were ever amended and only Canon 27, which concerned lawyer advertising, was changed substantially.⁹ The Canons’ sixty year hegemony during most of the twentieth century is striking, especially when compared to the roughly fifteen-year life of the A.B.A.’s normative statements regarding lawyer conduct since then.¹⁰

Times, 9 GEO. J. LEGAL ETHICS 31, 41–53 (1995) (discussing causes of the de-moralization of legal ethics); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II. The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 217 n.43 (2002) [hereinafter Wolfram, *Legal Ethics II*] (acknowledging the de-moralization of legal ethics).

5. Introduction of Resolutions, 35 A.B.A. Rep. 47, 53 (1910).

6. Report of the Comm. on Prof’l Ethics, 39 A.B.A. Rep. 559, 560–61 (1914).

7. Report of the Standing Comm. on Professional Ethics and Grievances, 49 A.B.A. Rep. 466, 467 (1924).

8. Canons 33–45 were adopted at the A.B.A.’s annual meeting in 1928. Proceedings, 53 A.B.A. Rep. 29, 130 (1928). Canon 46, regarding advertisement of specialized legal services, was adopted at the A.B.A.’s annual meeting in 1933. Proceedings, 58 A.B.A. Rep. 41, 178, 429 (1933). Canon 47, regarding conduct that aids the unauthorized practice of law, was adopted on September 30, 1937. Supplemental Report of the Standing Comm. on Professional Ethics and Grievances, 62 A.B.A. Rep. 761, 767 (1937).

9. Canons 7, 11, 12, 13, 27, 28, and 31 were the only Canons of the original thirty-two ever amended. Drinker, *supra* note 3, at 25–26. In 1928, Canon 28 was amended. Proceedings, 53 A.B.A. Rep. 130, 130–31 (1928). In 1933, Canons 11 and 13 were amended. 58 A.B.A. Rep. 428 (1933). In 1937, Canons 7, 11, 12, and 31 were amended. Report of the Standing Comm. on Professional Ethics and Grievances, 62 A.B.A. Rep. 761–64 (1937). None of those amendments were substantive, with the exception of the 1937 amendment to Canon 11, which added the following as the first paragraph of that Canon: “The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.” *Id.* at 761. Canon 27 was entirely redrafted in 1937, *Id.* at 762–64, and then amended five more times before 1970, House of Delegates Proceedings, 65 A.B.A. Rep. 89, 97–98 (1940); House of Delegates Proceedings, 67 A.B.A. Rep. 103, 149–50 (1942); House of Delegates Proceedings, 68 A.B.A. Rep. 115, 144–45 (1943); Report of the Special Comm. to Study the Matter of Amendment of Canon 27, 76 A.B.A. Rep. 437, 437–38 (1951); House of Delegates Proceedings, 88 A.B.A. Rep. 403, 448–49 (1963).

10. The Model Code was superseded by the Model Rules of Professional Conduct (“Model Rules”), which were adopted by the A.B.A. in August, 1983. House of Delegates Proceedings, 108 A.B.A. Rep. 763, 778 (1983). For an in-depth discussion of the drafting and adoption of the Model Rules, see Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

The Model Rules underwent a wholesale revision resulting from the work of the A.B.A.’s Commission on Evaluation of the Rules of Professional Conduct, which was established in the Spring of 1997. See Margaret Colgate Love, *The Revised A.B.A. Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002). That Commission presented its recommendations to the A.B.A.’s House of Delegates in August 2001 and February 2002 and the resulting amendments to the Model Rules became effective on February 5, 2002. See *id.* at 443–44.

The Canons have rarely been the subject of a comprehensive and detailed analysis.¹¹ Since the Canons were superseded by the Model Code, there has been no scholarly attempt to view the Canons as a separate and defining moment in the history of American legal ethics or the development of the modern legal profession.¹² The legal literature concerning the history of American legal ethics generally has discussed the Canons in terms of broader historical issues,¹³ dealing, for example, with the influence of earlier nineteenth-century ethics texts on the Canons,¹⁴ or the trend towards increased lawyer regulation,¹⁵ or the increasing de-moralization

11. The major exception is Henry S. Drinker, *Legal Ethics* (1953), which is a comprehensive treatise on the subject of legal ethics by the longtime chairman of the A.B.A.'s Standing Committee on Professional Ethics and Grievances. See *infra* note 50 and accompanying text. Since 1922, that Committee and its successors have been in charge of interpreting the A.B.A.'s normative rules. American Bar Foundation, *Opinions of the Committee on Professional Ethics 1–3, 6* (1967). In 1953, those rules were the Canons, as amended since 1908.

A second exception is Raymond L. Wise, *Legal Ethics* (1966), which explained groups of the Canons and their interpretations by ethics committees regarding specific topics. By 1970, when that book's second edition was published, the Canons had been superseded by the Model Code, and the newer norms were the subject of Part 1 of the book's second edition in 1970.

12. Jerold S. Auerbach's *Unequal Justice* (1976) might be considered an exception. That book discusses the Canons and their adoption, but within a much broader historical study of the development of the highly stratified modern legal profession. It does not discuss in any detail the historical antecedents of the Canons or the process of drafting the Canons, and it does not attempt to discuss the Canons as a whole or the vision underlying them. It does, however, discuss some of the Canons intended to combat the commercialism affecting the legal profession around the turn of the twentieth century, and Auerbach's views in that regard are discussed below. See *infra* notes 68, 441, 492, 496–97, 499, 574–77 and accompanying text.

13. One recent exception is Susan D. Carle, *Lawyers' Duty To Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOC. INQUIRY* 1 (1999). That article focuses directly and in detail on the Canons, but its analysis concerns the Canons' approach to only one issue—a lawyer's duty to be concerned about the justice of a client's cause.

14. For example, the influence of David Hoffman's *Fifty Resolutions in Regard to Professional Deportment* [hereinafter Hoffman's *Resolutions*] on American legal ethics is explored in Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 *MD. L. REV.* 673 (1979), and Stephen E. Kalish, *David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 *NEB. L. REV.* 54 (1982). The influence of George Sharswood's *Essay on Professional Ethics* [hereinafter Sharswood's *Ethics*] upon the Canons and the A.B.A.'s subsequent normative statements regarding lawyer conduct is the focus of Pearce, *Republican Origins*, *supra* note 3, at 241, and is discussed in Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 *U. CHI. L. SCH. ROUNDTABLE* 381 (2001) [hereinafter Pearce, *Governing Class*]. The influence of the Alabama Code of Legal Ethics on American legal ethics is explored in Allison Marston, *Guiding The Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 *ALA. L. REV.* 471 (1998), and Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 *NOTRE DAME LAW.* 483 (1932) [hereinafter Jones, *Canons*]; Walter Burgwyn Jones, *First Legal Code of Ethics Adopted in the United States*, 8 *A.B.A. J.* 111 (1922) [hereinafter Jones, *First Legal Code*]. Hoffman's *Resolutions*, Sharswood's *Ethics*, and the Alabama Code are each described briefly in Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 *A.B.A. J.* 1063 (1978).

15. See, e.g., Charles W. Wolfram, *Toward A History of the Legalization of American Legal Ethics—I. Origins*, 8 *U. CHI. L. SCH. ROUNDTABLE* 469 (2001) [hereinafter Wolfram, *Legal Ethics I*].

of American legal ethics.¹⁶ Recently, a number of articles have referred to one or two Canons as the historical starting point for an analysis of a particular topic in legal ethics.¹⁷ Thus, the Canons have become an obligatory reference in legal ethics scholarship, but their overarching, animating vision has been almost entirely overlooked. It is time now, as we approach their one hundredth anniversary, to identify that vision and to explain their distinctive contribution to the development of American legal ethics and the modern legal profession.

This article is intended to begin that task.¹⁸ It attempts to place the Canons in their particular historical context and to understand some of the meanings they had for those who promulgated or adopted them. This is no easy task. Already by the 1960s, when the A.B.A. was in the process of adopting the Model Code, the Canons seemed “quaint” and “hoary,” as if they were simply museum pieces, relics of an age whose power and complexity were no longer well understood.¹⁹

The first part of this article discusses the genesis of the A.B.A.’s project to promulgate an authoritative moral code of lawyer conduct (the “Canons Project”).

16. See *supra* note 4.

17. See, e.g., Terry R. Day and Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23, 26–27 (1998) (tracing back to Canon 31 a lawyer’s discretion to decide whom to represent); Daniel M. Filler, *Lawyers in the Yellow Pages*, 14 LAW & LITERATURE 169, 173 (2002) (tracing back to Canon 27 the restrictions on lawyer advertising); Lindsay M. Oldham & Christine M. Whitley, *The Catch-22 of Model Rule 8.3*, 15 GEO. J. LEGAL ETHICS 881, 882–83 (2002) (tracing back to Canon 29 the lawyer’s duty to report attorney misconduct); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 879–82 (1997) (tracing back to Canon 5 the prosecutor’s duty to disclose exculpatory evidence).

18. This article is part of a larger project regarding the history of the Canons which seeks, among other things, to explore the Canons in terms of the intellectual and social history of the United States in general and of the American legal profession in particular around the turn of the twentieth century.

19. The Model Code was the outgrowth of a five-year process that began in May 1964, when the A.B.A. Board of Governors created the Special Committee on Evaluation of Ethical Standards, the Committee that drafted the Code. Armstrong, *supra* note 14, at 1069; Wright, *supra* note 2, at 4. The Chairman of that Committee described its efforts to reorganize and rewrite the Canons:

[I]t was found that much of the language which had previously seemed clear because of its familiarity was in fact ambiguous. Inaccurate or obscure expressions obviously should not be perpetuated. The Committee encountered many doubts as to what much of the language meant, which in turn led to detailed analysis of what in fact the duties of a lawyer are and should be. And so our original efforts merely to reorganize and reword the Canons became an extended search for the full meaning of professional responsibility in the context of modern-day society, a search that culminated in the formulation of the [Model] Code.

Id. at 6. In short, the Committee found that the Canons “‘abound with quaint expressions of the past.’” *Id.* at 5 (internal citation omitted). Other commentators have agreed. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54 (1986) [hereinafter WOLFRAM, MODERN LEGAL ETHICS] (explaining that the Canons used “verbiage and conceptualization that even in 1908 must have appeared terribly dated”); Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934) (observing that the Canons “for the most part are generalizations designed for an earlier era”).

It shows that the Canons were the A.B.A.'s response to President Theodore Roosevelt's criticism of lawyers during a June 1905 commencement address at Harvard University, in which he disparagingly described lawyers as "hired cunning" because they thwarted what he viewed as the public interest by their lucrative representation of corporations and wealthy entrepreneurs.²⁰ In its 1906 report regarding the "advisability and practicability of the adoption of a code of professional ethics,"²¹ the A.B.A.'s Committee on the Code of Professional Ethics ("Canons Committee" or "Committee")²² described the pervasive commercialism that, in its view, was threatening to reduce a prestigious profession with an essential role in the administration of justice to a mere money-getting trade.²³ The promulgation of Canons was intended to help the legal profession enhance its reputation and, thereby, better perform its important social and political role as America's "governing class,"²⁴ by providing ethical standards: (i) to judge who should be permitted to become and remain lawyers; (ii) to educate young or inexperienced lawyers; and (iii) to elicit and strengthen lawyers' resolve to conduct themselves in accordance with the highest ethical standards.²⁵

The second Part of this Article describes the process of drafting and adopting the Canons and the pre-existing texts of legal ethics that were used in that

20. See *infra* notes 53–86 and accompanying text.

21. Report of the Comm. on Code of Professional Ethics, 29 A.B.A. Rep. 600, 600 (1906) [hereinafter, 1906 Comm. Rep.] (quoting 28 A.B.A. Rep. 132 (1905)).

22. The Committee grew in three phases. The Committee appointed in 1905 consisted of William Wirt Howe of New Orleans; James G. Jenkins of Milwaukee; Francis Lynde Stetson of New York City; Ezra R. Thayer of Boston; and the Chairman, Henry St. George Tucker, of Lexington, Virginia. In 1906, the Committee was expanded by four members: Lucien Hugh Alexander of Philadelphia; Frederick V. Brown of Minneapolis; Franklin Ferriss of St. Louis; and Thomas Hamlin Hubbard of New York City. In 1907, the Committee was expanded for the final time to enhance its prestige even more by adding five members: David Josiah Brewer of Washington, D.C.; Jacob McGavock Dickinson of Chicago; Thomas Goode Jones of Montgomery, Alabama; Alton Brooks Parker of New York City; and, George R. Peck of Chicago.

23. See *infra* notes 87–110 and accompanying text.

24. At the turn of the twentieth century, the standard text describing the special social and political role played by lawyers in American democracy was Alexis de Tocqueville's *Democracy in America*. De Tocqueville summarized his discussion of the role lawyers play in American democracy in flattering terms that lawyers have referenced ever since:

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply, without hesitation that it is not among the rich, which are united by no common tie, but that it occupies the judicial bench and the bar.

ALEXIS DE TOCQUEVILLE, I DEMOCRACY IN AMERICA 278 (Vintage Classic ed. 1990) (1840).

De Tocqueville was not the only nineteenth-century writer who saw in lawyers a "governing class." It was a common theme among those who adopted a republican political viewpoint in the antebellum period, including lawyers such as David Hoffman and George Sharswood. See Pearce, *Governing Class*, *supra* note 14, at 384–95.

25. See *infra* notes 114–31.

process. Although the Committee made every effort to involve not just A.B.A. members, but the legal profession more generally,²⁶ there were three main texts they consulted in drafting the Canons: (1) a section-by-section compilation of the codes of ethics adopted by eleven state bar associations over the score of years from 1887, when the Alabama State Bar Association adopted the first such code;²⁷ (2) George Sharswood's *Essay on Professional Ethics* ("Sharswood's *Ethics*");²⁸ and (3) David Hoffman's *Fifty Resolutions in Regard to Professional Deportment* ("Hoffman's *Resolutions*").²⁹

In terms of the language and content of the Canons, the most influential of these sources was the code of ethics adopted by the Alabama State Bar Association ("Alabama Code"),³⁰ which synthesized prior ethical texts and speeches into one code and formed the foundation for each of the subsequent state bar association codes of ethics. But even the influence of the Alabama Code was limited. In addition to consolidating and editing lightly the provision of the Alabama Code of which it approved, the Committee ploughed new ground. It significantly enhanced the lawyer's moral autonomy in the attorney-client relationship and, therefore, the lawyer's moral accountability, by expanding the role envisioned in the Alabama Code for the lawyer's conscience.³¹ Consistent with that deliberate limitation on the lawyer's zealous representation of a client, the Committee placed less emphasis than did the Alabama Code on conflicts of interest and the zealous defense of criminal defendants.³² It created prohibitions on advertising and solicitation and other commercial and competitive activities that were entirely unprecedented.³³ And, it imposed new obligations on lawyers to regulate their profession, at both the point of entry and thereafter.³⁴ Thus, the Canons are much more than just a restatement of or a new form for the ethical views of David Hoffman, George Sharswood, or even Thomas Goode Jones, the draftsman of the Alabama Code.³⁵

The third part of this article demonstrates that the Canons were animated by the vision of a self-regulating profession in which lawyers engaged in their professional activities as gentlemen.³⁶ The Canons prescribed a vision of conscientious

26. See *infra* Part II.A.

27. See *infra* Part II.B.3

28. See *infra* Part II.B.2.

29. See *infra* Part II.B.1.

30. See *infra* Part II.B.3.

31. See *infra* Part III.A.

32. See *infra* Part III.B.

33. See *infra* Part III.C.

34. See *infra* Part III.D.

35. See *infra* Part III. As the Chairman of a three-lawyer committee appointed to draft such a code, Jones alone prepared the original draft and submitted it to the other two Committee members. Jones, Canons, *supra* note 14, at 485. Although they "heart[ily] approv[ed]" of it, they appear to have made some changes in Jones's draft before the Committee proposed it to the Alabama State Bar Association for adoption, because Jones himself moved to strike out a portion of section 14 of the proposed code during the Association's consideration of it. *Id.*; see *infra* note 327.

36. See *infra* Part III.

lawyering.³⁷ According to that vision, lawyers should zealously represent their clients, but only insofar as they could do so in conformity with their personal duties and views as gentlemen and their republican duties as “officers of the court”³⁸ with a special obligation for achieving moral and legal justice.³⁹ Lawyers were to measure those duties by their own consciences, not those of their clients.⁴⁰ They should never allow their duties to their clients to obscure or undermine their moral autonomy or, therefore, their moral accountability.⁴¹ Consistent with that vision, and the concomitant goal of enhancing the stature of lawyers through adoption of the gentlemanly distinction between a profession and a trade, the Canons required lawyers to eschew commercialism in all facets of their professional practice, including specifically in relation to their existing and potential clients and in relation to other lawyers.⁴² In this respect, the Canons represent a counter-insurgency by a professional elite aimed at protecting their status from the increasingly ascendant bourgeois values during the Gilded Age and the increasing dominance of the market orientation of twentieth-century American capitalism.⁴³ Finally, recognizing a competitive pressure to lower the standards of lawyer conduct in an ever-expanding market for legal services, the Canons imposed requirements on lawyers to regulate their profession through control over admissions to the bar and reporting violations of the *Canons*’ normative standards.⁴⁴

Although the Canons were surely a product of their times, they became an important aspect of the A.B.A.’s efforts to define the legal profession in the context of the modernizing, industrialized capitalist economy of the late nineteenth and early twentieth centuries.⁴⁵ Thus, the Canons became the capstone completing the A.B.A.’s “professionalism project” and were a crucial component in the legal profession’s self-conception around the turn of the twentieth century.⁴⁶

I. The Genesis of the Canons Project

A. The Precipitating Dialogue in 1905

There was nothing necessary about the A.B.A.’s promulgation and adoption of a normative statement regarding lawyer conduct. The A.B.A. was formed in 1878 “as an exclusive social fraternal organization of high-status lawyers.”⁴⁷ Although

37. See *infra* Part III.A.

38. See *infra* Part III.A.4.

39. See *infra* Part III.A.4.

40. See *infra* Part III.A.4.

41. See *infra* Part III.A.4.

42. See *infra* Part III.C.

43. See *infra* notes 592–99 and accompanying text.

44. See *infra* Part III.D.

45. See *infra* notes 555–99 and accompanying text.

46. See *infra* notes 555–99 and accompanying text.

47. Wolfram, *Legal Ethics I*, *supra* note 15, at 485; See also John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in *THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL WAR AMERICA* 75 (Gerald W. Gawalt ed., 1984) (describing the elite lawyers who

on a few occasions during the 1890s the A.B.A. Committee on Legal Education and Admission to the Bar commented on the importance of legal ethics,⁴⁸ there was no suggestion to promulgate a code of legal ethics for almost forty years. This is particularly noteworthy, because in the years from 1887 through 1907, ten state bar associations, following the lead of the Alabama State Bar Association, adopted their own codes of ethics.⁴⁹

Thus, Henry S. Drinker, the leading twentieth-century authority on the Canons,⁵⁰ did not overstate the case when he said of Henry St. George Tucker, the A.B.A.'s President in 1904–1905,⁵¹ that “it was primarily owing to his influence that the project [of drafting an A.B.A. code of professional ethics] went forward.”⁵² Tucker placed the question of whether to promulgate such a code on the A.B.A.'s agenda. At the end of his 1905 presidential address, after completing his report on the legislation passed during the past year, as was then required by the A.B.A. Constitution,⁵³ Tucker reached out in response to President Roosevelt's recent criticism of lawyers:

The serious charge made by the President . . . against some of the members of our profession must give us pause; his recognized position in the country in stimulating lofty ideals in life, as well as his recognition of the position of our profession in moulding public sentiment in the country, forces upon us, willingly or unwillingly, as an Association, the inquiry, not only whether the charge be true, but also the broader inquiry whether

founded the A.B.A. as liberal reformers who fit John Sproat's definition of “the best men, . . . men of breeding and intelligence, of taste and substance,” epitomized by the man most responsible for the A.B.A.'s formation, Simeon E. Baldwin (quoting JOHN G. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE 4–10 (1968)).

48. See, e.g., Report of Comm. on Legal Education and Admission to the Bar, 20 A.B.A. Rep. 349, 377–82 (1897) (discussing the need “for some special training in the ethics of the law, training which is systematic and to be had in a course, instead of being accidental and incidental”); Report of Comm. on Legal Education, 18 A.B.A. Rep. 309, 324–25 (1895) (recommending that a legal ethics course be included in the law school curriculum).

49. See *infra* notes 256–59 and accompanying text.

50. See Drinker, *supra* note 3, at viii; MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 3 (1990). Drinker was a member of the A.B.A.'s Committee on Professional Ethics and Grievances for fourteen years, from 1939 to 1953, and the Committee's Chairman for nine of them, before publishing his treatise on the Canons in 1953. He then served another three years on the Committee from 1955–1958. American Bar Foundation, *supra* note 11, at 4; see also Armstrong, *supra* note 14, at 1067 (describing Drinker's influence on legal ethics as “exceed[ing] that of anyone else in the history of the American bar”).

51. A.B.A. Presidents take office at the A.B.A.'s annual meeting in August and serve a one-year term until the next annual meeting. A.B.A. Const., art. III, reprinted in 28 A.B.A. Rep. 170 (1905). Tucker became A.B.A. President in August 1904, Election of Officers, 27 A.B.A. Rep. 63 (1904), and was succeeded by George R. Peck in August 1905, Election of Officers, 28 A.B.A. Rep. 91, 133 (1905).

52. DRINKER, *supra* note 3, at 24 n.12.

53. A.B.A. Const., art. VIII, *supra* note 51, at 173.

the ethics of our profession rise to the high standard which its position of influence in the country demands; surely no more important question than this can be forced upon the profession.⁵⁴

What was President Roosevelt's "serious charge"? In a commencement speech at Harvard, his alma mater,⁵⁵ Roosevelt appealed to the graduates to adopt and help create

a public sentiment which shall demand of all men of means, and especially of the men of vast fortune, that they set up an example to their less fortunate brethren, by paying scrupulous heed not only to the letter but to the spirit of the laws, and by acknowledging in their heartiest fashion the moral obligations which cannot be expressed in law, but which stand back of and above all laws.⁵⁶

In Roosevelt's view, Harvard had imbued the graduates with a "character" fit to do "honorable" work,⁵⁷ and, therefore, "[m]uch has been given to these men and we have a right to demand much of them in return."⁵⁸ Roosevelt called for moral leadership from the graduates and other Harvard alumni who would join or already had joined "the great profession of the law, whose members are so potent in shaping the growth of the national soul."⁵⁹ Observing a distance between the moral leadership he was exhorting and the existing practices of some of the leaders of the legal profession, Roosevelt criticized the role elite lawyers played in assisting wealthy clients to subvert the law:

Every man of great wealth who runs his business with cynical contempt for those prohibitions of the law which by hired cunning he can escape or evade is a menace to our community; and the community is not to be excused if it does not develop a spirit which actively frowns on and discourages him. The great profession of the law should be that whose members ought to take the lead in the creation of just such a spirit. We all know that, as things actually are, many of the most influential and most highly remunerated members of the Bar in every centre of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws

54. Henry St. George Tucker, *Address of the President*, 28 A.B.A. Rep. 299, 384 [hereinafter Tucker, *Address*].

55. Roosevelt graduated from Harvard College in 1880. See XIV HARVARD GRADUATES' MAGAZINE No. 53 at 9 (Sept. 1905).

56. Roosevelt's speech, *The Harvard Spirit*, was presented at the Harvard Commencement Exercises in Memorial Hall on June 28, 1905, and was printed in XIV HARVARD GRADUATES' MAGAZINE, *supra* note 55. See also Theodore Roosevelt, *The Harvard Spirit* (June 28, 1905), in IV Presidential Addresses and State Papers 407 (1910).

57. XIV HARVARD GRADUATES' MAGAZINE, *supra* note 55, at 1.

58. *Id.* at 7.

59. *Id.* at 8.

which are made to regulate in the interest of the public the use of great wealth. Now, the great lawyer who employs his talent and learning in the highly remunerative task of enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy. Such a spirit may breed the demand that laws shall be made even more drastic against the rich, or else it may manifest itself in hostility to all laws. Surely Harvard has the right to expect from her sons a high standard of applied morality, whether their paths lead them into business, or into the profession of the law. . . .⁶⁰

The President's speech sounded standard Progressive themes. The law, in Roosevelt's view, reflected the public interest, which was being corrupted by concentrations of the wealthy serving their own private interests. His description of the big businessman with a "cynical contempt" for the law recalls Holmes's "bad man," who single-mindedly pursues his own economic advantage without regard for the law's moral content or his personal conscience.⁶¹ The elite lawyers—in Roosevelt's metaphor, "hired cunning"—adopted a complementary attitude, using their talents and legal learning to undermine the moral spirit of the law, and the public interest it was designed to serve, by enabling their wealthy clients to implement their own private interests at the expense of the law, rather than strengthening the law by advocating it to their clients and eliciting their "better nature."

The President's criticism of corporation lawyers echoed another well-known progressive's speech about lawyers addressed to another Harvard audience just weeks before. On May 4, 1905, Louis Brandeis presented his famous address, *The Opportunity in the Law*, to undergraduates at the Harvard Ethical Society.⁶²

60. *Id.* at 7–8.

61. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (describing the bad man). Holmes contrasts the "bad man" with the "good man": "[a bad] man, who cares only for the material consequences which such knowledge enables him to predict, . . . a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." *Id.* Robert Gordon views Holmes's bad man as "the rational man—homo law-and-economics—who treats all legal rules as prices on conduct, risks to be discounted by the probability of enforcement, data for cost-benefit analysis." Robert W. Gordon, *Law as Vocation: Holmes and the Lawyer's Path*, in OLIVER WENDELL HOLMES, JR. AND THE PATH OF THE LAW 13 (Steven Burton ed., 2000). Some commentators have considered "the bad man [a]s a realistic picture of the usual corporate client of Holmes' day." See David Luban, *The Bad Man and the Good Lawyer*, in *id.* at 43. By "Holmes' day," Luban may be referring to 1897, when Holmes first presented *The Path of the Law* as an address at the dedication of the new hall of the Boston University School of Law. See Holmes, *supra*, at 457 n.1. Roosevelt was familiar with Holmes's judicial decisions and appointed him to the Supreme Court in 1903. E. DIGBY BALTZELL, PURITAN BOSTON AND QUAKER PHILADELPHIA 13 (Beacon Press ed. 1979) [hereinafter BALTZELL, PURITAN BOSTON] (citing CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY 361 (1944)).

62. This address was first published in Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905). It was subsequently published in LOUIS D. BRANDEIS, BUSINESS: A PROFESSION 329 (photo. reprint 1996) (1914) [hereinafter BRANDEIS, BUSINESS].

Brandeis shared Roosevelt's observation that the wealthy and powerful corporate interests had retained members of the legal elite and made them captive to their private interests: "The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations."⁶³

Unlike Roosevelt, Brandeis placed the current problem of the declining prestige of the legal profession in historical context. He referred back to the early nineteenth century, when almost all lawyers were individual general practitioners, representing at one time or another during their career—and often concurrently—all the various constituents of the small town community.⁶⁴ He recalled the public's reputedly high regard for lawyers then, when, according to De Tocqueville, they occupied the position of a political aristocracy and acted "as a brake upon democracy."⁶⁵

Marking the decline in lawyers' public standing since the Civil War, Brandeis quoted the well-known observation of yet another foreign observer, Lord Bryce, in the 1880s, that "the last thirty years have witnessed a certain decadence in the Bar of the great cities" because "the growth of the enormously rich and powerful corporations willing to pay vast sums for questionable services has seduced the virtue of some counsel whose eminence makes their example important."⁶⁶ In Brandeis' view, the primary reason why contemporary lawyers enjoyed less prestige was their failure to remain independent of the interests of the highest paying constituency:

It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the "corporation lawyer," and far too little of the "people's lawyer." The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people.⁶⁷

63. BRANDEIS, BUSINESS, *supra* note 62, at 338; *see also id.* ("The leaders of the Bar, without any preconceived intent on their part, and rather as an incident to their professional standing, have, with rare exceptions, been ranged on the side of the corporations. . .").

64. *Id.* at 332. For a more current, but confirming, description of that small town general practitioner in the first half of the twentieth century by another Supreme Court Justice, *see* Robert H. Jackson, *The County-Seat Lawyer*, 36 A.B.A. J. 497 (1950). *See also* Robert H. Jackson, *Tribute to Country Lawyers: A Review*, 30 A.B.A. J. 136 (1944) (reviewing book by a "county-seat" lawyer in Georgia).

65. BRANDEIS, BUSINESS, *supra* note 62, at 342.

66. *Id.* at 337–38; *see also id.* at 333–34, (quoting JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (1888)).

67. *Id.* at 337. In this speech, Brandeis gives little guidance on precisely what he means by "independence." Is he criticizing legal specialization and exclusive representation for wealthy clients, suggesting that every lawyer should represent a wide range of clients within his or her practice,

Although many lawyers themselves were dismayed by the increasing commercialization of legal practice around the turn of the twentieth century,⁶⁸ it was President Roosevelt's attack on corporation lawyers captured by their wealthy and powerful clients that caught Tucker's attention during the summer of 1905. Less than two months after President Roosevelt's Harvard address, Tucker gave the annual presidential speech to the 277 delegates at the A.B.A.'s Annual Meeting.⁶⁹ At the end of his speech, Tucker quoted Roosevelt's comments about corporation lawyers and posed his important question: Do "the ethics of our profession rise to the high standard which its position of influence in the country demands?"⁷⁰

Tucker addressed that question in an explicitly religious context. He began by comparing the moral value of the legal profession with that of the clergy: "I am one of those who believe that the profession of the law has more potential for good than any other profession, excepting the Christian ministry, and in some respects more powerful for good than even that high profession."⁷¹ He ended his speech by appealing to the delegates before him "who stand forth clothed in priestly robes, as ministers at the altar of justice," for "vindication of the claim that the profession of the law is the most ennobling and powerful for good of all the secular professions."⁷² Between these religious references, Tucker presented his reasoning.

corporations and the "people" alike? Or, is he suggesting that within the representation of a single client, even during representation of the "bad man" for example, a lawyer has the obligation to take into account his personal view of the interests of third parties and the public generally? Brandeis himself states no clear answer in this speech. *See id.* at 342–43.

68. *See, e.g.*, JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION* 212, 241, 244 (G.A. Jennings Co., Inc., rev. ed. 1924); JOHN R. DOS PASSOS, *THE AMERICAN LAWYER* 13, 25, 46, 177–78 (photo reprint 1986) (1907); THERON G. STRONG, *LANDMARKS OF A LAWYER'S LIFETIME* 347, 354, 377–78 (1914); Champ S. Andrews, *The Law—A Business or a Profession?*, 17 *YALE L.J.* 602 (1908); George F. Shelton, *Law as a Business*, 10 *YALE L.J.* 275 (1901). As Jerold S. Auerbach has astutely observed, "commercialization" was the "protean term of invective that most vividly expressed" the uneasiness lawyers felt in the early twentieth century about the social changes in their profession. Auerbach, *supra* note 12, at 40.

At one extreme, it expressed anxiety about concentrated economic power and hostility toward corporation lawyers, whose rapid professional ascendance and apparent subservience to businessmen were deeply unsettling. At the other as an indication of concern with immigrant ghettos and urban poverty, it demonstrated antagonism toward lawyers from ethnic minority groups—the profession's new and growing underclass. Both the Wall Street lawyer and the ambulance chaser threatened models of professional independence and esteem associated with a homogeneous society and an arcadian past.

Id.; *see also* WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890–1930*, at 298 (1986) ("'Commercialization' had several meanings, depending upon which stratum of the bar it was applied to").

69. List of Members and Delegates Registered, 28 *A.B.A. Rep.* 155 (1905). There were 2,049 A.B.A. members at the time. *Id.* at 296.

70. Tucker, *Address*, *supra* note 54, at 384.

71. *Id.*

72. *Id.* at 389. Elsewhere in his presidential address, Tucker likens lawyers to "minister[s]" and courts to "temples of justice." *Id.* at 385. This religious metaphor was common throughout the

Like Roosevelt, Tucker viewed the lawyer as a powerful force in shaping public sentiment, analogizing the lawyer's power to teach right and wrong in everyday affairs to the priest's Sunday sermons: "the lawyer appears in a different role, as the minister of week-day ethics as applied to men in their everyday business affairs, as the expositor of justice and right unaided by priestly exegesis or any other sources than those of natural law and justice."⁷³ Tucker then contrasted "the bad lawyer" with "the good lawyer":

If by cunning artifice he seeks to conceal the real truth, or by devious methods he seeks to attain immoral ends under legal form, or if for the purpose of obtaining a meretricious success he takes position in favor of an immoral conclusion in its application to the facts of his case, that position finds ready defenders among those already too willing to applaud a principle which, however base, has for its object the success of the cause. On the other hand, the lawyer who fights his battles in the open, with no weapons save those taken from the arsenal of eternal truth and right, who scorns the temptation to advance a principle for his client or his cause as his own which cannot be defended in the forum of conscience, leaves a lasting impress for good upon those who hear him. . . .⁷⁴

Given the potential of lawyers to exemplify for the community both good and bad, and recognizing "the delicate distinctions in the law . . . which makes it possible for a lawyer to cover his tracks in the accomplishment of his wicked ends, if he be so inclined," Tucker contended that "principles of genuine honesty" counted more than "learn[ing] in the law."⁷⁵ What America really needed "in the transaction of private business and in the moulding of a lofty, public sentiment," Tucker concluded, like Roosevelt before him, was "the high-toned, honorable, conscientious lawyer."⁷⁶

nineteenth century and adopted by many legal thinkers, such as Maryland's David Hoffman, *see infra* notes 177–78 and accompanying text, and Ohio's Timothy Walker, *see* TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 17–18 (1837) ("I speak of the enlightened and high-minded jurist, who ministers, with clean hands and a pure heart, in the sacred temples of human justice."); Kentucky's George Robertson, *see* Proceedings of the Second Annual Meeting of the Kentucky State Bar Association 27 (1903) [hereinafter Ky. Second Meeting] (quoting George Robertson, Valedictory Address (1847)); and Pennsylvania's George Sharswood, *see infra* notes 190–93 and accompanying text. That metaphor still had vitality among elite lawyers in 1905. *See, e.g.*, Alfred Hemenway, *The American Lawyer*, 28 A.B.A. Rep. 390, 395 (1905) (referring to lawyers "in whose temple he is a minister").

73. Tucker, *Address*, *supra* note 54, at 385.

74. *Id.*

75. *Id.* at 387.

76. *Id.* Tucker's agreement with Roosevelt about the importance of "lofty ideals" and the need for lawyers to live by them puts into question Jerold Auerbach's view that Tucker was "stung" by Roosevelt's criticism of lawyers. Auerbach, *supra* note 12, at 40.

To Tucker, a fourth generation legal educator,⁷⁷ the challenge for the A.B.A. was more educational than disciplinary. “[P]urging its membership of the unworthy member who brings dishonor upon the whole profession”⁷⁸ was an issue for both the A.B.A. and state bar associations alike, but, because dishonorable conduct would be known only to the local bar where such conduct occurred, Tucker rejected a disciplinary role for the A.B.A. itself.⁷⁹ “This is one of the many questions to be considered in the education of the lawyer, and like all other questions which affect morality and ethics, can best be accomplished in the very beginning of the study of the law, when character is unformed. . . .”⁸⁰

Tucker made two specific educational proposals. First, he proposed that all law schools prescribe “an enlarged and comprehensive course in the subject of ‘legal ethics’ to be taught. . . by ‘men of lofty ideals, which they try to live up to and not merely talk of.’”⁸¹ Second, he proposed the adoption in every law school of an “honor system,” which, Tucker explained, helped to create within a student “a manly sentiment of honor and integrity and a corresponding scorn of chicanery and deception.”⁸²

Tucker himself did not suggest that the A.B.A. adopt a code of legal ethics. That step was not formally proposed until the A.B.A.’s 1906 Annual Meeting. But, after hearing Tucker’s presidential address, M. F. Dickinson, an A.B.A. member from Massachusetts, proposed a resolution that a five person committee be appointed, with Tucker as Chair, “to report at the next meeting. . . upon the advisability and practicability of the adoption of a code of professional ethics by this Association.”⁸³ The resolution carried.⁸⁴

In sum, the Canons Project grew out of President Theodore Roosevelt’s progressive critique of corporation lawyers and the spirit of commercialism pervading legal practice. Tucker agreed with Roosevelt that money was having a corrupting influence upon lawyers’ conduct; he acknowledged “the great temptation to the lawyer to take that course which may lead to the largest remuneration to himself.”⁸⁵

77. In 1905, at the time of his presidential address, Tucker was the Dean of the School of Jurisprudence and Law at what is now George Washington University in Washington, D.C. See JAMES GRAFTON ROGERS, *AMERICAN BAR LEADERS* 131 (1932); *CONCISE DICTIONARY OF AMERICAN BIOGRAPHY* 1059–60 (3d ed. 1980).

78. Tucker, *Address*, *supra* note 54, at 387.

79. *Id.*

80. *Id.*

81. *Id.* at 388 (quoting Theodore Roosevelt, *The Harvard Spirit*, in *IV Presidential Addresses and State Papers* 418 (1910)).

82. *Id.* at 388–89.

83. Proceedings of the Comm. on Legal Ethics, 28 A.B.A. Rep. 132, 132 (1905) [hereinafter 1905 Comm. Proc.].

84. *Id.*

85. Tucker, *Address*, *supra* note 54, at 387.

But Tucker did not focus the A.B.A.'s ethical concerns directly on corporation lawyers, even though he shared Roosevelt's critical stance towards corporations.⁸⁶

B. The Committee's 1906 Report

On August 26, 1906, during the A.B.A.'s next annual meeting, Tucker presented the Committee's printed report on the advisability and practicability of adopting a code of professional ethics.⁸⁷ There are no public records indicating that the Committee's five original members held any meetings or discussions regarding that report. Indeed, correspondence of Ezra R. Thayer, a Committee member and later the Dean of Harvard Law School, with Tucker in September, 1906, strongly suggests that Tucker authored that report without significant input from the other four original Committee members.⁸⁸ That 1906 report was based substantially on a paper presented at the A.B.A. annual meeting the previous year.

Two days before Tucker gave his 1905 presidential address, Lucien Hugh Alexander, a Philadelphia lawyer who became a member and the secretary of the Committee after the A.B.A.'s 1906 annual meeting,⁸⁹ read his paper, *Some Admission Requirements Considered Apart From Educational Standards*.⁹⁰ The issue of bar admissions requirements had long been an important topic at A.B.A.

86. See, e.g., Henry St. George Tucker, *Have the Corporations Been Law Abiding?*, 16 VA. L. REG. 881 (1911).

87. 1906 Comm. Rep., *supra*, note 21, at 600–04.

88. Only four of the five members of the Canons Committee signed the Committee's 1906 report—Tucker, Howe, Jenkins, and Stetson. *Id.* at 604. The fifth member of the Committee, Thayer, acknowledged that he did not participate in the drafting of the report. See Letter from Thayer to Tucker (Sept. 11, 1906), in the Thayer Archives at Harvard University Law School, Vol. 4, at 391. Indeed, on July 31, 1906, Tucker telegraphed Thayer, asking Thayer for authorization to sign his name to the Committee's report without his having seen it. See *id.* Thayer responded that he first would like to see that report. *Id.* Tucker then sent the proposed report to Thayer, who reviewed it just before he left for his summer vacation. *Id.* Although "all the views expressed commanded [his] unqualified approval," Thayer did not send Tucker the requested formal authorization because the proposed report already had his name on it. *Id.* Apparently believing, however, that he had not been authorized to sign Thayer's name, Tucker submitted the Committee's 1906 report without Thayer's name on it.

Because Tucker did not even contact Thayer about the proposed Committee report until July 31, less than a month before the A.B.A.'s Annual Meeting, because Tucker shared the proposed report with Thayer only as a result of his special request, and because there is no reason to believe that any other Committee member was more involved in the drafting than Thayer, it appears that Tucker drafted the Committee's 1906 report entirely himself.

89. Alexander was added to the Canons Committee after the Committee gave its 1906 report, see 1906 Comm. Rep., *supra* note 21, at 600, and Tucker chose Alexander as secretary of the Committee in or about December 1906. See Letter from Thayer to Tucker (Dec. 29, 1906), in the Thayer Archives at Harvard University Law School, Vol. 4, at 463 (endorsing Tucker's selection of Alexander as secretary of the Committee).

90. Alexander read his paper on the afternoon of August 23, 1905. Minutes of Section on Legal Education, 28 A.B.A. Rep. 549, 550 (1905); see Lucien Hugh Alexander, *Some Admissions Requirements Considered Apart From Educational Standards*, 28 A.B.A. Rep. 619 (1905).

meetings.⁹¹ From its very first meeting, the A.B.A. had focused on the importance of raising the educational standards for bar admission.⁹² By 1905, as a result of the A.B.A.'s efforts, law school had become the preferred means of legal education,⁹³ eclipsing the older practice of apprenticeships.⁹⁴

Concerned about the number and quality of the resulting "flood" of law school graduates,⁹⁵ Alexander proposed two requirements for bar admissions in addition to formal academic programs. First, "the standard for admission to the Bar [should] be held sufficiently high in matters of character as well as in educational qualifications."⁹⁶ Second, admission should be restricted to those who have gained experience and knowledge of the actual practice of law.⁹⁷ Alexander suggested a one year clerkship in a law office as a means to satisfy that criterion.⁹⁸

Alexander's 1905 paper must have made an impression upon Tucker, because the first half of the Committee's 1906 report was drawn directly from Alexander's

91. M. LOUISE RUTHERFORD, *THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* 42–55 (1937).

92. *Id.*

93. In his 1905 report, Alexander stated that the A.B.A. "recogniz[ed] the [law schools] to be the giant feeder of the profession, and destined to be ever increasingly so." Alexander, *supra* note 90, at 622. He noted that by 1904 there were 108 law schools with nearly 15,000 students in the country, a dramatic increase from the forty-three law schools with just over 3,000 students in 1880. *Id.* at 627 (citing James Barr Ames, *Chairman's Address*, 27 A.B.A. Rep. 507 (1904)).

94. Reading law in a practitioner's office was the most common means of legal education for lawyers seeking bar admission before the twentieth century. Auerbach, *supra* note 12, at 94 & n.53; Hobson, *supra* note 68, at 104 ("During the 1890s, the law school replaced the law office as the primary focus of legal training."); ROBERT STEVENS, *LAW SCHOOL* 24 (1983) ("The vast majority of the legal profession until the turn of the century still experienced only on-the-job legal education."); Wolfram, *Legal Ethics I*, *supra* note 15, at 480 ("'[R]eading law' was the method by which the great majority of lawyers prepared for admission until after the Civil War, when most of the oldest law schools were founded."). In 1909, there were approximately 20,000 law students attending 124 law schools. Stevens, *supra*, at 113 & n.6. By 1910, two-thirds of those admitted to the bar were graduates of law school, compared to one-quarter in 1870. Auerbach, *supra* note 12, at 94.

Although law school overtook apprenticeships as the standard means of legal education by the end of the nineteenth century, the apprenticeship or clerkship method still continued in many jurisdictions. Several Committee members—Brewer, Hubbard, and Parker—read law in a law office in addition to attending law school during the middle of the nineteenth century. *See infra* note 307 and accompanying text.

95. Alexander explained that:

[T]he fact remains that the Bar is being flooded with law school men, most of whom are inadequately prepared in practice, and the law school army for admission still comes marching on, ever increasing with a rapidity out of all proportion to the population and needs of the courts for practising lawyers.

Alexander, *supra* note 90, at 628.

96. *Id.* at 629.

97. *Id.* at 630–33.

98. *Id.* at 630.

paper. The Committee's report began, like Alexander's paper, with the republican emphasis on the bar's politically important role in American government:

Under our form of government, unless the system for establishing and dispensing justice is so developed and maintained that there shall be continued confidence on the part of the public in the fairness, integrity, and impartiality of its administration, there can be no lasting permanence to our republican institutions. Our profession is necessarily the keystone of the republican arch of government . . . [T]he future of the republic depends upon our maintenance of the shrine of justice pure and unsullied.⁹⁹

The Committee exalted that republican view of the lawyer's special role in the administration of justice in the religious metaphor used by both Tucker and Alexander in 1905: "[T]he lawyer is and must ever be the high priest at the shrine of justice."¹⁰⁰ Other portions of the Committee's report extended that metaphor: like God, "justice reigns;"¹⁰¹ courts are "shrines of justice;"¹⁰² lawyers are the "ministers of her courts of justice robed in the priestly garments of truth, honor and integrity;"¹⁰³ the practice of law is a lawyer's "high calling;"¹⁰⁴ and the code of ethics is called and composed of "Canons."¹⁰⁵

The problem, explained the Committee, lay in the "trend of many . . . away from the ideals of the past and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood or of personal aggrandizement."¹⁰⁶ Contributing to this trend, if not creating it, is "the influx of increasing numbers who seek admission to the profession, mainly for its emoluments."¹⁰⁷ These lawyers—"the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners"¹⁰⁸—who are "controlled by graft, greed and gain, or other unworthy motive," exert a "corroding and demoralizing influence" on other lawyers and the profession as a whole.¹⁰⁹ "[T]hey not only lower the *morale* within the profession, but they debase our high calling in the eyes of the public. They hamper the administration and even at times subvert the ends of justice."¹¹⁰

99. This is taken nearly verbatim from Alexander's 1905 paper. *Compare* 1906 Comm. Rep., *supra* note 21, at 600–01, with Alexander, *supra* note 90, at 620.

100. Alexander said precisely the same thing in his 1905 paper. *Compare* 1906 Comm. Rep., *supra* note 21, at 600 with Alexander, *supra* note 90, at 619.

101. Alexander, *supra* note 90, at 600.

102. *Id.*

103. *Id.* at 602.

104. *Id.* at 601, 602.

105. *Id.* at 602–04.

106. *Id.* at 601.

107. *Id.*

108. *Id.* Noticeably absent from this list is the wealthy and powerful corporation lawyer that was the focus of President Roosevelt's 1905 speech. *See supra* notes 55–61 and accompanying text.

109. Alexander, *supra* note 90, at 601.

110. *Id.* at 602.

The Committee's analysis of the problem affecting the legal profession was widely shared. The vice of commercialism, often expressed in terms of the gentlemanly distinction between a profession and a trade,¹¹¹ had been articulated as a primary reason for state bar associations to adopt their own codes of legal ethics. Like Tucker's 1905 presidential address and the Committee's 1906 report, the state bar leaders most often spoke about the spirit of commercialism in general, not specifying what particular lawyer conduct they so opposed.¹¹² Only a few focused their concern on corporation lawyers.¹¹³

The Committee intended the A.B.A.'s "adoption and promulgation of a series of reasonable Canons of professional ethics in the form of a code"¹¹⁴ to address this problem of commercialism. The fundamental purpose of the Canons was to enable the legal profession better to perform its special political role.¹¹⁵ Achieving that ultimate goal required lawyers to improve the ethical quality of their conduct and motives.¹¹⁶ The hoped-for result would be the restoration of the legal profession's prestige in the eyes of the general public.

The Canons, the Committee envisioned, would help improve the ethical quality of lawyers' conduct and motives in four respects. First, the Canons would

111. It is beyond the scope of this article to describe in detail the origins of the English gentleman's distinction between a profession and a trade, and its significance for late nineteenth-century American culture in general and for late nineteenth-century American lawyers in particular. That is a task for another time. For purposes of this article, it is sufficient to acknowledge the view of eighteenth-century English gentlemen that only certain occupations were suitable for someone of their class: "apart from government and the armed services, [there] were the 'liberal professions', and of these there were only three: divinity, physic [medicine], and law." W. J. READER, *PROFESSIONAL MEN* 9 (1966).

Trade, in the ordinary contemporary meaning of the word, was beneath him: partly because commercial morality was not high and its associations were all rather grubby, partly for the simple reason that it did not pay enough. "Trade" was what the blacksmith did, or the carpenter, or the tailor, or any other skilled craftsman, and there certainly was not a gentlemanly competence in that.

Id. at 6.

112. See Proceedings of the Tenth Annual Meeting of the Alabama State Bar Ass'n 106 (1888) [hereinafter Ala. Tenth Meeting]; see also Report of the Fifth Annual Meeting of the Georgia State Bar Ass'n 146 (1889) [hereinafter Ga. Fifth Meeting]; Report of the Sixth Annual Meeting of the Maryland State Bar Ass'n 38-39 (1902) [hereinafter Md. Sixth Meeting].

113. Report of the First Annual Meeting of the Colorado Bar Ass'n 60-61 (1898) [hereinafter Colo. First Meeting]; Ky. Second Meeting, *supra* note 72, at 32.

114. 1906 Comm. Rep., *supra* note 21, at 603. Although the Committee was appointed in 1905 to report on the "advisability and practicability of the adoption of a code of professional ethics," 1905 Comm. Proc., *supra* note 83, at 132, the Committee vacillated in its 1906 report between referring to the normative statement it was considering as a "code of ethics," 1906 Comm. Rep., *supra* note 21, at 601-03, or as "Canons of ethics." *Id.* at 602-04. At the end of its Report, the Committee recommended the adoption of "a series of Canons of professional ethics in the form of a code." *Id.* at 604.

115. 1906 Comm. Rep., *supra* note 21, at 601.

116. The Committee's concern was not merely about how lawyers acted, but also about lawyers' motives. The Committee contrasted the tradesmen's motives of personal gain, self-aggrandizement, and the "quest for lucre," with the motives of a high-minded lawyer who practiced a calling, "pure and unsullied," designed to serve justice. *Id.*

provide a set of ethical standards by which judgments could be made about which individuals should be permitted to become, and to remain, lawyers.¹¹⁷ Second, the Canons would educate lawyers, especially well-intentioned young practitioners whose professional character was not yet formed, by informing them of “the ethical requirements of the situation.”¹¹⁸ These Canons now had to be written down and authoritatively promulgated apparently because, as Alexander’s 1905 paper indicated, recent law school graduates had not had the experience and knowledge of actual practice gained under the old apprenticeship system or the one year clerkship Alexander had proposed.¹¹⁹ Third, the Canons would motivate practitioners of any experience level—by, for example, its “high resolve,”¹²⁰ and “moral suasion,”¹²¹—to aspire to conduct themselves in accordance with their special obligations as “officers of the court” and would support and strengthen the resolve of those already so committed,¹²² even though, as the Committee acknowledged, peer pressure was less effective outside the smaller, more homogeneous community of lawyers that formerly had existed.¹²³ Fourth, because the Canons would apply nationwide, they

117. 1906 Comm. Rep., *supra* note 21, at 602. Some of the state bar associations that promulgated their own ethics codes in the twenty years before 1906 were similarly motivated. *See also* Report of the Third Annual Meeting of the Alabama State Bar Ass’n 235 (1881) [hereinafter Ala. Third Meeting]; Report of the Seventeenth Annual Session of the Georgia Bar Ass’n 106 (1901); Proceedings of the First Annual Meeting of the Kentucky Bar Ass’n 95 (1902); Report of the Comm. on Legal Education and Admission to the Bar, Proceedings of the Twenty-Fourth Annual Meeting of the Missouri Bar Ass’n 29 (1907).

118. 1906 Comm. Rep., *supra* note 21, at 603. This educational goal was often articulated by the state bar associations that adopted codes of legal ethics in the twenty years before 1906. *See, e.g.*, Ala. Tenth Meeting, *supra* note 112, at 14; Ky. Second Meeting, *supra* note 72, at 33; Md. Sixth Meeting, *supra* note 112, at 47.

119. *See supra* note 94 and accompanying text. Furthermore, as the case method replaced recitations in law schools, it became common for law school professors to teach full time without having had the experience of legal practice. *See Stevens, supra* note 94, at 38. Thus, a law school graduate might have little, or even no, exposure to teachers with any practical and moral experience to impart. The absence of professors who were or had been practitioners meant that law students wholly lacked socialization in the lawyer’s role, including experience and training regarding the ethical issues that arise in actual legal practice. *See* Report of the Comm. on Legal Education and Admission to the Bar, 20 A.B.A. Rep. 378 (1897) (observing that law students have a special need to be instructed “in the relations which exist between a lawyer and his client, and their correlative rights and duties”).

120. 1906 Comm. Rep., *supra* note 21, at 603.

121. *Id.* at 601.

122. Moral support was another reason state bar associations promulgated codes of legal ethics. Thomas Goode Jones told the members of the Alabama State Bar Association, for example, that “the Code [of Legal Ethics] would . . . carry with it the whole moral power of the profession.” Ala. Third Meeting, *supra* note 117, at 235. Similar statements were made to members of other state bar associations. *See, e.g.*, Colo. First Meeting, *supra* note 113, at 108 (“The world is ruled by force of example, and the standard of this association, vigorously defended, ought to bring every member of the bar to a sense of the honor and responsibility of his calling.”); Ky. Second Meeting, *supra* note 72, at 33–34 (“The printed code . . . will undoubtedly tend to keep all of us on our good behavior.”).

123. 1906 Comm. Rep., *supra* note 21, at 601. (“Once possible ostracism by professional brethren was sufficient to keep from serious error the practitioner with no fixed ideals of ethical conduct”; but, “the good or bad esteem of their co-laborers” is nothing to “this new type of lawyer.”).

would tend to create a uniform ethical standard among the states, thereby offering even greater “moral support.”¹²⁴

For these reasons, the Committee recommended that the A.B.A. promulgate and popularize a written code that would “crystallize abstract ethical principles into a series of canons applicable to the usual concrete ethical problems which confront the lawyer in the routine of practice.”¹²⁵ The Committee’s recommendation represents both a continuation of, and a change from, the past. On the one hand, the Committee’s recommendation still implied the creation of an ethos or moral code—what the Committee called “that indefinable ethical something which is the soul and spirit of law and justice”¹²⁶—that was a standard for judging lawyer conduct that aimed higher than either the criminal law or the rules of the marketplace.¹²⁷ On the other hand, that same recommendation was an acknowledgement of a changed legal profession, a profession with far more lawyers, differing in class and educational background, and trained in the law through law school instead of apprenticeships.¹²⁸

Charles A. Boston, a New York City attorney very active in ethics matters, and subsequently an A.B.A. President from 1930–1931, 108 A.B.A. Rep. 1340 (1983), observed that the need for a code of ethics was greatest among lawyers in large cities, like New York, where “there is no brotherhood; the Bar is too numerous and too heterogeneous for any central influence.” Charles A. Boston, *A Code of Legal Ethics*, 20 THE GREEN BAG 224, 227 (1908). Boston’s observation implies that there was a general need for the Canons because the informal pressures of a close-knit legal community had dissipated; the American legal profession, at least in metropolitan areas, was no longer cohesive enough for such pressures to influence lawyer conduct and motives.

124. 1906 Comm. Rep., *supra* note 21, at 603.

125. *Id.* at 604.

126. *Id.* at 602. Many of the state bar associations also recognized the need for an inspirational moral standard higher than positive law. *See, e.g.*, Ga. Fifth Meeting, *supra* note 112, at 144; Ky. Second Meeting, *supra* note 72, at 34.

127. The need for a set of ethical standards that were more stringent than the rules of conduct embodied in the criminal law was well recognized by the state bar associations in adopting their own ethics codes. *See, e.g.*, Proceedings of the First Annual Meeting of the Kentucky Bar Ass’n 96 (1902) (“The criminal code and the criminal laws of the Commonwealth serve a good purpose for extreme cases, but there are many matters resting largely in conscience and in good manners, which the criminal statutes do not, and can not reach.”).

Many years later, Justice Stone made a similar point: “It is needful that we look beyond the club of the policeman as a civilizing agency to the sanctions of professional standards which condemn the doing of what the law has not yet forbidden.” Stone, *supra* note 19, at 13. More recently, Justice O’Connor has pointed out, in the context of attorney advertising, that enforcing high ethical standards for lawyers lies beyond the realm of positive law. *See Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 488–89 (1988) (O’Connor, J., dissenting) (“Membership [in the legal profession] entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.”).

128. One contemporary commentator, George Costigan, Jr., Dean of the College of Law at the University of Nebraska, wrote that “democratization has made it inevitable that the unwritten common law of professional etiquette . . . which governed generations of lawyers in the past shall be replaced by written rules of professional etiquette and a written ethical code.” George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 THE GREEN BAG 57, 57 (1908) [hereinafter Costigan, *American Code*]. Professor Wolfram has acknowledged that the rapid growth of the number of

Although formerly the informal understandings of appropriate lawyer conduct, coupled with the peer pressure among lawyers in a smaller, more homogenous legal community,¹²⁹ had seemed sufficient, except in the few instances of actual fraud or criminal conduct,¹³⁰ the Committee's Report implied that this was no longer the case and that something more, something written and more formal, had become necessary. Thus, in addition to a step backward to an idealized past, the Committee's recommendation was simultaneously a step forward towards a more positivistic regulation of lawyer conduct than previously had existed, a step toward the sort of purely formal, de-moralized regulation to which lawyers are subject today.¹³¹

II. Creation of the Text

A. The Drafting Process

The process of drafting and adopting the Canons reflected the Committee's view that the task to be accomplished was "so momentous" that there should be extended discussion of the subject matter not merely among the Committee or even the A.B.A. delegates present at its annual meetings, but from all A.B.A. members and from state and local bar associations as well.¹³² Involving the entire profession in the process of drafting the Canons began in November 1907, when, in conformity with the recommendation contained in the Committee's 1907 Report, the Committee mailed to every A.B.A. member a copy of its 1907 Report and a reprint of Sharswood's *Ethics*, requesting their suggestions and comments.¹³³ Three weeks later, the Committee sent the same package to every state and local bar association in the United States, requesting their comments as well.¹³⁴ Lucien Alexander, once again the Committee's secretary,¹³⁵ reviewed the replies received from the bar associations and the A.B.A. members and selected "the more

lawyers in the first half of the nineteenth century "substantially weakened" the "informal controls lawyers formerly exerted over their colleagues." Wolfram, *Legal Ethics I*, *supra* note 15, at 477; *see also supra* note 123 and accompanying text.

129. For example, George Sharswood emphasizes the importance to a lawyer of his reputation among "his professional brethren." Sharswood's *Ethics*, 32 A.B.A. Rep. 75-76 (1907) [hereinafter Sharswood]. In Sharswood's view, "[s]ooner or later, the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar." *Id.*

130. 1906 Comm. Rep., *supra* note 21, at 601.

131. *See supra* note 4.

132. Report of the Comm. on Code of Professional Ethics, 31 A.B.A. Rep. 61, 62 (1907) [hereinafter 1907 Comm. Rep. I].

133. Final Report of the Comm. on Code of Professional Ethics, 33 A.B.A. Rep. 567, 568 (1908) [hereinafter Final Report]. The date of the transmittal letter was Nov. 29, 1907. *Id.*

134. *Id.* The date of the transmittal letter was December 19, 1907.

135. Letter from Thayer to Stetson (Nov. 9, 1907), in the Thayer Archives at Harvard University Law School, Vol. 5, at 200 (regarding the appointment of Alexander as secretary of the Committee). Alexander was similarly endorsed as secretary of the Committee in 1906. *See* Letter from Thayer to Tucker (Dec. 29, 1906), in the Thayer Archives at Harvard University Law School, Vol. 4, at 463.

important and complete replies.”¹³⁶ He compiled them, along with selections from a number of articles previously published in professional journals on topics in legal ethics, into a 131-page memorandum, dated March 23, 1908, and entitled *Memorandum for Use of American Bar Association’s Committee To Draft Canons of Professional Ethics*.¹³⁷ One hundred copies of that memorandum—the so-called “Red Book”¹³⁸—were printed, and a copy was provided to each of the Committee’s fourteen members.¹³⁹

The *Red Book* contains the comments of twenty-six identified lawyers or judges, three persons who made comments anonymously, and the Bar Association of the City of Boston. Of the identified commentators, three were members of the Committee—Dickinson, Hubbard, and Howe.¹⁴⁰ A fourth member, Thayer, was a member of the Grievance Committee of the Bar Association of the City of Boston, which prepared an extensive letter of comments that was reviewed and revised by that Association’s Executive Council.¹⁴¹ Other notable commentators were Simeon E. Baldwin, then Chief Justice of Connecticut and the founder and a former President of the A.B.A.;¹⁴² Charles A. Boston, a New York lawyer prominent in the field of legal ethics who served as the A.B.A. President in 1931–1932;¹⁴³

136. Lucien Alexander, *Memorandum for Use of American Bar Association’s Committee to Draft Canons of Professional Ethics* 3 (1908) [hereinafter, *Red Book*].

137. *See id.*

138. Final Report, *supra* note 133, at 568–69.

139. *Red Book*, *supra* note 136, at 2.

140. *Id.* at 3–4.

141. *Id.* at 4–5; *see also id.* at 28–29.

142. *Id.* at 3. Baldwin was one of “the best men” who founded the A.B.A. Simeon Eben Baldwin, in Rogers, *supra* note 77, at 61, 64–65. He was the A.B.A. President in 1890–1891. *Id.* at 61. In addition to being the “founder and original guiding spirit” of the A.B.A., Charles E. Clark, *Foreward*, in FREDERICK H. JACKSON, SIMEON EBEN BALDWIN, at x (1955), he was for 50 years a professor and a financial mainstay of the Yale Law School, *see* FREDERICK H. JACKSON, SIMEON EBEN BALDWIN 92–94, 130, 211 (1955). A leader of the Mugwumps in Connecticut, *id.* at 84, he thereafter switched his allegiance to the Democratic Party and was elected Governor of Connecticut in 1910 as a Democrat. *Id.* at 86, 165.

In 1840, Baldwin was born into a family that had everything—“distinguished ancestry, a well-established and esteemed position in the community, culture and intelligence, and an ample income though not great wealth.” *Id.* at 5.

From 1871 through 1893, Baldwin practiced primarily as a corporation lawyer, representing, among others, the New York and New England Railroad. *Id.* at 58, 75. During those years, “he attained an eminence at the Connecticut bar equaled by few and surpassed by none.” *Id.* at 75. In 1893, he became Associate Justice of Connecticut’s Supreme Court, a position he held until 1907, when he became Chief Justice of that court. Simeon Eben Baldwin, in Rogers, *supra* note 77, at 61.

Once the Canons were adopted, Baldwin recommended adoption of the Canons by state and local bar associations in his article, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541 (1908) [hereinafter Baldwin, *New American Code*].

143. *Red Book*, *supra* note 136, at 3; Yearbook of the New York County Lawyer Ass’n 394–98 (1935).

George P. Costigan, Jr., Dean of the College of Law, University of Nebraska;¹⁴⁴ William Draper Lewis, Dean of the Department of Law at the University of Pennsylvania;¹⁴⁵ Roscoe Pound, then editor of the *Illinois Law Review*;¹⁴⁶ and Edward S. Cox-Sinclair, an English barrister practicing in London.¹⁴⁷

Armed with the Red Book, the Committee met in Washington, D.C., on March 30 through April 1, 1908, to draft the Canons and a form of lawyer's oath.¹⁴⁸ With the exception only of Howe and two other members, Franklin Ferriss and James G. Jenkins, the entire committee was present for at least one day.¹⁴⁹ At the end of that meeting, the Committee delegated to Lucien Hugh Alexander, Thomas Hamlin Hubbard, and Francis Lynde Stetson the task of resolving "various questions of form and style . . . that the nature and value of the Code . . . ma[de] . . . peculiarly important."¹⁵⁰

Following the Washington meeting, this smaller subcommittee met at Stetson's office on April 24, 1908, to resolve those issues, and a number of changes were made "in the way of simplification and reduction."¹⁵¹ In May 1908, the Committee sent a draft of the proposed Canons and of the proposed form of oath to every A.B.A. member¹⁵² and to the secretaries of all state bar associations and

144. Red Book, *supra* note 136, at 3. Costigan wrote one article about the A.B.A.'s proposed Code, Costigan, *American Code*, *supra* note 128, at 57, parts of which were excerpted in the Red Book, *supra* note 136, at 20, 24–25, 26, 32, 49, 99, 126, and he wrote another recommending that the Nebraska State Bar Association adopt the Canons, George P. Costigan, *The Canons of Legal Ethics*, 21 THE GREEN BAG 271, 277 (1909) [hereinafter Costigan, *The Canons*].

145. Red Book, *supra* note 136, at 4. Lewis "was active in the movement to tighten admission standards for law schools and the bar," arguing in 1900 that "the proper preparatory study for law students required . . . a college degree." Carle, *supra* note 13, at 21, 28 n.53.

146. Red Book, *supra* note 136, at 4. Pound succeeded Thayer as Dean of the Harvard Law School in 1915. JOEL SELIGMAN, *THE HIGH CITADEL* 57 (1978).

147. Red Book, *supra* note 136, at 3. During the years 1904 through 1908, Cox-Sinclair carried on a correspondence with Committee member Hubbard about issues regarding legal ethics. *Id.* at 103.

148. Discussion Upon Canons, *supra* note 1, at 56.

149. *Id.* In describing the participants at the Washington meeting, Dickinson did not state that Judge Jones was present. However, a letter suggests that Jones did attend. Letter from Thayer to Jones (July 2, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 452. And, a May 1908 letter from Lucien Alexander cited in the Committee's 1908 Report states that Judge Jones "attended the three days' session . . . in Washington, March 30 to April 1, 1908, and moved the adoption of a number of your committee's modifications of the Alabama code drafted by him more than a score of years ago." Final Report, *supra* note 133, at 569–70. But not all attending Committee members attended for the full three days. For example, Stetson was not present for the sessions on all three days. See Letter from Thayer to Stetson (Apr. 8, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 322.

150. Letter from Thayer to Stetson (Apr. 8, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 322.

151. Discussion Upon Canons, *supra* note 1, at 56–57; Letter from Thayer to Stetson (Apr. 23, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 347.

152. Discussion Upon Canons, *supra* note 1, at 56. (Dickinson's 1908 oral Report of the Committee); Final Report, *supra* note 133, at 567 (Committee's 1908 written report).

their ethics committees, requesting suggestions and comments.¹⁵³ That letter stated about the enclosed draft:

The annexed draft for the canons represents our best present judgment after a most careful consideration of the subject; but we hope that the committees of the respective State Bar Associations will aid us with their advice, and that every member of the American Bar, whether a member of the American Bar Association or not, will freely and frankly criticise the canons and *before June 15 next* advise the committee of any points, whether of substance or phraseology, with which he is not in accord, and will also submit *draft* for any additional canons which he believes should be inserted. All such criticisms and suggestions will receive your committee's careful consideration. Only in this way can our final report be presented to the Association in the best possible form and in harmony with the consensus of opinion in the profession.¹⁵⁴

The preliminary draft contained a notation that "Hon. James G. Jenkins of the committee, dissents from Canon 13, as he is opposed to contingent fees under any circumstances."¹⁵⁵

The Committee received more than 1,000 replies,¹⁵⁶ more than 200 of which specifically concerned the draft provision on contingency fees.¹⁵⁷ The Committee reported that "with the exception of the canon on contingent fees, the preliminary

153. Final Report, *supra* note 133, at 570 (Committee's 1908 written report). The text of that May 1908 first draft was presented to and in some instances actually adopted by state bar associations between May 1908 and the A.B.A.'s annual meeting in August 1908. *See, e.g.*, Report of the Twelfth Annual Meeting of the State Bar Association of Indiana 164–85 (1908) (adopting, on July 21, 1908, the Canons of Ethics "which will be reported to the 1908 meeting of that association, soon to convene at Seattle"); Report of the Fourteenth Annual Meeting of the Pennsylvania Bar Ass'n 257–70 (1908) [hereinafter Penn. Fourteenth Meeting] (copy of the May 1908 Preliminary Report of the Canons Committee, with a copy of the May 1908 Draft); Proceedings of the Twenty-Seventh Annual Meeting of the Bar Ass'n of Tennessee 38–46 (1908) [hereinafter Tenn. Twenty-Seventh Meeting] (copy of the "canon of professional ethics recommended by a committee of the American Bar Association" before May 21, 1908).

154. Final Report, *supra* note 133, at 570. The Committee's entire preliminary report is quoted at *id.* at 567–70. The requested "suggestions and criticisms," *id.* at 567, were to be sent to Alexander no later than June 15, 1908. *Id.* at 570.

155. Report of the Twelfth Annual Meeting of the State Bar Ass'n of Indiana 169 (1908); Penn. Fourteenth Meeting, *supra* note 153, at 266; Tenn. Twenty-Seventh Meeting, *supra* note 153, at 41; *see also* Costigan, *The Canons*, *supra* note 144, at 277.

When that distinguished Committee of fourteen members sent out its preliminary report with the original clause about contingent fees bearing the unlucky number 13, it contained this notation: "Hon. James G. Jenkins [the Wisconsin member] of the Committee dissents from Canon 13, as he is opposed to contingent fees under any circumstances."

Id.

156. Final Report, *supra* note 133, at 570.

157. *Id.* at 571.

draft has been overwhelmingly approved by those communicating with us, adverse criticisms of the other canons and of the oath being few in number and relating mainly to matters of phraseology.”¹⁵⁸

In response, there was another meeting in New York on July 15, 1908, among Alexander, Stetson, Hubbard, Thayer, and Dickinson, “to make the canons more precise by slight changes in phraseology, and in a few instances [to] redraft [] particular canons.”¹⁵⁹ What resulted from that meeting and some subsequent correspondence among Committee members was a set of Canons “unanimously recommended by all the members of the committee.”¹⁶⁰

The Canons were formally presented at the A.B.A.’s Annual Meeting in Seattle on August 27, 1908.¹⁶¹ After Dickinson presented the oral report, the delegates debated and voted on the Canons, one-by-one.¹⁶² With the exception of Canon 13 regarding contingent fees, they were adopted that day as proposed.¹⁶³

In its report, the Committee recommended that the Canons be adopted and printed annually in the Association’s reports, that they be reprinted in pamphlet form, and that two copies be forwarded to each A.B.A. member and ten copies to the Secretary of each state bar association. The Committee further recommended

158. *Id.* The Committee made minor language changes to the preliminary draft of Canons 13, 21, 22, 28, and 31 before proposing the final version of the Canons at the A.B.A.’s annual meeting in August 1908. *Compare* Tenn. Twenty-Seventh Meeting, *supra* note 153, at 38–46 (May 1908 first draft), *with infra* App. (August 1908 final version).

159. Final Report, *supra* note 133, at 571. The date of that meeting is implied in the Letter from Thayer to Stetson (July 16, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 488. The participants at the meeting are stated or implied in the Letter of Thayer to Alexander (Aug. 3, 1908), in the Thayer Archives at Harvard University Law School, Vol. 6, at 30. Thayer’s correspondence suggests that the content of the oath and Canon 30, at least, were among the texts subject to further redrafting. *See infra* notes 336–43 and accompanying text. In addition, the final version of the Canons the Committee proposed in August 1908 contained substantive changes to Canons 1, 5, 7, 10, 15, 21, 22, 28, 30, and 31 from the May 1908 first draft. *See* Proceedings of the Twenty-Eighth Meeting of the Bar Ass’n of Tennessee 163 (1909); *compare* Tenn. Twenty-Seventh Meeting, *supra* note 153, at 38–46 (May 1908 preliminary draft), *with infra* App. (August 1908 final version). Only the changes to Canons 1, 5, 7, 10, 15, and 30 were substantive. They are discussed below. *See infra* notes 320–28, 334–41, 384, 450–54, 493–95, 545–47 and accompanying text.

The change to Canon 13 noted above in the Proceedings of the Twenty-Eighth Meeting of the Bar Ass’n of Tennessee, was a change between the May 1908 draft and what the A.B.A. adopted in August 1908 that was based upon a change proposed during the debate on the proposed Canons. *See infra* notes 465–72 and accompanying text. Canon 13 was presented to the A.B.A. delegates in August 1908 in precisely the same form as it was presented in the May 1908 preliminary draft. *Compare* Tenn. Twenty-Seventh Meeting, *supra* note 153, at 41 (1908), *with* Canon 13 as presented *infra* App.

160. Discussion Upon Canons, *supra* note 1, at 57.

161. *See id.* at 55.

162. *Id.* at 61–85.

163. *Id.*; *see also supra* notes 465–72 and accompanying text.

that the A.B.A. “advise that the subject of professional ethics be taught in all law schools, and that all candidates for admission to the Bar be examined thereon.”¹⁶⁴

In his presidential address, Dickinson, the outgoing A.B.A. President, stated that the Canons had been framed with the expectation that they would appeal to and serve as guidance for the majority of the profession, not just A.B.A. members.¹⁶⁵ He expressed his further “expectation that it will be accepted not only by the Bar Associations of the several states, but will, at least in substance, be enacted into law by many of the states.”¹⁶⁶

B. The Materials at Hand

The Canons Committee’s report at the A.B.A.’s Annual Meeting in 1907 identified the three principal sources for creating the text of a national code of legal ethics: (1) Hoffman’s *Resolutions*, a “code of professional ethics . . . framed early in the XIXth century by David Hoffman . . . of the Baltimore Bar, for adoption by his students on admission to the Bar”;¹⁶⁷ (2) Sharswood’s *Ethics*,¹⁶⁸ “doubtless the inspiration for the Alabama code”;¹⁶⁹ and (3) a section-by-section compilation of the codes of ethics adopted by eleven state bar associations during the score of years from 1887, when the Alabama State Bar Association adopted the first such code.¹⁷⁰ Each of those principal sources and its influence on the Canons is described below.¹⁷¹

164. Final Report, *supra* note 133, at 573.

165. Jacob M. Dickinson, *Address of the President*, 33 A.B.A. Rep. 341, 356.

166. *Id.*

167. *Id.* at 717–35. Because Appendix H to the Committee’s 1907 Report contains the text of Hoffman’s *Resolutions* that the Committee used, that is the text of Hoffman’s *Resolutions* that is referenced throughout this article.

168. The first edition of that work was published under the title “A Compend of Lectures on the Aims and Duties of the Profession of Law, delivered before the Law Class of the University of Pennsylvania.” Sharswood, *supra* note 129, at 7. The Committee recommended that a reprint of Sharswood’s *Ethics* be sent to each A.B.A. member by December 1, 1907. 1907 Comm. Rep. II, *supra* note 170, at 680. That reprint, 32 A.B.A. Rep. (1907), was mailed to A.B.A. members on November 29, 1907. See *supra* note 133, *infra* notes 188–89 and accompanying text. Because that is the version of Sharswood’s *Ethics* that was prepared for the Committee’s use, that is the text of Sharswood’s *Ethics* that is referenced throughout this article.

169. Report of the Comm. on Code of Professional Ethics, 31 A.B.A. Rep. 676, at 678 (1907) [hereinafter 1907 Comm. Rep. II].

170. Report of the Comm. on Code of Professional Ethics, 31 A.B.A. Rep. 676, at 678 (1907) [hereinafter 1907 Comm. Rep. II].

171. The Report also included, as Appendix C, the Louisiana Bar Association’s Code of Ethics. 1907 Comm. Rep. II, *supra* note 170, at 714. Stated in Article II of the 1899 charter of that Association, that code of ethics—just an enumeration of eight duties—more closely resembled a lawyer’s oath than a code of ethics. See Drinker, *supra* note 3, at 23. The Louisiana Code was substantially similar in form and content to the attorneys’ oaths in Washington, Oregon and California, which derived from the oath proposed in the so-called Field Code of Procedure recommended in New York in 1850, which was translated from the advocate’s oath prescribed by the Swiss Canton of Geneva. See *id.* at 23; Wolfram, *Legal Ethics I*, *supra* note 15, at 485. Unlike the codes of ethics adopted by the other state bar associations, the Louisiana Code was not based upon and did not share a family resemblance in either form or content with the Alabama Code. 1907 Comm. Rep. II, *supra* note 169, at 678.

1. *Hoffman's Resolutions*

David Hoffman (1784–1854), a very successful Baltimore lawyer,¹⁷² also was one of the foremost legal educators of the early American Bar.¹⁷³ In 1817, he published *A Course of Legal Study*, a curriculum for his planned law school at the University of Maryland, which was a standard manual for prospective lawyers until well after its second printing in 1836.¹⁷⁴ The second edition contained Hoffman's *Resolutions*, considered by some commentators as “the first American code of legal ethics.”¹⁷⁵ Intended to instruct law students and aspiring lawyers, the Resolutions are written primarily in the active voice of an experienced practitioner making promises about his future intentions and most of them take the form “I will do . . .”; “I will never . . .”¹⁷⁶

Based upon what Susan Carle has called a “religious jurisprudence,”¹⁷⁷ Hoffman's *Resolutions* recognize as important the distinction between moral law and positive law, consistently requiring the lawyer to give priority to the moral law, natural justice, and the purity and quality of his character.¹⁷⁸ Above all, Hoffman

Drinker observed that in addition to the state ethics codes in the states listed in the 1907 report, “there were also, by 1908, Codes of Ethics more or less complete, as the result of codifications of statutory enactments or of the action of bar associations” in “Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, Oklahoma, South Dakota, and Utah.” Drinker, *supra* note 3, at 23. Those codes also derived from the so-called Field Code of Procedure recommended in New York in 1850, and they also did not bear a family resemblance to the ethics codes based upon the Alabama Code. See Wolfram, *Legal Ethics I*, *supra* note 15, at 484–85. In any event, those codes were outside the chain of influence upon the Canons Committee.

172. See Bloomfield, *supra* note 14, at 678 n.21.

173. PERRY MILLER, *THE LEGAL MIND IN AMERICA* 83 (1962) (“In the history of legal education . . . Hoffman is a central figure.”). Writing in 1817, Supreme Court Justice Story called Hoffman's *Course of Legal Study* “by far the most perfect system for the study of the law that has ever been offered to the public.” Joseph Story, *Book Review*, *THE NORTH AMERICAN REVIEW* 76 (Nov. 1817).

174. James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 *YALE L.J.* 1052 (1994) (citing CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 540 (William S. Hein & Co. 1990)).

175. Kalish, *supra* note 14, at 58; accord Armstrong, *supra* note 14, at 1064; see also George Akers, *Hoffman's Fifty Resolutions*, 14 *ALA. LAW.* 171, 171 (1953) (“*Hoffman's Fifty Resolutions* may be regarded as the first outline of a code of ethics.”). Hoffman himself believed that the subject of the proper conduct of the lawyer was “almost wholly new,” DAVID HOFFMAN, *2 A COURSE OF LEGAL STUDY* 723 (2d ed. 1836), and that “on the peculiar duties and conduct of the lawyer, little that is very valuable, has been written.” *Id.* at 724.

176. In a few instances, they are written in the first person passive voice, see 1907 Comm. Rep. II, *supra* note 170, at 719 (*Resolutions IX, X, XXII*), and in a few instances they are general statements written in the third person, see, e.g., 1907 Comm. Rep. II, *supra* note 170, at 723, 727, 732–33 (*Resolutions XXI, XXXI, XLV, XLVI, and XLVII*).

177. Carle, *supra* note 13, at 10–11, 10 n.19. Like many of his contemporaries, Hoffman made use of the religious metaphor in talking about lawyers, regarding them as “ministers at a holy altar.” 1907 Comm. Rep. II, *supra* note 170, at 720–21 (*Resolution XV*); accord 1907 Comm. Rep. II, *supra* note 170, at 718 (*Resolution V*); see *supra* note 72.

178. A number of the Resolutions distinguish justice or moral law or God's law from positive or man-made law. See, e.g., 1907 Comm. Rep. II, *supra* note 170, at 719 (*Resolution XI*) (referring to a result denied “both by law and justice”); *id.* at 720 (*Resolution XIII*) (referring to “legal or moral

stresses the importance of the lawyer's own conscience. In Hoffman's view, "neither loyalty to client nor compliance with the technicalities of the legal process could absolve an attorney from obeying the dictates of conscience and striving to do substantial justice to all parties."¹⁷⁹ Resolution XXXIII summarized Hoffman's view that personal conscience is the cornerstone of professional ethics: "I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right."¹⁸⁰

Because they were written in a different form and for a different purpose than the Canons, and because their style is pretentious and frequently verbose, Hoffman's *Resolutions* generally were not used as the immediate source from which individual Canons were drafted.¹⁸¹ With only one possible exception, the language

defense"); *id.* at 720–21 (Resolution XV) (referring to evidence, "whether legal or moral," against someone accused of a serious crime); *id.* (Resolution XV) (referring to violations of "the laws of God and man"); *id.* at 724–25 (Resolution XXIV) ("A claim or defense may be perfectly good in law, and in justice"); *id.* at 726 (Resolution XXIX) (refunding the unused portion of a retainer required "on every principle of law, and of good morals"); *id.* at 727 (Resolution XXXI) (expressing his belief that counsel should be responsible "to God and man").

Other Resolutions concern the preservation of the purity and quality of the lawyer's character. *Id.* at 717 (Resolution I) ("I will never permit professional zeal to carry me beyond the limits of sobriety and decorum."); *id.* at 721–22 (Resolution XVI) ("Whatever personal influence I may be so fortunate as to possess shall be used by me only as the most valuable of my possessions, and not be cheapened or rendered questionable by a too frequent appeal to its influence. There is nothing more fatal to weight of character than its common use."); *id.* at 727 (Resolution XXXII) (rejecting tactical negotiations, even though they "might finally extract something more than my own or even my client's hopes," because "[r]eputation gained for this species of skill is sure to be followed by more than an equivalent loss of character."):

Hoffman accorded greater priority to the lawyer's own personal views about morality and justice than to his client's interests. *Id.* at 719–20 (Resolution XI, XIV). In order to preserve the purity of the lawyer's views and character, Hoffman required that lawyers control the representation of a client, making the lawyer the sole judge whether the circumstances were appropriate to assert defenses, such as the statute of limitations or infancy, which might in the circumstances lead to an unjust result. *See id.* (Resolutions XII & XIII). Similarly, Resolution XIV made the lawyer the sole judge of whether the facts and the law warrant the assertion on behalf of the client of certain factual or legal propositions. *Id.* at 720.

179. Bloomfield, *supra* note 14, at 684.

180. 1907 Comm. Rep. II, *supra* note 170, at 728. Maxwell Bloomfield has stated that Hoffman "referred all problems to the practitioner's conscience." Bloomfield, *supra* note 14, at 687; *see also* Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325, 332 (2001) ("*Fifty Resolutions* is remarkable for its unrelenting contention that representation of clients in no way absolves lawyers from the dictates of conscience."). Allison Marston agrees that the role of conscience is prominent in Hoffman's thought: "Hoffman's moral system, then, is explicitly premised on the assumption that men's consciences will accurately reflect shared community norms." Marston, *supra* note 14, at 494. Although she cites Bloomfield in support of that statement, neither Marston nor Bloomfield gives any textual support, in Hoffman's *Resolutions* or elsewhere, for the view that Hoffman "assum[ed] that men's consciences will accurately reflect shared community norms."

181. In a circular dated November 28, 1907, the Committee asked for comments upon Hoffman's *Resolutions* and some of those responses were collected in the *Red Book* at pages 91–94.

of the Resolutions was not directly incorporated in the Canons. That possible exception is Resolution XIV, which begins, “My client’s conscience and my own are distinct entities.” That first sentence of Resolution XIV may be the basis for the last sentence in Canon 15, which states that the lawyer “must obey his own conscience and not that of his client.”¹⁸²

It is undisputable, however, that the Committee consulted more than 40 of the Resolutions in drafting the Canons.¹⁸³ Although many of those Resolutions were relevant to the *Canons*’ subject matter, in only one or two instances do the Resolutions offer an idea taken up in the Canons that is not also contained in more suitable language in the ethics code of a state bar association.¹⁸⁴

Herbert Fordham, a lawyer in New York City, considered Hoffman’s *Resolutions* “too verbose and cumbersome.” *Id.* at 4, 92. Another lawyer agreed they were “too longwinded.” *Id.* at 92. Mark Norris, a Michigan lawyer who chaired the Michigan Bar Association committee presenting that association’s code of ethics, opined that “Hoffman’s Resolutions are all good, but I do not think there is anything in them which states the ethics of the profession any better than the several state codes.” *Id.* at 4, 93. William Draper Lewis, Dean of the Department of Law at the University of Pennsylvania, agreed and suggested that the compilation of the ethics codes of the state bar associations “is on the whole a better code to work with as a basis for final action.” *Id.* at 4, 92. The Boston Bar Association rejected Hoffman’s *Resolutions* for:

our present purpose, which is to form a Code of Professional Ethics... [because] many of his resolutions are in the nature of counsels of perfection... [and] the code... should contain only such Canons as the ordinarily honest man would cheerfully subscribe [to] or would at least concur in after he had given the matter some small measure of reflection.

Id. at 93.

182. See *infra* notes 320–28 and accompanying text. Although the language of Canon 18 also appears to support an argument that it was drawn directly from Hoffman Resolution XIV, the drafting process makes that questionable. The Canons Committee considered both Resolution XIV and Section 27 of the Alabama Code in drafting Canon 18. Index and Synopsis of Canons, *infra* App.; Red Book, *supra* note 136, at 40–50. The part of Canon 18 resembling Hoffman Resolution XIV—the second sentence of Canon 18, which states that “[t]he client cannot be made the keeper of the lawyer’s conscience in professional matters,” *infra* App. (Canon 18), is identical to Section 27. There is no available textual evidence that Jones, the draftsman of the Alabama Code, drew upon Hoffman Resolution XIV in drafting Section 27. Moreover, that Code section bears an even greater resemblance to Chief Justice Gibson’s opinion in *Rush v. Cavanaugh*, see *infra* note 275 and accompanying text, with which Jones would have been familiar as the result of his study of Sharswood’s *Ethics*. See *infra* notes 219–22 and accompanying text.

183. See Index and Synopsis of Canons, *infra* App.; Red Book, *supra* note 136, at 11–90.

184. One of those exceptions is Hoffman Resolution XLIV, which concerns the subject of lawyers dealing with unrepresented parties. 1907 Comm. Rep. II, *supra* note 170, at 732. That subject is dealt with in Canon 9, which states:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

Infra App. (Canon 9). Although the Committee indicated that Canon 9 was based on Sections 46 and 47 of the Alabama Code, among other sources, *infra* App., both of those sections concern only

Although Hoffman's *Resolutions* had only limited direct influence on the *Canons'* text, they were known to George Sharswood¹⁸⁵ and apparently also to Thomas Goode Jones,¹⁸⁶ and their influence on the *Canons* primarily passed indirectly through Sharswood's *Ethics* and the Alabama Code.¹⁸⁷

2. Sharswood's *Ethics*

As recommended in the Canons Committee's 1907 Report, Sharswood's *Ethics* was reprinted in November 1907 and sent to every A.B.A. member.¹⁸⁸ The costs were paid by Hubbard, a Committee member, who, out of gentlemanly modesty, requested that his generosity not be publicly mentioned.¹⁸⁹

a lawyer's contact with a represented party, 1907 Comm. Rep. II, *supra* note 170, at 706. The Committee also indicated that Canon 9 was based upon Hoffman *Resolutions* XLIII and XLIV, Index and Synopsis of *Canons*, *infra* App., but only Resolution XLIV deals with a lawyer's contact with an unrepresented party:

Should the party just mentioned have no counsel, and my client's interest demand that I should still commune with him, it shall be done in writing only, and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, or take down in writing his reply in the presence of others; so that if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

1907 Comm. Rep. II, *supra* note 170, at 732. Presumably, then, Hoffman Resolution XLIV is the basis for the second sentence of Canon 9.

Another likely exception is Canon 10, which appears to be derived from Resolution XXIV, rather than Section 38 of the Alabama Code. See *infra* notes 451–54 and accompanying text.

185. According to the legal historian Maxwell Bloomfield, "Sharswood was familiar with Hoffman's *Fifty Resolutions* and agreed with many of their specific recommendations." Bloomfield, *supra* note 14, at 687. It is likely that Sharswood knew of Hoffman and his work, because Hoffman conducted a private law school in Philadelphia from 1844 to 1847, Maxwell Bloomfield, *supra* note 14, at 685 n.47, when Sharswood was in private practice and then a judge in Philadelphia. Sharswood, *supra* note 129, at 5–6.

186. See Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822–1833*, 32 J. LEGAL EDUC. 127, 128 (1982). Allison Marston also concludes that Jones "[a]pparently . . . consulted" Hoffman's writings, Marston, *supra* note 14, at 493 & n.124, but she cites in support only a law review article, N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 927 (1995), which itself offers no support for its statement that "Hoffman's [R]esolutions . . . influenced the first official ethics code adopted by Alabama in 1887."

187. See Shaffer, *supra* note 186, at 128 (noting Hoffman's influence on the *Canons'* two precursors, Sharswood's *Ethics* and the Alabama Code). It is noteworthy that Hoffman's *Resolutions* "failed to attract a substantial readership," Bloomfield, *supra* note 14, at 688, and that Hoffman was criticized for "impracticality and neglect of his clients' interests" on at least one occasion when he carried out his *Resolutions* in his own practice. *Id.* at 685.

188. See *supra* text accompanying note 133.

189. Sharswood, *supra* note 129, at 5.

In his *Ethics*, Sharswood combines Hoffman's religious and moralistic orientation with a solid commitment to republican political ideas.¹⁹⁰ On the one hand, Sharswood views lawyers as engaged in "the ministry of the Temple of Justice,"¹⁹¹ believes that "no man can ever be a truly great lawyer, who is not also in every sense of the word, a good man,"¹⁹² and emphasizes the importance of a lawyer's conscience in carrying out his professional duties.¹⁹³ On the other hand, he is at least more explicit than Hoffman in viewing lawyers as the governing political class, not only because they held so many high public offices¹⁹⁴ and "the actual administration of law is entirely in their hands,"¹⁹⁵ but also because they are a potent force in shaping public opinion about political matters.¹⁹⁶ In Sharswood's view, the dignity and honor of the legal profession is based upon the lawyers' role in the administration of justice.¹⁹⁷

Because Sharswood emphasizes, much more than Hoffman, the importance of the adversary process to the administration of justice and acknowledges, to a much greater extent, that the lawyer's professional role is shaped by that process, Sharswood's view of the lawyer's duty "when the legal demands or interests of his client conflict with his own sense of what is just and right"¹⁹⁸ is much more nuanced than Hoffman's. Indeed, the complexity of Sharswood's explication of that conflict has sometimes led to a misunderstanding among commentators. It is helpful, therefore, to observe that Sharswood's explication proceeds in two stages: the first, a response to the "common accusation" that "lawyers are as often the ministers of injustice as of justice;"¹⁹⁹ the second, a few "principle[s] of private action for the advocate"²⁰⁰ for "solving this [conflict] practically in the majority of cases."²⁰¹

190. Sharswood's republicanism and its influence on both the Alabama Code and the 1908 Canons are a major focus of Pearce, *Republican Origins*, *supra* note 3. The religious dimension in Sharswood's *Ethics* is discussed briefly in Carle, *supra* note 13, at 12–13. These two dimensions are mutually reinforcing in Sharswood's *Ethics*. For example, according to Sharswood, the lawyer's oath reflects his status as "the incumbent of an office . . . in the administration of justice," Sharswood, *supra* note 129, at 58, and "the higher and more impressive sanction of an appeal to the Searcher of all Hearts," *id.* at 61. As that statement about the lawyer's oath suggests, Sharswood views the religious dimension as more fundamental and important than the political dimension. *See also id.* at 10 (noting that legislation is "nobler" than adjudication because "it resembles most nearly the work of the Deity").

191. Sharswood, *supra* note 129, at 163.

192. *Id.* at 168.

193. *See, e.g., id.* at 90, 96, 99, 145 n.1; *see also id.* at 55 ("There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law . . . High moral principle is [the lawyer's] only safe guide.").

194. *Id.* at 26, 54, 171–72.

195. *Id.* at 30.

196. *Id.* at 30–31, 54, 172.

197. *Id.* at 62.

198. *Id.* at 81.

199. *Id.*

200. *Id.* at 84.

201. *Id.* at 90.

Initially, in defending lawyers against that common accusation, Sharswood seems to exonerate them for their actions as advocates in the adversary system:

Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has the right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought to hear and weigh both sides; and the office of the counsel is to assist them doing that, which the client in person, from wanting of learning, experience, and address, is unable to do in a proper manner. The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the function of both judge and jury.²⁰²

But Sharswood is very clear that this defense to a general accusation against lawyers as a class, which he considers “quite satisfactory,” is no basis for an individual lawyer to claim a lack of moral accountability in determining how to conduct himself personally.²⁰³ Indeed, it is precisely at this point in the Ethics, when he turns to the question of how an individual lawyer should resolve the conflict between his duty to his client and his personal moral views of what is just, that he rejects unfettered zeal on behalf of the client as a principle for individual action.²⁰⁴

Sharswood proposes a general solution to that conflict in four different situations. Before doing so, however, he emphasizes the vagaries of any general propositions, because the resolution of that conflict in any situation heavily depends upon the particular circumstances of the case, the parties, and the information available to the lawyer.²⁰⁵

First, as counsel appointed to represent a criminal defendant, Sharswood maintains that “the advocate [should] exert all of his ability, learning, and ingenuity, . . . even if he should be perfectly assured in his own mind of the actual guilt of the prisoner.”²⁰⁶ In Sharswood’s view, in that situation, the accused’s right to trial and counsel trumps the lawyer’s right to preserve his moral purity, even if the accused is guilty.²⁰⁷ Of course, the defense attorney in that situation is limited in the means he may employ in conducting the defense: he should present only fair arguments based upon the evidence and he should not engage in sharp practices, exploit the prosecutor’s mistakes, or place his reputation in the service of the defendant.²⁰⁸

202. *Id.* at 83–84.

203. *Id.* at 84.

204. *Id.* at 84–88.

205. *Id.* at 88–89.

206. *Id.* at 92.

207. *Id.* at 90.

208. *Id.* at 99–100, 103–07.

In stating that the court-appointed lawyer's defense of a criminal defendant, even one the lawyer believes is guilty, "is not to be termed screening the guilty from punishment,"²⁰⁹ Sharswood may be deliberately distancing himself from Hoffman, who used a similar phrase to express his disdain for lawyers who defend those guilty of heinous crimes.²¹⁰

Second, Sharswood maintains that a lawyer should never engage in a private prosecution against a person whom he knows or believes is innocent.²¹¹ Because the government provides public prosecutors, there is no justification, Sharswood concludes, for a lawyer to pursue a private prosecution that he does not believe is warranted on the merits.²¹²

Third, in representing a defendant in a civil case, Sharswood again considers the dependency of defendants upon lawyers in the adversary system sufficient justification for a lawyer to represent a civil defendant whom he believes committed a wrong.²¹³ In other contexts, Sharswood makes it clear, however, that in his view there are limits to the zeal with which a lawyer should undertake such a defense.²¹⁴

Fourth, in representing a plaintiff in a civil case, a lawyer has "an undoubted right, and [is] in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right."²¹⁵ In this situation, Sharswood remarks, there is no need for counsel to assist a client, as there is with a criminal defendant or even a defendant in a civil case.²¹⁶ Therefore, Sharswood considers it "an immoral act to afford that assistance, when his conscience t[ells] him that the client [is] aiming to perpetrate a wrong through the

209. *Id.* at 92.

210. In Resolution XV, Hoffman describes as "inwardly base [and] unworthy" those lawyers who defend murderers and "other perpetrator[s] of like revolting crimes" they know are guilty and, thereby, "pollute the streams of justice and . . . screen such foul offenders from merited penalties." 1907 Comm. Rep. II, *supra* note 170, at 721.

211. Sharswood, *supra* note 129, at 93.

212. *Id.* at 93–94.

213. *Id.* at 95–96.

214. Sharswood rejects Lord Brougham's view at Sharswood, *supra* note 129, at 86–88. Sharswood also speaks of specific limits on overly zealous representation. He insists that a lawyer must "use no deceit, imposition, or evasion" in all his dealings with the court. *Id.* at 72. Commenting on the Courvoisier case, he agrees that a criminal defense lawyer who is satisfied in his own mind that his client is guilty should not present the defense that an innocent third party committed the crime. *Id.* at 103–07. With respect to drafting client affidavits, Sharswood cautions counsel against proceeding in a manner that will tempt the client to stretch the truth. *Id.* at 111–12. He advises counsel to avoid strategies to mislead or surprise opposing counsel, *id.* at 73–74; to avoid abusing the opposing party and witnesses, *id.* at 118–19; to avoid undue influence over the judge and jury, *id.* at 66–67; and to restrain his client from engaging in these improprieties, *id.* He even defends a lawyer's right, based upon his own "sense of honor and propriety," not to take advantage of opposing counsel's "slips and oversights" despite the client's contrary instructions. *Id.* at 74–75.

215. *Id.* at 96.

216. *Id.*

means of some advantage the law may have afforded him.”²¹⁷ In giving priority to the lawyer’s sense of justice over the client’s legal or moral interests, Sharswood’s approach to this situation approximates Hoffman’s less discriminating moralism.

Sharswood’s *Ethics* has had a significant impact on the legal profession’s thought and writing about legal ethics. But the view that Sharswood’s *Ethics* “became the standard work on the subject [of professional ethics] for the next century,”²¹⁸ is clearly exaggerated, because that work was not institutionalized like the Alabama Code and its progeny or the 1908 Canons. There is no doubt, however, that Sharswood’s *Ethics* had an important influence on the Alabama Code and, through that Code, the ethics codes of other state bar associations.²¹⁹ Indeed, Thomas Goode Jones’s son has written that his father kept Sharswood’s *Ethics* on his desk and consulted it for ethical guidance.²²⁰ The Chairman of the Kentucky Bar Association committee that proposed its code of ethics in 1903 remarked upon the extent of its substantive influence: “Anyone who is familiar with the little book by Judge Sharswood on ‘*Legal Ethics*’ will readily see how large a part of [the Alabama] code has been drawn from that source.”²²¹ The Canons Committee agreed, considering Sharswood’s *Ethics* “the inspiration for the Alabama Code.”²²²

Although Sharswood’s *Ethics* had a significant indirect influence on the Canons because of its role in the formulation of the Alabama Code, the central text for the formulation of the Canons,²²³ the direct impact of Sharswood’s *Ethics* on the Canons has been overstated.²²⁴ First, there is only one small portion of Sharswood’s

217. *Id.* In support of his view, Sharswood quotes from Chief Justice Gibson in *Rush v. Cavanaugh*, 2 Pa. 187 (1845), to the effect that the client is not the keeper of the lawyer’s conscience. See *infra* note 275 and accompanying text.

218. Bloomfield, *supra* note 14, at 687 (citing Auerbach, *supra* note 12, at 40–52).

219. Armstrong, *supra* note 14, at 1063 (explaining that the Alabama Code “is based largely on a series of lectures delivered by Judge George Sharswood . . . and published as *Essay on Professional Ethics*”).

220. Jones, *Canons*, *supra* note 14, at 484. In an earlier article, Jones’s son stated that his father drafted the Alabama Code “without model or guide, though he had read Judge Sharswood’s *Essay on Professional Ethics*.” Jones, *First Legal Code*, *supra* note 14, at 113. Jones himself described a part of the process of drafting the Alabama Code in 1884, three years before the draft code was proposed at the 1887 Annual Meeting of the Alabama State Bar Association, but he made no mention of consulting Sharswood’s *Ethics*. Proceedings of the Sixth Annual Meeting of the Alabama State Bar Ass’n 21 (1884).

221. 1907 Comm. Rep. II, *supra* note 170, at 678 (quoting Ky. Second Meeting, *supra* note 72, at 25).

222. *Id.* Relying on these sources and their own comparisons of the text of Sharswood’s *Ethics* and the Alabama Code, modern legal scholars have reached the same conclusion with more specific support. See, e.g., Marston, *supra* note 14, at 498–503; Pearce, *Republican Origins*, *supra* note 3, at 243–44 (arguing that the Alabama Code is “largely . . . a codification of the principles contained in Sharswood’s essay.”).

223. See *infra* notes 260–63 and accompanying text.

224. Russell Pearce has stated that “Sharswood’s work . . . was the basis for the Canons.” Pearce, *Republican Origins*, *supra* note 3, at 248; see also *id.* (“The 1908 Canons largely borrow text and standards from Sharswood.”); *id.* at 259 (“The drafters [of the Canons] liberally borrowed text

Ethics that is quoted verbatim in the Canons: Sharswood's definition of the duty of zealous representation a lawyer owes a client that is marked by quotation marks in Canon 15.²²⁵

Second, the main topics of eight out of the original thirty-two Canons are not discussed at all in Sharswood's *Ethics*: Canon 2, dealing with the merit selection of judges; Canon 7, dealing with differences in opinions with professional colleagues and competition with them; Canon 9, dealing with communications with an adverse party; Canon 19, dealing with the advocate-witness rule; Canon 20, dealing with the use of newspaper publicity; Canon 27, dealing with newspaper and other advertising; Canon 28, dealing with runners and paid third party recommendations; and, Canon 29, dealing with the reporting of lawyer misconduct.²²⁶

Third, at least six other Canons diverge substantively from the content of Sharswood's *Ethics*.²²⁷

and ideas from Sharswood's essay."); *id.* at 267 ("The Canons drew on Sharswood's republican vision for both form and content."). Other legal ethics commentators have reached the same conclusion based upon a less detailed analysis. *See, e.g.,* Auerbach, *supra* note 12, at 41 ("The new canons drew heavily upon George Sharswood's *Essay on Professional Ethics*, published in 1854."); GEOFFREY C. HAZARD & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 108 (3d ed. 1994) (Sharswood's *Ethics* "heavily influenced . . . the [A.B.A.'s] Canons of Ethics"); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 *EMORY L.J.* 909, 929 (1980) (Sharswood's "*Essay* was enormously influential in the drafting and adoption of the Canons").

225. *See infra* App. (referring to Canon 15's use of "zealous representation"). The Canons Committee also chose to introduce the Canons with three famous quotations, one of which—the quotation about the moral temptations a lawyer faces—is from Sharswood's *Ethics*. *Id.*

226. *Compare infra* App. (Canons 2, 7, 9, 19, 20, 27, 28 and 29), with Sharswood, *supra* note 129, at 9–182 (Sharswood's *Ethics*). Professor Pearce acknowledges that seven of the thirty-two Canons (all of those cited, except Canon 28) are not derived at all from Sharswood. Pearce, *Republican Origins*, *supra* note 3, at 245–46, 268.

227. For example, Canon 4 discourages, but still allows, a lawyer to decline court-assigned representation of an indigent prisoner for non-trivial reasons. *Infra* App. (Canon 4). Sharswood's *Ethics* approvingly cites judicial decisions prohibiting a lawyer from declining such court assignment. Sharswood, *supra* note 129, at 91–92. Professor Pearce acknowledges that the Canons are "less rigorous" in this regard. Pearce, *Republican Origins*, *supra* note 3, at 245.

Canon 13 requires judicial supervision of contingent fee arrangements. It is "less restrictive" than Sharswood's *Ethics* because it "allow[s] contingent fee agreements but urge[s] strict court scrutiny," Pearce, *Republican Origins*, *supra* note 3, at 270, while Sharswood's *Ethics* completely discountenances contingent fee arrangements. Sharswood, *supra* note 129, at 153, 159–64; *see also* Pearce, *Republican Origins*, *supra* note 3, at 245 n.24.

Canon 14 defines the circumstances when a lawyer can sue a client for a fee. *Infra* App. (Canon 14). Canon 14 is less restrictive of such suits than Sharswood's *Ethics*, which envisions such suits being warranted only in an extraordinary situation. *Compare id.*, with Sharswood's *Ethics*, Sharswood, *supra* note 129, at 151–52. Professor Pearce acknowledges this. Pearce, *Republican Origins*, *supra* note 3, at 270 & n.244 (explaining that Canon 14 is "less restrictive" than Sharswood's *Ethics* in that "[w]hile disfavoring suits against clients, the Canons permit such suits."); *see also id.* at 245 n.24.

Canon 15 generally prohibits a lawyer from stating his personal belief in the justice of his client's cause. *Infra* App. (Canon 15). This is contrary to Sharswood's *Ethics*, which acknowledges that there are some "very rare" occasions when a lawyer "ought to throw the weight of his private

Fourth, in virtually every instance where the Alabama Code is the basis for the Canons—which, in the Committee’s view, is twenty-eight of the thirty-two original Canons²²⁸—the available sources evidencing the Committee’s work strongly suggest that, except for Canon 15, Sharswood’s text played no role in the wording of the Canons.²²⁹ The *Red Book* incorporates lawyers’ comments and materials Alexander considered relevant regarding each of the provisions of the codes of ethics of the state bar associations. The *Red Book* shows that with respect to the vast majority of the Canons, the Committee and other commentators edited the sections of the Alabama Code or the ethics code of some other state bar association to arrive at the language actually used in the Canons.²³⁰ The Committee itself cross-referenced, as part of its 1908 Report, the sections of the state bar association ethics codes and the numbers of Hoffman’s *Resolutions* which related to each Canon, but it did not cross-reference to Sharswood’s *Ethics*.²³¹ Moreover, there are a few references to Sharswood’s *Ethics* in the *Red Book* itself,²³² suggesting, at least, that the non-referenced portions of Sharswood’s *Ethics* were not part of the materials the Committee used directly in drafting the Canons.

For example, Professor Pearce contends that Canon 6, which concerns conflicts of interest, “incorporates many of Sharswood’s phrases without quotation marks.”²³³ In support, Professor Pearce quotes the following passage in Sharswood’s *Ethics*:

[T]he advocate is bound in honor, as well as duty, to disclose to the client at the time of the retainer, every circumstance of his own connection with

opinion [about the justice of his client’s cause] into the scales in favor of the side he has espoused.” Sharswood, *supra* note 129, at 99.

Canon 23 is more absolute in its prohibition of trial counsel’s communication with jurors, proscribing communications “even as to matters foreign to the cause,” *infra* App. (Canon 23), while Sharswood’s *Ethics* requires the avoidance of only “unnecessary communications with the jurors.” Sharswood, *supra* note 129, at 67.

Canon 26 allows lawyers to lobby before legislatures and executive departments of the government, reflecting the Committee’s rejection of Sharswood’s unqualified condemnation of lawyers lobbying for legislative changes affecting pending cases they are handling. *Red Book*, *supra* note 136, at 127–28 (quoting Sharswood, *supra* note 129, at 24–25) *see also* Sharswood, *supra* note 129, at 24–25 (describing Sharswood’s opposition to such lobbying).

Canon 30 “go[es] further than Sharswood by requiring a lawyer for a defendant, as well as a plaintiff, not to take a case intended “to harass or to injure the opposite party or to work oppression or wrong.” Pearce, *Republican Origins*, *supra* note 3, at 269.

228. Index and Synopsis of Canons, *infra* App.; *but see infra* note 263 and accompanying text.

229. *But see* Pearce, *Republican Origins*, *supra* note 3, at 243–44 (noting that the language of Sharswood’s essay found its way into the Canons sometimes by “unattributed quotation” and at other times was “generally paraphrased”).

230. *See infra* Part III.A-D.

231. *See* Index and Synopsis of Canons, *infra* App.

232. *Red Book*, *supra* note 136, at 8, 39, 98, 127–28.

233. Pearce, *Republican Origins*, *supra* note 3, at 244.

the parties or prior relation to the controversy, which can or may influence his determination in the selection of him for the office.²³⁴

He compares that quoted passage to the first paragraph of Canon 6, which states:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.²³⁵

Although the language of the two passages is close, the language of Canon 6 is also close to the first sentence of Section 34 of the Alabama Code, which states:

An attorney is in honor bound to disclose to the client at the time of retainer, all the circumstances of his relation to the parties, or interest or connection with the controversy, which might justly influence the client in the selection of his attorney.²³⁶

Although it is debatable whether the language of the first paragraph of Canon 6 is closer to the first sentence of Section 34 or the quoted passage from Sharswood, the *Red Book* shows that the comments made to the Committee generally approved of the language of Section 34 and did not mention the quoted passage from Sharswood at all.²³⁷ Thus, it is fair to assume that Canon 6 was based upon Section 34, as the Committee reported,²³⁸ rather than the language Professor Pearce quotes from Sharswood.²³⁹

Similar close textual analysis and the available documentary history of the Committee's drafting efforts reveals that, even when the Canons adopted provisions similar to the normative standards proposed or approved in Sharswood's *Ethics*, except in rare instances, the language of the other Canons also are generally drawn from the Alabama Code, not Sharswood's *Ethics*.²⁴⁰

234. *Id.* at 244 n.21, (quoting Sharswood, *supra* note 129, at 109–10).

235. *Infra* App. (Canon 6).

236. 1907 Comm. Rep. II, *supra* note 170, at 703.

237. *Red Book*, *supra* note 136, at 57.

238. Index and Synopsis of Canons, *infra* App.

239. For an extensive comparison of Canon 6 in its entirety and the Alabama Code sections upon which it is based, see *infra* notes 392–416 and accompanying text.

240. For example, Canon 1 is much closer to Sections 1 and 4 of the Alabama Code, which the Committee cross-referenced, Index and Synopsis of Canons, *infra* App., than Sharswood's comments about respect for the courts, compare *infra* App. (Canon 1), with 1907 Comm. Rep. II, *supra* note 170, at 688–90 (Ala. Code §§ 1, 4), and 1907 Comm. Rep. I, *supra* note 132, at 61–64; see also Pearce, *Republican Origins*, *supra* note 3, at 268 & n.208. Canon 3 is much closer to Sections 3 and 15 of the Alabama Code, which the Committee cross-referenced, Index and Synopsis of Canons, *infra* App., than Sharswood's negative comments on ex parte conversations with judges, compare *infra* App. (Canon 3), with 1907 Comm. Rep. II, *supra* note 170, at 689, 695 (Ala. Code §§ 3, 15), and Sharswood, *supra* note 129, at 66, cited in Pearce, *Republican Origins*, *supra* note 3, at 245 & n.22. Canon 8 is much closer to Sections 32 and 35 of the Alabama Code, which the Committee cross-referenced, Index

Fifth, with respect to the four or five Canons that were not based upon the Alabama Code, at least two of those Canons clearly were based upon sources other than Sharswood's *Ethics*.²⁴¹

and Synopsis of Canons, *infra App.*, than Sharswood's comments about the lawyer's duty to advise the client candidly about the merits of his case and the duty to seek a settlement in litigation, *compare infra App.* (Canon 8), with 1907 Comm. Rep. II, *supra* note 170, at 703–04 (Ala. Code §§ 35, 38), and Sharswood, *supra* note 129, at 107, 109, cited in Pearce, *Republican Origins*, *supra* note 3, at 270 & n.236. The second paragraph of Canon 11 is closer to Section 37 of the Alabama Code, which the Committee cross-referenced, Index and Synopsis of Canons, *infra App.*, than Sharswood's comments on handling client funds, *compare infra App.* (Canon 11), with 1907 Comm. Rep. II, *supra* note 170, at 705 (Ala. Code § 37), and Sharswood, *supra* note 129, at 166, cited in Pearce, *Republican Origins*, *supra* note 3, at 270 & nn.234–35. Although Canon 15 contains a quotation of Sharswood's famous definition of zealous representation, *see supra* note 225 and accompanying text, the remaining text of that Canon is derived primarily from Section 10 of the Alabama Code, as edited by commentators on that section, *see infra* notes 321–27 and accompanying text. The first sentence of Canon 18 is closer to Sections 27 and 53 of the Alabama Code, which the Committee cross-referenced, Index and Synopsis of Canons, *infra App.*, than Sharswood's exhortation not to abuse the opposing party, *compare infra App.* (Canon 18), with 1907 Comm. Rep. II, *supra* note 170, at 701, 710 (Ala. Code §§ 27, 53), and Sharswood, *supra* note 129, at 118. Canon 23 is closer to Section 55 of the Alabama Code, which the Committee cross-referenced, Index and Synopsis of Canons, *infra App.*, than Sharswood's negative comments on an advocate's communications with jurors, *compare infra App.* (Canon 23), with 1907 Comm. Rep. II, *supra* note 170, at 712, and Sharswood, *supra* note 129, at 67 (Sharswood's comments). The last sentence of Canon 24 was based upon a rewriting of Section 30 of the Alabama Code, *see infra* notes 333–35 and accompanying text, rather than Sharswood's counterpart statement that “[t]he client has no right to require him to be illiberal,” *see Pearce, Republican Origins*, *supra* note 3, at 268 & n.217, (citing Sharswood, *supra* note 129, at 74–75 (1907)). Canon 25 is closer to Section 41 of the Alabama Code, which the Committee cross-referenced, Index and Synopsis of Canons, *infra App.*, than Sharswood's admonitions to act fairly towards opposing counsel and avoid misleading or surprising them, *compare infra App.* (Canon 25), with 1907 Comm. Rep. II, *supra* note 170, at 705 (Ala. Code § 41), and Sharswood, *supra* note 129, at 73–74, cited in Pearce, *Republican Origins*, *supra* note 3, at 264 & nn.183–85 and 268 & n.216. But, the second sentence of Canon 18—“The client cannot be made the keeper of the lawyer's conscience,”—may or may not be closer to Sharswood's quotation of Chief Justice Gibbons, Sharswood, *supra* note 129, at 96–97, than Hoffman's Resolution XIV, to which the Committee referred, Index and Synopsis of Canons, *infra App.*; *see also supra* notes 182, 331–32 and accompanying text. There are, however, a few instances when Sharswood's *Ethics* offers a closer match to the Canons' concept or language than the Alabama Code, even when the Committee cross-referenced Canons to sections of the Alabama Code. For example, Canon 10 states: “The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.” The referenced section of the Alabama Code, Section 38, states that a lawyer and client “ought scrupulously to refrain from bargaining about the subject matter of their litigation, so long as the relation of attorney and client continues.” 1907 Comm. Rep. II, *supra* note 170, at 704. The pertinent text from Sharswood's *Ethics*, Sharswood, *supra* note 129, at 155, n.1, seems closer to Canon 10 in both concept and language: “The purchase by an attorney from his client, pending litigation, of the subject-matter of the litigation, is absolutely void.”

241. *See* Index and Synopsis of Canons, *infra App.*; 1907 Comm. Rep. II, *supra* note 170, at 713. Canon 2, which concerns lawyer obligations to support the non-partisan, merit-based selection of independent judges, was based upon Section 55 of the code of ethics of the Kentucky Bar Association. *See infra* note 550 and accompanying text. As discussed above, this topic is not discussed at all in Sharswood's *Ethics*. *See supra* note 226 and accompanying text. Canon 16 was based primarily

On the other hand, the Committee was well aware of Sharswood's *Ethics*, and there is nothing to suggest that particular Committee members did not bring Sharswood's *Ethics* into their discussions. Although the Committee met to discuss the formulation of the Canons for three days during the Spring of 1908,²⁴² no notes or minutes of that meeting have yet been located. Also, Dickinson's statement that the Committee's work was "based upon Sharswood's Legal Ethics"²⁴³ raises at least the possibility that the implications of the existing written record may be misleading in minimizing the direct influence of Sharswood's *Ethics* on the Canons.²⁴⁴ Indeed, the Committee acknowledged its use of Sharswood's *Ethics* in formulating the lawyer's oath they proposed. The A.B.A. adopted this oath as an accompaniment to the Canons.²⁴⁵

For example, Committee member Hubbard made suggestions regarding the text of both Canons 30 and 31.²⁴⁶ Those Canons concern, among other things, a lawyer's gate-keeping responsibilities for both litigation and transactional work, and both Canons not only make lawyers morally accountable for their decisions in that regard, but Canon 31 also explicitly states that lawyers cannot hide behind their clients' instructions to justify or excuse their decisions.²⁴⁷ This same idea is expressed in Sharswood's *Ethics*,²⁴⁸ and that may have been the source of Hubbard's suggestions, since those suggestions were not based upon any of the state bar association ethics codes.²⁴⁹ Further, Hubbard appears to have been familiar

upon Section 37 of the code of ethics of the Michigan State Bar Association, even though Canon 16, which concerns a lawyer's duty to restrain his client from engaging in improprieties surrounding the trial of his case, expresses a duty with which Sharswood concurs. *See infra* note 353 and accompanying text; Sharswood, *supra* note 129, at 66–67. Canons 30 and 31 draw upon suggestions that Hubbard made to the Committee, but those suggestions may themselves have been based on Sharswood's *Ethics*. *See infra* notes 246–51, 336–46 and accompanying text.

242. *See supra* notes 148–49 and accompanying text.

243. Discussion Upon Canons, *supra* note 1, at 56.

244. Although the Alabama Code was the source for the language of the vast majority of the Canons, sometimes a Canon contained another idea or additional language not provided by the pertinent section or sections of the Alabama Code. In those instances, Sharswood's *Ethics* may have provided the basis for the additional idea or language. For example, some of the types of misleading conduct that are prohibited by the lawyer's duty of candor to the court as described in Canon 22 do not derive from the pertinent section of the Alabama Code, but appear to come from Sharswood's *Ethics*, which describes the ethical issues relating to drafting client affidavits and witness statements that are the subject of the third paragraph of Canon 22. *See infra* text accompanying note 348.

245. *See infra* App. (Lawyer's Oath).

246. *See* Red Book, *supra* note 136, at 107; *see also infra* notes 336–46 and accompanying text.

247. *See infra* App. (Canon 31); *see also infra* note 346 and accompanying text.

248. Sharswood, *supra* note 129, at 84, 96–97. This "principle of private action for the advocate," is distinguishable, however, from Sharswood's acceptance and general defense of the adversary system of justice, which allows the lawyer, as an officer of the court, "to assist [the client] by doing that, which the client, for want of learning, experience and address, is unable to do in a proper manner." *Id.* at 83–84.

249. Although the Canons Committee cross-referenced Section 13 of the Alabama Code with respect to Canons 30 and 31, Index and Synopsis of Canons, *infra* App., that reference appears

with Sharswood's *Ethics*, having suggested its reprinting and distribution to every A.B.A. member,²⁵⁰ and then having paid the associated costs.²⁵¹

Thus, like Hoffman's *Resolutions*, Sharswood's *Ethics* left only a very limited mark on the language of the Canons. Unlike Hoffman's *Resolutions*, however, Sharswood's *Ethics* had a very direct and pervasive influence on the content of the Alabama Code. Although, as the next part of this article demonstrates, both the content and language of the Alabama Code were substantively and substantially changed when Code sections were incorporated into the Canons, because so many of the values and ethical standards contained in the Alabama Code are found in Sharswood's *Ethics*, many of those same values and ethical standards have been continued, albeit often modified, in the Canons. In that respect, the content and intellectual underpinnings of the Canons share a family resemblance with that of Sharswood's *Ethics*. It is clearly an overstatement to say that George Sharswood is the father of the 1908 Canons,²⁵² but it is not an exaggeration to think about him as having a grandfatherly influence over them.

3. Alabama Code

George Sharswood died in 1883, by which time Thomas Goode Jones already may have been busy at work on the Alabama Code.²⁵³ In 1881,²⁵⁴ at age thirty-seven,

erroneous. Section 13 concerns the obligation of a lawyer to defend a person accused of a crime. 1907 Comm. Rep. II, *supra* note 170, at 695. The focus of Canons 30 and 31 is much broader and much different. *See infra* notes 336–46 and accompanying text.

250. 1907 Comm. Rep. I, *supra* note 132, at 63.

251. *See supra* note 189.

252. Compare *supra* text accompanying notes 218–41 with Russell G. Pearce, *The Lawyer and Public Service*, 9 AM. U. J. GENDER SOC. POL'Y & L. 171, 172 n.5 (2001) ("Sharswood was the father of the legal ethics codes.").

253. The Alabama Code was not proposed and adopted until 1887. *See Ala. Tenth Meeting, supra* note 112, at 10–21. Jones, the sole draftsman of the Code, had prepared a draft of the code by the Annual Meeting in 1886. *See supra* note 35 and accompanying text; Proceedings of the Ninth Annual Meeting of the Alabama State Bar Ass'n 51 (1888). Jones also had written letters to judges and lawyers soliciting their views on such a code by the time of that Association's Annual Meeting in 1884. *See Proceedings of the Sixth Annual Meeting of the Alabama State Bar Ass'n* 21 (1884).

254. Jones was the Chairman of the Alabama State Bar Association's Committee on Judicial Administration and Remedial Procedure in 1881, and he gave the Committee's report on December 30, 1881. Report of the Third Annual Meeting of the Alabama State Bar Ass'n 173 (1881). In that report, his Committee "recommend[ed] that the Association appoint a committee, with instructions to report a Code of legal ethics for consideration, at the next annual meeting." *Id.* at 236.

Jones and his Committee sought to improve the quality of lawyers in Alabama by expelling unethical practitioners: "[J]udicial administration would be greatly advanced if there were some organized body of lawyers, armed with legal authority and duty to investigate and prosecute unworthy members." Marston, *supra* note 14, at 483 (citing Proceedings of the First, Second, and Third Annual meetings of the Alabama State Bar Ass'n 235 (1882) (alteration in original)). But Jones questioned the propriety of such prosecutions without clear ethical guidelines:

While there are standard works of great eminence and authority upon legal ethics, these are not always accessible. In many instances practices of questionable propriety are

Jones first proposed that the Alabama State Bar Association adopt a code of ethics, and he was appointed chairman of the committee to draft such a code the next year.²⁵⁵ That code was proposed and adopted at that Association's Annual Meeting in 1887, making it the first code of ethics adopted by any state bar association in the country.²⁵⁶ With the exception of the Louisiana State Bar Association, each of the other eleven state bar associations that adopted a code of ethics between 1887 and 1907 acknowledged reliance upon the Alabama Code.²⁵⁷ The Committee, which compiled all of the codes of ethics of the state bar associations as Appendix B to its 1907 Report,²⁵⁸ expressly recognized the overwhelming reliance of the ethics codes of the other state bar associations on the Alabama Code and the uniformity of their content.²⁵⁹

thoughtless rather than willful, and would have been avoided if any short, concise Code of Legal Ethics, stamped with the approval of the Bar, had been in easy reach. Nearly every profession has such a work, which is treasured by its members.

Id. at 483 (quoting Proceedings of the First, Second, and Third Annual Meetings of the Alabama State Bar Ass'n 235 (1882)).

An additional motive for adopting the Alabama Code was to codify the moral views of the profession, so as to be a written embodiment of peer pressure. Jones and his Committee certainly saw the proposed code in that way:

With such a guide, pointing out in advance the sentiment of the Bar against practices which it condemns, we would find them gradually disappearing; and should any be bold enough to engage in evil practices, the Code would be a ready witness for his condemnation, and carry with it the whole moral power of the profession.

Id. at 500.

255. Proceedings of the Fourth Annual Meeting of the Alabama State Bar Ass'n 20 (1883).

256. Ala. Tenth Meeting, *supra* note 112, at 10–21; Jones, *Canons*, *supra* note 14, at 493 (“the first code of Legal Ethics ever adopted in this country”).

257. *See, e.g.*, Colo. First Meeting, *supra* note 113, at 108 (1898); Report of the Sixth Annual Meeting of the Georgia Bar Ass'n 99 (1889); Proceedings of the First Annual Meeting of the Kentucky State Bar Ass'n 25–26 (1903); Report of the Sixth Annual Meeting of the Maryland State Bar Ass'n 47 (1901); Proceedings of the Eighth Annual Meeting of the Michigan State Bar Ass'n 34 (1897); Proceedings of the Twenty-Fourth Annual Meeting of the Missouri Bar Ass'n 29 (1906); Report of the Second Annual Meeting of the North Carolina Bar Ass'n 87 (1899); Report of the First Annual Meeting of the Virginia State Bar Ass'n 25 (1889). On the origins of the Louisiana Code, *see supra* note 171.

258. 1907 Comm. Rep. II, *supra* note 170, at 685, 713.

259. Citing the Preliminary Report of the Committee, dated May 1908, and sent to each member of the A.B.A., the Committee stated that the other state bar associations adopted the Alabama Code “with but slight modifications.” Final Report, *supra* note 133, at 569. The Committee made a similar observation the prior year: “With the exception of the Louisiana code, all the State Bar Association codes are formulated, almost *totidem verbis*, upon that of Alabama. . . .” 1907 Comm. Rep. II, *supra* note 170, at 678. In introducing that 1907 Report, Committee member Hubbard commented on the Alabama Code's relation to the ethics codes of the other state bar associations: “It was substantially adopted in ten other states; it was slightly extended in some and in others slightly contracted.” 1907 Comm. Rep. I, *supra* note 132, at 61. Modern legal scholars have acknowledged how wholesale was the adoption of the content of the Alabama Code by the other

Because the Alabama Code was, as the Committee recognized, “the foundation of all the other [ethics] codes,”²⁶⁰ it likewise became for the Committee “[t]he foundation of the draft for [the] canons of ethics.”²⁶¹ As Hubbard explained, the pull of precedent on the lawyerly mind was too great to ignore:

[T]he Alabama Code and the variations made by the ten associations other than the association of the State of Alabama that have followed it [are] the substance of all that is needed to prepare canons of ethics and you have in the main a form which may safely be adopted; for manifestly, it is safer to follow a good precedent if one has been made than to establish a new one.²⁶²

Following these statements, modern legal scholars have been quick to recognize the *Canons*' reliance on the Alabama Code,²⁶³ but in doing so they have glossed over the *Canons*' substantial original contributions.

state bar associations. Allison Marston, who has given the most scholarly attention to the Alabama Code, has observed:

The ABA's report reveals substantial uniformity among the state codes. Not surprisingly, advertising and fee fixing were two of the only three areas significantly modified by other states. Six states heightened their condemnation of soliciting individuals for legal business. While Alabama had stated this practice “ought to be avoided,” three states declared the practice “disreputable,” while Kentucky labeled it “highly objectionable.” However, seven states rejected both the Alabama Code's assertion that lawyers often overestimate the worth of their services and the admonition that “[a] client's ability to pay can never justify a charge for more than the service is worth. . . .” Six states rejected the Code's provision that a regular client may be charged less for services than a “casual” client.

Marston, *supra* note 14, at 504–05 (alteration in original). Her description of the few inconsistencies is, however, somewhat inaccurate. The advertising approach of Alabama was widely adopted by the other state bar associations; it was Alabama's approach to personal solicitation that was condemned more vigorously by other state bar associations. *See* 1907 Comm. Rep. II, *supra* note 170, at 696 (comparing provisions regarding advertising and personal solicitation). Section 48 of the Alabama Code, the provision about not overestimating the value of one's legal services, was rejected (or at least not included) in the ethics codes of seven other state bar associations, and adopted by three other state bar associations. 1907 Comm. Rep. II, *supra* note 170, at 708.

260. 1907 Comm. Rep. II, *supra* note 170, at 685.

261. Final Report, *supra* note 133, at 569.

262. 1907 Comm. Rep. I, *supra* note 132, at 62.

263. *See, e.g.*, THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 12 (6th ed. 1995) (“It was the Alabama Code [of Ethics], in turn, that formed the basis for the American Bar Association's first statement of ethical principles, the Canons of Professional Ethics, published in 1908.”); WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 54 n.21 (“The 1908 Canons were not designed to break new ground. They were largely copied from the 1887 Code of Ethics of the Alabama State Bar Association.”); Marston, *supra* note 14, at 471 n.2 (“[T]he Canons of Professional Ethics . . . drew heavily from the structure and content of the Alabama Code.”); *Id.* at 504 (The Canons Committee “used [the Alabama Code] as its model”); Patterson, *supra* note 224, at 929 (“The Canons were, in fact, a redraft of the Alabama Code of Ethics.”); *id.* at 935 (“The Canons, indeed, were little more than a redraft of the Alabama Code. . . .”).

One of the goals of the next part of this article is to demonstrate that too superficial an understanding of this reliance has caused a failure to appreciate the distinctive contribution the Canons made to American legal ethics. Indeed, there has never been an effort to describe the originality of the Canons.²⁶⁴ Although it is indisputable that the Alabama Code was the starting point for the vast majority of the Canons,²⁶⁵ the members of the Committee further developed some of the key concepts of the Alabama Code, made startling substantive changes in others, and added their own entirely new ethical ideas. What resulted was a comprehensive and detailed vision of conscientious lawyering, supported by new and expanded prohibitions on commercial practices by lawyers and by a virtually unprecedented duty imposed on lawyers actively to regulate the conduct of the lawyers and judges comprising what became the modern legal profession.²⁶⁶

Allison Marston, in particular, overemphasizes the Canons' reliance upon the Alabama Code, when she states that "[v]irtually all of the thirty-two original Canons derive from one of the fifty-six provisions of the Alabama Code of Ethics." Marston, *supra* note 14, at 505. This is not true. The Committee itself references the Alabama Code as a basis for 28 of the 32 Canons, all except Canon 2 (derived from Section 55 of the Kentucky Code), Canon 10 (derived from Hoffman's *Resolutions*), Canon 16 (derived from Section 37 of the Michigan Code), and Canon 32 (purportedly derived from Section 52 of the Kentucky Code). See Index and Synopsis of Canons, *infra* App. However, a careful comparison of the Canons and the Alabama Code shows that Section 14 of the Alabama Code is not the basis for Canon 31, see *infra* note 344 and accompanying text, as the Committee states, see Index and Synopsis of Canons, *infra* App. Thus, only twenty-seven of the Canons can fairly be described as based at least in part on sections of the Alabama Code, and of those twenty-seven Canons there is much that is new and different. See *infra* Part III.

Allison Marston also argues that Canon 10 is really based upon Section 38 of the Alabama Code, even though the Committee did not indicate that in its 1908 written report, Index and Synopsis of Canons, *infra* App. See *infra* notes 451–54 and accompanying text.

264. For example, even though the Canons' reliance on the Alabama Code has been well recognized, no careful comparison of the Canons and the counterpart sections of the Alabama Code has ever been made. Allison Marston, whose recent article is the most detailed discussion of the Alabama Code and its background, expressly states that "a detailed comparison between the A.B.A. Canons and the Alabama Code of Ethics is beyond the scope of this article." Marston, *supra* note 14, at 505.

265. See *supra* note 263.

266. The Canons also contributed to the development of American legal ethics and professionalism by omitting some of the concepts in the Alabama Code. By identifying the Alabama Code sections that were not carried over into the Canons, a clear pattern emerges, demonstrating that the Canons did not promote civility as much as the Alabama Code and the ethics codes of the other state bar associations.

Section 5 of the Alabama Code stated: "Personal colloquies between counsel tend to delay and promote unseemly wrangling, and ought to be discouraged." 1907 Comm. Rep. II, *supra* note 170, at 691. The third paragraph of this section, adopted in the ethics codes of eight other state bar associations, *id.*, was omitted from Canon 22, which is based on Alabama Code Section 5. Index and Synopsis of Canons, *infra* App.

Section 6 of the Alabama Code stated: "whenever an attorney is late he should apologize or explain his absence." 1907 Comm. Rep. II, *supra* note 170, at 691. This was adopted in the ethics codes of seven other state bar associations, *id.*, but was omitted from Canon 21, which is based on Alabama Code Section 6. Index and Synopsis of Canons, *infra* App.

Section 7 of the Alabama Code stated: "One side must always lose the cause; and it is not wise or respectful to the court, for attorneys to display temper because of an adverse ruling." 1907 Comm.

III. The Canons's Distinctive Contribution

A careful comparison of the *Canons'* provisions against the sections of the Alabama Code reveals four overarching patterns to the Committee's work.²⁶⁷ First, compared with the Alabama Code's provisions regarding the moral dimensions of

Rep. II, *supra* note 170, at 692. This section was adopted in the ethics codes of ten other state bar associations. *Id.* This Code section is not the basis of any Canon. Index and Synopsis of Canons, *infra* App.

Section 9 of the Alabama Code stated:

An attorney should not speak slightly or disparagingly of his profession, or pander in any way to unjust prejudices against it; and he should scrupulously refrain at all times, and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

1907 Comm. Rep. II, *supra* note 170, at 693. This section was adopted in the ethics codes of nine other state bar associations, *id.*, but not in the Canons. Index and Synopsis of Canons, *infra* App.

Section 26 of the Alabama Code quoted from pages 118–19 of Sharswood's *Ethics*: "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified." 1907 Comm. Rep. II, *supra* note 170, at 701. This section was adopted in the ethics codes of seven other state bar associations, *id.*, but not in the Canons. Index and Synopsis of Canons, *infra* App.

Section 53 of the Alabama Code goes beyond Canon 18, which concerns the treatment of witnesses and litigants. The second sentence of Section 53 stated: "When essential to the ends of justice to arraign their conduct or testimony, it should be done without vilification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness's testimony and often rob deserved strictures of proper weight." 1907 Comm. Rep. II, *supra* note 170, at 710. This section was adopted in the ethics codes of ten other state bar associations, *id.*, but not in the Canons.

267. These four patterns are formed from twenty-two of the original thirty-two Canons. The other ten Canons do not fit into any of those four patterns or any other overarching pattern. Canon 3 concerns the proper relationship between the bench and the bar. Canon 8 concerns a lawyer's advice to a client on the merits of a claim. Canon 9 concerns a lawyer's dealings with represented and unrepresented parties. Canon 11 concerns a lawyer's handling of trust property. *See infra* note 578 and accompanying text. Canon 19 concerns the advocate-witness rule. Canon 20 concerns trial publicity. *See infra* note 438 and accompanying text. Canon 21 concerns punctuality in court. Canon 23 concerns trial counsel's dealing with juries. Canon 25 concerns a lawyer's agreements and dealings with opposing counsel. *See infra* note 585 and accompanying text. Canon 26 concerns lobbying.

All but two of those Canons are substantially the same as the sections of the Alabama Code upon which they are based. The last sentence of Canon 9, however, concerns a lawyer's duty not to mislead an unrepresented party or to advise him as to the law, a topic not addressed in Section 45 of the Alabama Code, *see* 1907 Comm. Rep. II, *supra* note 170, at 707, the section upon which Canon 9 is based, *see* Index and Synopsis of Canons, *infra* App. Canon 21 concerns a lawyer's punctuality in court, like Section 33 of the Alabama Code, but it is narrower than Section 33, which also concerns punctuality in responding to letters and keeping appointments. *Compare infra* App. (Canon 21), with 1907 Comm. Rep. II, *supra* note 170, at 703. Insofar as Canon 21 also makes it a lawyer's duty to "be concise and direct in the trial and disposition of causes," it is broader than both Section 33 and Section 6 of the Alabama Code, *see* 1907 Comm. Rep. II, *supra* note 170, at 691, 703, upon which it is based, *see* Index and Synopsis of Canons, *infra* App., because neither of those sections addresses the speed or brevity of a lawyer's presentations in court.

the attorney-client relationship, nine of the Canons—Canons 15, 16, 17, 18, 22, 24, 30, 31, and 32—express a more robust vision of conscientious lawyering that enlarges the authority of, and gives greater support to, the lawyer's moral autonomy in that relationship. Second, consistent with that vision of conscientious lawyering, Canons 4, 5 and 6 de-emphasize the duties imposed by the Alabama Code to represent a criminal defendant and to avoid conflicts of interest. Third, building on the gentlemanly distinction in Section 50 of the Alabama Code between a profession devoted to justice and a trade dedicated to money-getting, seven of the Canons—Canons 7, 10, 12, 13, 14, 27, and 28—adopt a more thorough-going attitude against commercialism with respect to both the financial dimensions of an existing attorney-client relationship and the efforts of lawyers to obtain new clients. Fourth, expanding upon Section 11 of the Alabama Code, four of the Canons—Canons 1, 2, 28, and 29—impose additional obligations upon lawyers to regulate their profession, including at its point of origin—admission to the bar—and at its successful point of termination—appointment or election to a judgeship. Each of these four patterns, including the relationship of each of the Canons in the patterns to the Alabama Code and other pre-existing ethical texts, is described below. Together, those four patterns constitute the *Canons'* overall vision and the *Canons'* distinctive contribution to the development of American legal ethics.

A. The Vision of Conscientious Lawyering

The captured corporation lawyers whom Roosevelt criticized exemplify a fundamental conflict intrinsic to the private attorney-client relationship in a free market economy. Because litigators play a role in the administration of justice, they have been considered “officers of the court” with special obligations to the court system.²⁶⁸ Insofar as transactional lawyers engage in structuring and documenting transactions in the context of a legal system comprised of substantive and procedural rules and enforcement regimes, they are “custodians of the legal

268. Although some commentators have contended that lawyers do not owe any substantive obligations to the court system that other citizens do not, *see, e.g.*, James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court”*, 48 *BUFF. L. REV.* 349 (2000), it is undeniable that lawyers, unlike other citizens, have a special gate-keeping obligation to ensure that the courts are not clogged with lawsuits raising frivolous claims or defenses and that lawsuits are not used solely for purposes of harassment or delay. Not only is such an obligation imposed upon lawyers practicing in federal court pursuant to Rule 11 of the Federal Rules of Civil Procedure, *see infra* note 336 and accompanying text, and similar state statutes or rules regarding the state courts, *see, e.g.*, 22 *N.Y. Comp. Codes R. & Regs. tit. 1, § 130* (2001), but also the applicable rules of professional conduct generally impose such an obligation upon lawyers, *see* MODEL RULES OF PROF'L CONDUCT, R. 3.1; R. 4.4; MODEL CODE OF PROF'L RESP., DR 7-102(A)(1). As demonstrated below, Canons 1, 2, and 32 regarding lawyer conduct vis-à-vis judges and Canon 23 regarding lawyer conduct vis-à-vis juries impose ethical obligations upon lawyers regarding the administration of justice that are not incumbent upon citizens generally. *See infra* notes 357-76, 545-50 and accompanying text. There are other Canons as well, such as Canon 20 regarding trial publicity and Canon 26 regarding lobbying, that impose ethical obligations upon lawyers regarding the administration of justice that are not imposed on citizens generally.

system” with special obligations to preserve that system.²⁶⁹ But all private practitioners, whether litigators or transactional lawyers, are agents for the clients who retain them. Those clients (or third parties on their behalf) pay their lawyers and collectively enable them to earn a living. Thus, a four-sided conflict is created within the attorney-client relationship among: (1) the lawyer’s duty to the court and the legal system generally; (2) the lawyer’s duty to his own moral and political views about what is just; (3) the lawyer’s duty to represent zealously the interests of his private client; and (4) the lawyer’s economic self-interest in the continuity of representation and the client’s payment of legal fees.²⁷⁰ When clients are wealthy or politically powerful and hire lawyers on a regular basis, there is the potential that the continuous impact of clients’ wealth or power will cause lawyers to privilege the interests of such clients over their duty to the courts and the legal system generally and even over their own moral and political views. When that happens, as in the case of Roosevelt’s captured corporation lawyers, the courts and the legal system suffer the distortions caused by lawyers’ failure to maintain sufficient independence from their clients.

1. *The Nineteenth-Century Criticism
of Unlimited Loyalty to the Client*

Roosevelt’s criticism of corporation lawyers resonated with a well-developed theme among elite lawyers during at least the last half of the nineteenth century. During that period, American lawyers often viewed the problem of lawyer independence in terms of Lord Brougham’s famous speech to the English House of Lords during his defense of Queen Caroline in 1820:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among

269. Robert W. Gordon “paint[s] a portrait of [such a] Progressive lawyer-statesman” in his article, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 265 (1990) [hereinafter Gordon, *Corporate Law Practice*]. In that portrait, lawyers are members of a public profession who

are supposed to work . . . to maintain the integrity of the framework of laws, institutions, and procedures that constrain their clients’ practices and their own—and not just to maintain that framework, but to help transform it so that it more nearly will approach the conditions of justice and civic community.

Id. at 255. Gordon draws from Supreme Court Chief Justice Harlan Fiske Stone’s 1934 address at the University of Michigan to describe the role of the transactional lawyer who subscribes to that ideal: “[L]awyers . . . lift their eyes from day-to-day deals, to understand the social effects of their practices taken as a whole, and then to discipline each other to act collectively to counsel corporate clients to observe, rather than subvert, their obligations as trustees.” *Id.* at 258 (citing Stone, *supra* note 19, at 9).

270. The A.B.A. Model Rules acknowledges those four duties: “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities [1] to clients, [2] to the legal system and [3] to the lawyer’s own interest in remaining an upright person while [4] earning a satisfactory living.” MODEL RULES OF PROF’L CONDUCT, Preamble para. 8 (1983).

them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the suffering, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion.²⁷¹

Although Lord Brougham commented later that the absolute loyalty to the client articulated in his speech was “not so much a statement of [a lawyer’s] duty as it was a political threat” in the particular context of challenging King George IV’s bill to divorce Queen Caroline,²⁷² the quoted language has stood for decades as the classic statement of zealous representation.²⁷³ According to Lord Brougham’s speech, a litigator’s duty to a client completely eclipses any duty that he owes to anyone else, whether the courts, the legal system generally, the government, any other third parties, or even himself. By making the client sovereign over the advocate, Lord Brougham’s speech accords the lawyer no independence whatsoever during the attorney-client relationship.

One “tradition” of nineteenth-century legal ethics was critical of Lord Brougham’s view of zealous representation.²⁷⁴ In 1845, Chief Justice Gibson of the Pennsylvania Supreme Court took issue with Lord Brougham’s view. In an influential opinion in a case involving a private lawyer’s decision, as a special prosecutor, to dismiss his client’s charges against the accused, Gibson wrote:

It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to

271. 2 Trial of Queen Caroline 8 (1821).

272. Patterson, *supra* note 224, at 909–10 & nn. 1–4; *see also* Freedman, *supra* note 50, at 66 n.6; Krauss, *supra* note 180, at 332 (“Lord Brougham’s dictum is routinely taken out of context. Brougham never advocated ‘hired gunship’—he simply said he would stand up to *political power* when his client was in the right.”). On the other hand, Brougham “was proud enough of [his speech] to polish it, and republish it.” DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 189 (1973) (citing 9 Brougham, Works 83 (1872)). Lord Brougham “was a prolific author and statesman who went on to become Lord Chancellor of England.” M. H. Hoeflich, *Legal Ethics in the Nineteenth Century: The “Other Tradition,”* 47 U. KAN. L. REV. 793, 794 n.5 (1999).

273. Geoffrey Hazard calls Brougham’s speech the profession’s “classic articulation” of the lawyer’s duty. Hazard, *supra* note 4, at 1244. Monroe Freedman considers Brougham’s speech the “classic statement of th[e] ideal [of zealous representation].” Freedman, *supra* note 50, at 65.

274. One historian of the nineteenth-century American legal profession has focused his scholarship on the critical response of American lawyers to Lord Brougham’s speech. “Brougham’s statements quickly became well-known, but they were not quickly approved. In fact, Brougham’s vision of zealous advocacy... was rejected by many of his contemporaries. Indeed, in the United States, Brougham’s statements were attacked and viewed by contemporaries and successors as being utterly inappropriate.” Hoeflich, *supra* note 272, at 795. In that article, Hoeflich describes the views of numerous lawyers, expressed in various treatises, lectures, public orations, memoirs, funeral eulogies, and memorial addresses during the first three-quarters of the nineteenth century that explicitly took issue with Brougham’s speech or advanced a view of a lawyer’s ethical responsibilities that conflicted with that speech’s view of unlimited zeal and client loyalty. *Id.* at 795–814.

behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment . . . The high and honorable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience.²⁷⁵

Underlying Chief Justice Gibson's statement is the view that the lawyer's professional role as an officer of the court, as a "minister of justice," requires the exercise of an independent, finely-tuned professional conscience that makes discriminating judgments about what is just and unjust in a broader moral sense, not merely what is lawful and unlawful. Thus, says Gibson, the lawyer who abandons his own conscience in deference to the client's self-interested views of what is right and wrong in professional matters has abdicated his "high and honorable office." He has become "degraded to [the role] of a mercenary" because he has given up the moral authority of his professional conscience by choosing to follow the self-interested judgment of the person who pays him. In this respect, he has ceased to be a professional; he is no better than a money-grubbing tradesman. Too great an interest in financial reward, Gibson implies, undermines a lawyer's professionalism.

Gibson's view was quoted approvingly in the 1854 edition of *Sharswood's Ethics* and each of the four subsequent printings.²⁷⁶ Sharswood juxtaposed Gibson's view with Lord Brougham's view on the advocate's duty to his client, which he also quoted, stating that Lord Brougham "was led by the excitement of so great an occasion to say what cool reflection and sober reason certainly can never approve."²⁷⁷

Lord Brougham's speech was quoted also in a chapter on legal ethics in a book by David Paul Brown,²⁷⁸ a noted Philadelphia lawyer, that was published in 1856 and purchased by leading lawyers in and outside Pennsylvania.²⁷⁹ After quoting Brougham, Brown stated: "[I]f carried out to the extent suggested, [Brougham's words] make the advocate worse than a highwayman, and render him, under cover of the law, a virtual outlaw."²⁸⁰

In New York, during this same twenty-year period, David Dudley Field, the author of the Field Codes, also was speaking out against Lord Brougham's view that a litigator's sole duty is to serve his client. In an 1844 magazine article, he wrote:

[A] more revolting doctrine scarcely ever fell from any man's lips. . . . It assumes that a man has a right to whatever the law will give him, that the law itself is so clear that it cannot be mistaken or perverted, and that he

275. *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

276. Sharswood, *supra* note 129, at 96–97; *see also supra* note 217 and accompanying text.

277. Sharswood, *supra* note 129, at 87; *see also supra* notes 198–217 and accompanying text.

278. *See* 2 DAVID PAUL BROWN, *THE FORUM; OR FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* 28 (1856).

279. Hoeflich, *supra* note 272, at 807 & n.83.

280. Brown, *supra* note 278, at 28.

may rightfully avail himself of every defect in an adversary's proof...; three propositions, every one of which is without foundation...²⁸¹

After refuting each of those three propositions, Field gave his "comprehensive answer" to the maxim that litigators owe total allegiance to their clients without regard to the justness of the client's objectives: "[T]he law and all its machinery are means, not ends;... the purpose of their creation is justice; and, therefore, he who in his zeal for the maintenance of the means, forgets the end, betrays not only an unsound heart, but an unsound understanding."²⁸²

Thereafter, New York adopted Section 511 of the Field Code of Procedure, which provided, "[i]t is the duty of an attorney... [t]o counsel or maintain such actions, proceedings or defenses, only, as appear to him legal and just, except the defense of a person charged with a public offense."²⁸³ In 1849, in commenting upon a litigator's duties under Section 511, Field stated that lawyers should not be indifferent to "the moral aspects of the causes they advocate" and that it was error to believe "that a lawyer may properly advocate a bad cause."²⁸⁴ Field further argued that any lawyer asked to assent to "the bad scheme of an unjust client" should "refrain from pursuing [such] an unjust object."²⁸⁵

Six years later Field placed the lawyer's duty to his client in the context of his other duties:

His first duty is undoubtedly to his own client, but that is not the only one; there is also a duty to Court, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human being can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity.²⁸⁶

Ten years later, in *Third Great Western Turnpike-Road Co. v. Loomis*,²⁸⁷ the New York Court of Appeals expressed its own disapproval of Lord Brougham's view regarding an advocate's duty to his client in a case concerning a trial judge's discretion to exclude cross-examination questions disparaging a witness' credibility. The court's concern that trial judges needed discretion to protect a witness from such cross-examination in certain situations was based, in part, on its lack of faith

281. David Dudley Field, *The Study and Practice of Law*, 14 DEMOCRATIC REV. 345 (1844), reprinted in THE GOLDEN AGE OF AMERICAN LAW 30, 33 (Charles M. Haar ed., 1965). The irony of Field's criticism of Lord Brougham's speech given Field's subsequent conduct as counsel in the Erie litigation of the late 1860s and early 1870s is described in Patterson, *supra* note 224, at 948–55.

282. Field, *supra* note 281, at 34.

283. 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 296–97 (A.P. Sprague ed., D. Appleton & Co. 1884).

284. *Id.* at 298.

285. *Id.* at 299.

286. *Id.* at 497–98.

287. 32 N.Y. 127 (1865).

that trial counsel, “deeply enlisted for their clients, and zealous to maintain their rights,” could be relied upon to exercise appropriate forbearance.²⁸⁸ Finding Lord Brougham’s statement supportive of that lack of faith in trial counsel, the court referred to Lord Brougham’s speech as that “atrocious but memorable declaration” which “shocks the moral sense, but . . . illustrates the impolicy of divesting the presiding judge of the power to protect witnesses from irrelevant assault and inquisition.”²⁸⁹

Criticism of Lord Brougham’s view continued into the early twentieth century. John Dos Passos, a wealthy and well-regarded New York City lawyer at the turn of the century,²⁹⁰ also offered a deeply critical assessment of Lord Brougham’s statement:

There perhaps never was language written, or spoken, which contained worse doctrine than that which I have just quoted, of Brougham, and yet it has been relied on over and over again by lawyers, to cover all kinds of dishonest practices and defenses, and the great name of Lord Brougham is still used, to sustain many ridiculous and false positions of advocates. . . .²⁹¹

This criticism of the principle of unfettered zealous representation articulated in Lord Brougham’s speech was so constant throughout the mid- to late nineteenth century that it suggests something more than just a scholarly criticism of a possible deformation in the attorney-client relationship. The continuing criticism implies an urgency, an important need, to attack something actually occurring with distressing regularity in legal practice. Indeed, Chief Justice Gibson observed that Lord Brougham’s view was not only mistaken, but also “popular.”²⁹² In 1865, when the New York Court of Appeals rejected Lord Brougham’s views, the court acknowledged that “[t]here is much diversity of opinion, even among eminent members of the profession, as to the measure of obligation imposed upon counsel, by the implied pledge of fidelity to the client.”²⁹³ Twenty-five years after first rejecting Lord Brougham’s views, David Dudley Field was accused of adopting those views in his representation of clients in the infamous Erie Railroad litigation.²⁹⁴ In the early twentieth century, Dos Passos acknowledged that Lord Brougham’s speech “has been relied on over and over again by lawyers.”²⁹⁵ There is, therefore, considerable support for the view that “by the 1870s leading American lawyers were coming to

288. *Id.* at 132.

289. *Id.* at 132–33.

290. E. DIGBY BALTZELL, *THE PROTESTANT ESTABLISHMENT* 16 (1964). Dos Passos’s son, also named John Dos Passos, was the well-known author of the U.S.A. Trilogy published in the 1930s. *Id.* at 272.

291. JOHN R. DOS PASSOS, *THE AMERICAN LAWYER* 142 (1907).

292. *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

293. *Third Great W. Turnpike-Road Co.*, 32 N.Y. at 133.

294. *See Altman*, *supra* note 174, at 1054–55.

295. Dos Passos, *supra* note 291, at 142.

espouse a responsibility to their clients as their primary and even exclusive moral obligation as lawyers.”²⁹⁶

2. *The Alabama Code's Resolution*

The Alabama Code also rejected Lord Brougham's view and sketched an alternate view of the attorney-client relationship that provided support for a lawyer's moral autonomy. Quoting directly from Sharswood's *Ethics*,²⁹⁷ the first two sentences of the second paragraph of Section 10 of the Alabama Code describe a lawyer's duty of zealous representation:

An attorney “owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,” to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty.²⁹⁸

At the same time, however, the Alabama Code clearly states that there are limits to that duty of zealous representation. The next two sentences of Section 10 describe those limits:

Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to the Creator, or loosen the duty of obedience to law, and the obligation to his

296. Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 193 (1977); accord Wolfram, *Legal Ethics II*, *supra* note 4, at 221 (“Field's sentiments then were much more securely client-centered, and represented far more accurately what had already become, and remains, the dominant professional outlook of American lawyers and their ethical rules.”). Another legal historian of the nineteenth century agrees:

The change came—the change that initiated the more modern view of the lawyer-client relationship—in the 1870s. This change brought with it a reinvigoration of Lord Brougham's perspective on the relationship and the lawyer's duties within it. Once again, it is possible to identify both the context within which this change occurred and the lawyer who most clearly and earliest enunciated it. The context was the rise of a new type of law in the United States, what we now call corporate law, and the lawyer most responsible for popularizing the view was David Dudley Field.

Hoeflich, *supra* note 272, at 814. In his 1903 lecture to Albany Law School students, Committee member Hubbard acknowledged that an ethics of conscientious lawyering conflicted with much current legal practice. Gen. Thomas H. Hubbard & Simeon E. Baldwin, *Lectures Delivered Before the Students of Law Department of Union University* 14, 16–19 (Nov. 12, 1903) (on file with author) [hereinafter Hubbard & Baldwin, *Union Lectures*]; see also *infra* notes 523–30 and accompanying text.

297. Compare 1907 Comm. Rep. II, *supra* note 170, at 693, with Sharswood, *supra* note 129, at 78–79.

298. 1907 Comm. Rep. II, *supra* note 170, at 693.

neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.²⁹⁹

Thus, according to the Alabama Code, the lawyer's duty of zealous representation is subject to the lawyer's greater obligations to (i) the legal system, i.e., "obedience to law"; (ii) third parties, i.e., "the obligation to his neighbor"; and (iii) his own moral view of right and wrong or, in other words, what was just and unjust in the eyes of his God, i.e., "accountability to the Creator."

Consistent with Chief Justice Gibson's phraseology, Section 27 of the Alabama Code locates the lawyer's moral autonomy in the freedom of his conscience: "[t]he client can not be made the keeper of the attorney's conscience in professional matters."³⁰⁰ In various circumstances, the Alabama Code seeks to clarify the extent of the client's control over the lawyer and the lawyer's independence from the client.

Section 27, for example, deals with a litigator's interactions with the opposing party: "An attorney is under no obligation to minister to the malevolence or prejudices of a client in the trial or conduct of a cause . . . He can not demand as of right that his attorney shall abuse the opposite party."³⁰¹ Section 28 distinguishes a lawyer's relationship to opposing counsel and the client's adversary from his client and the relationship between the parties: "Clients and not their attorneys, are the litigants; and whatever may be the ill feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case."³⁰² Section 26 particularizes the rule of Section 28 with respect specifically to how a lawyer talks to the opposing party: "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified."³⁰³

Finally, with respect to the "incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client," Section 30 of the Alabama Code makes it clear that the lawyer cannot be constrained by the client's direction:

As to the incidental matters pending the trial, . . . such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed

299. *Id.* at 693–94.

300. *Id.* at 701. This language bears a resemblance to Chief Justice Gibson's opinion in *Rush v. Cavanaugh*, see *supra* note 275 and accompanying text, with which Thomas Goode Jones would have gained familiarity through his study of Sharswood's *Ethics*, see *supra* note 220 and accompanying text, but it also echoes, albeit more faintly, the language of Hoffman Resolution XIV, see *supra* note 182 and accompanying text.

301. 1907 Comm. Rep. II, *supra* note 170, at 701.

302. *Id.*

303. *Id.*

for signing a bill of exceptions, cross interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety.³⁰⁴

In the event that the client “insist[s]” that the lawyer engage in such conduct “repugnant to his own sense of honor and propriety[, then] the attorney should retire from the cause.”³⁰⁵

3. *The Hubbard Lectures on Legal Ethics*

In 1902, Hubbard, a Committee member, donated \$10,000 to the Albany Law School to provide “for a half dozen lectures or so on th[e] subject” of legal ethics.³⁰⁶ Along with Brewer before him and Parker after him, Hubbard had attended Albany Law School in 1860 and 1861 in order to supplement his law office education.³⁰⁷ By 1902, after a highly successful law practice had led him to lucrative positions in business, Hubbard was wealthy and already had undertaken a number of philanthropic projects.³⁰⁸

On November 12, 1903, Hubbard gave the inaugural lecture in what became known as the Hubbard Course on Legal Ethics at the Albany Law School.³⁰⁹ Acknowledging the public criticism of lawyers, Hubbard described two prominent causes of that criticism:

First of these is the fact, recognized by the ethics of the profession, that clients, and not lawyers, decide what cases shall be brought into court and control the substantial methods of their conduct in court.

The second is that lawyers are permitted to personate their clients; to say what they think their clients would say and do what they think their clients would do, in order to win their cases.

....

And so it turns out that the lawyer is compelled to conduct litigations that his own conscience does not approve and to shelter himself from its reproaches by adopting the hypothetical conscience of the client.³¹⁰

304. *Id.* at 702.

305. *Id.*

306. Hubbard & Baldwin, *Union Lectures*, *supra* note 296, at 5.

307. Brewer was in the Class of 1858. *Id.* at 8. Hubbard was in the Class of 1860, and Parker was in the Class of 1872. *Id.* at 8–9. Each of the three had also studied law in a law office. *See supra* note 94 and accompanying text. Hubbard and Parker were active alumni. David J. Brewer, *Address Delivered at Commencement of Albany Law School 4* (June 1, 1904) (on file with author). Indeed, Hubbard was the president of the alumni association from 1904–05. *Id.* at 3.

308. Henry S. Burrage, *Thomas Hamlin Hubbard* 52–54 (1923); Louis C. Hatch, *The History of Bowdoin College* 385, 431–33 (1927) (describing Hubbard’s gifts of a library building, a building fund, and an athletic grandstand to Bowdoin).

309. Hubbard & Baldwin, *Union Lectures*, *supra* note 296, at 3.

310. *Id.* at 14, 16.

To remedy the situation, Hubbard proposed the adoption of an enforceable oath of office,³¹¹ such as the attorney's oath prescribed by the State of Washington.³¹² The purpose of such an oath was to put the lawyer's conscience in charge of all aspects of litigation:

The lawyer should be emancipated from servitude to his client in respect to the commencement and conduct of suits.

The lawyer should control in determining what cases may be brought before the court; what suits may be begun; what defenses may be interposed. His appearance in any cause should be deemed a certificate, upon his honor as counsel, that it involves, in his opinion, the honest assertion of legal and equitable rights withheld by the opposing party. *In all matters that involve conscience, whether matters of form or substance, the lawyer's decision should be supreme from the beginning to the end of litigation. The custom should be shattered, that permits the lawyer to personate the client; to argue against his own convictions; to substitute his client's morals and conscience for his own, in the conduct of his cause.*³¹³

A few years later and just a few months before the Canons were adopted, Henry St. George Tucker presented his own view of legal ethics as part of the Hubbard Course on Legal Ethics.³¹⁴ In discussing the duty a lawyer owes his client, Tucker also registered his dissent from Lord Brougham's view of unfettered loyalty to the client:

The duty which the lawyer owes his client is undoubtedly great. It is said by some that he must forget self and regard only his client. From that view I must dissent. I do not believe under any proper system of ethics that a lawyer can be held as surrendering, when he accepts a retainer, his personal notions of propriety or freedom of personal action. To do so, would be to surrender the right of self-use and personal responsibility to the paramount right of another.³¹⁵

In Tucker's view, not only do a corporation lawyer's moral views—"his own conscience"—place a limit on his representation of a corporate client, but so do his political views about his obligations as a citizen.³¹⁶ The consequence, Tucker

311. *Id.* at 21 ("The most effectual aid must come from the oath administered to the lawyer on his admission to the bar and the enforcement of that oath by corresponding rules of the court.")

312. *Id.* at 24. For the text of that oath *see id.* at 24–25. Hubbard explained: "The whole oath puts the responsibility of bringing suit, interposing defense, and of conducting either, exactly where that responsibility should be put, upon the conscience and honor of the lawyer." *Id.* at 26.

313. *Id.* at 20 (emphasis added).

314. *See* Henry St. George Tucker, Lecture Delivered Before the Students of the Albany Law School in the Hubbard Course on Legal Ethics 3 (Apr. 8, 1908) (on file with author).

315. *Id.* at 11.

316. *Id.* at 10–11.

concluded, is that the ethical limits on a lawyer's conduct, such as giving advice to a corporate client, will depend on the lawyer's own moral and political views³¹⁷

Thus, according to Tucker, when the law itself does not set limits on whether the lawyer can pursue the client's expressed interests, what is ethical representation for one lawyer may be unethical representation for another, because people differ in their moral and political views. For lawyers who seek to obtain or to continue representation of wealthy or politically powerful corporations or individuals, Tucker's view creates an economic incentive to adopt moral and political views similar to those of such potential or existing clients.³¹⁸

4. *The Canons' Expansion of Conscientious Lawyering*

The Canons Committee sought to hold the lawyer morally accountable for all of his conduct in the course of a professional representation. Like Jones, Hubbard, and Tucker, the other members of the Canons Committee recognized the moral dimensions of the attorney-client relationship. They understood that the moral accountability of lawyers went hand-in-hand with the moral autonomy of lawyers in that relationship—a lawyer could be morally accountable for his conduct in the representation of a client only if he were free enough of his client's direction to make his own choices regarding his conduct during that representation. The Committee further strengthened and supported the lawyer's autonomy by setting clear limits on the extent to which the client may control the lawyer's conduct. Adopting the vernacular of the nineteenth century, and particularly of their class, the men who drafted the 1908 Canons talked about these issues in terms of conscience.³¹⁹

317. *See id.* at 11–12.

318. Indeed, Robert Nelson's survey in the early 1980s about the attitudes of large firm corporation lawyers showed that their political and social values and attitudes closely match the political and social values and attitudes of their corporate clients. *See* Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *STAN. L. REV.* 503, 524–28, 534–38 (1985); *cf.* Gordon, *Corporate Law Practice*, *supra* note 269, at 288 (“[T]he obvious psychological fact that if you spend your whole professional life among business people, you are likely to come to think as they do about most things anyway, and will not rock the boat even if you do not.”).

319. It is beyond the scope of this article to describe in depth the meaning of “conscience” for nineteenth-century lawyers and judges, such as Hoffman, Sharswood, Jones, Tucker, Hubbard, and the other members of the Canons Committee. That is a task for another time. *See supra* note 18. For purposes of this article, however, the meaning of that term can be taken from WILLIAM WHEWELL, *THE ELEMENTS OF MORALITY, INCLUDING POLITY* (1845), the only philosophical work concerning ethics that is used in Sharswood's *Ethics*. *See* Sharswood, *supra* note 129, at 100–02. According to Whewell:

Conscience is to each man the representative of the Supreme Law, and is invested with the authority of the Supreme Law. It is the voice which pronounces for him the distinction of right and wrong, of moral good and evil; and when he has done all that he can to enlighten and instruct it, by the aid of Religion, as well as of Morality, it is for him the Voice of God.

Whewell, *supra*, at 240. According to Whewell, insofar as Conscience involves a judgment that an action does not conform to what appears to an individual as the Supreme Law, Conscience “inflicts *Punishment* for the offenses thus condemned.” *Id.* at 236.

When compared to the Alabama Code, the Canons express a vision of conscientious lawyering that enlarges the authority of, and gives even greater support to, the lawyer's conscience.

Canon 15 directly expresses the Canon's vision of conscientious lawyering:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, or to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.³²⁰

Canon 15 is derived primarily from Section 10 of the Alabama Code. The first paragraph of Canon 15 is based upon a rewrite of Section 10 proposed by Simeon Baldwin.³²¹ Like Section 10, that first paragraph flatly repudiates the view of zealous representation articulated in Lord Brougham's speech. The idea underlying the second paragraph of Canon 15, which prohibits a lawyer from stepping out of his professional role and personating the client by stating his personal belief in the client or his cause, is drawn from Section 19 of the Alabama Code.³²² In accordance

320. *Infra* App. (Canon 15).

321. Red Book, *supra* note 136, at 21. Baldwin is described *supra* note 142.

322. Section 19 of the Alabama Code states both the rule in the second paragraph of Canon 15 and its rationale:

The same reasons which make it improper in general for an attorney to testify for his client, apply with greater force to assertions, sometimes made by counsel in argument, of personal belief in the client's innocence or the justice of his cause. If such assertions are habitually made they lose all force and subject the attorney to falsehoods; while the failure to make them in particular cases will often be esteemed a tacit admission of belief of the client's guilt, or the weakness of his cause.

with Dickinson's suggestion, the language in Section 10 that described the limitations upon a lawyer's zealous representation of his client in terms of "man's accountability to his Creator, . . . the duty of obedience to law, and the obligation to his neighbor," was deleted.³²³ Believing that in the normal case a retainer should not require a lawyer to put his life in danger, the Boston Bar Association and others suggested deleting Section 10's sentence, "No sacrifice or peril, even to loss of life itself, can absolve [a lawyer] from the fearless discharge of his duty."³²⁴ The third sentence of the third paragraph is entirely new and its origin is unclear, except that it was added after the Committee sought comments on the May 1908 first draft of the Canons.³²⁵ Its meaning and language resemble the second sentence of Canon 5, which concerns the duty of a defense attorney in a criminal case.³²⁶ However, the Canons Committee did not consider Section 13 of the Alabama Code, from which the language of Canon 5 is derived, to be part of the basis for Canon 15.³²⁷ The entirely new last sentence of Canon 15, which describes the ultimate decision-making authority in the attorney-client relationship in terms of personal conscience, emphasizes that the lawyer owes the most fundamental duty to his own conscience, rather than his client's. That sentence may be derived from Hoffman's Resolution XIV.³²⁸

1907 Comm. Rep. II, *supra* note 170, at 697. This entire second paragraph was added to Canon 15 after the preliminary draft of the Canons was sent out for comment. *Compare* Tenn. Twenty-Seventh Meeting, *supra* note 153, at 41–42 (May 1908 first draft), *with infra* App. (final version of Canon 15).

323. Red Book, *supra* note 136, at 22. The change from accountability to God to the dictates of personal conscience reflects, perhaps, the force of secularization in late nineteenth- and early twentieth-century America.

324. *Id.* at 21–22.

325. *Compare* Tenn. Twenty-Seventh Meeting, *supra* note 153, at 41–42 (1908) (May 1908 first draft of Canon 15), *with infra* App. (final version of Canon 15).

326. *See infra* notes 380–91 and accompanying text.

327. Index and Synopsis of Canons, *infra* App. Susan Carle suggests that in drafting this third sentence the Canons Committee used "the language Thomas Goode Jones had unsuccessfully proposed to the Alabama Legal Ethics Committee." Carle, *supra* note 13, at 30. The available historical evidence does not support that suggestion.

As Carle describes that situation, the original draft of what became Section 13 of the Alabama Code contained a second clause that was dropped based upon an amendment from the floor during the members' debate on the proposed Code. *Id.* at 14–15 & n.27. But, it was Jones who proposed the floor amendment deleting that language. Ala. Tenth Meeting, *supra* note 112, at 19; *see also* Jones, Canons, *supra* note 14, at 495. Contrary to Carle's suggestion, the proposed language for Section 13 that was dropped during debate on that section, but was used later by the Canons Committee for the third sentence of the second paragraph of Canon 15, would have been language that Jones had opposed, rather than language he supported.

328. Resolution XIV begins: "My client's conscience and my own are distinct entities." In the Red Book, Alexander suggested to the Canons Committee that Hoffman Resolution XIV was something to consider in connection with Alabama Code Section 10, Red Book, *supra* note 136, at 23, from which Canon 15 derived. Index and Synopsis of Canons, *infra* App.; *see also supra* notes 321–27 and accompanying text.

Consistent with the fundamental vision expressed in Canon 15, Canons 17, 18, and 24 give priority to the lawyer's conscience with respect to dealings with opposing counsel, opposing parties, witnesses, court personnel, and the incidental matters pending trial. For example, combining language from Sections 5, 28, and 29 of the Alabama Code,³²⁹ Canon 17 provides:

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.³³⁰

Canon 18, which is based on Sections 27 and 53 of the Alabama Code,³³¹ states:

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.³³²

329. The Canons Committee acknowledged that Canon 17 was derived from Sections 28 and 29 of the Alabama Code, but it did not acknowledge the relevance to Canon 17 of Section 5 of that Code. Index and Synopsis of Canons, *infra* App. Nonetheless, the last sentence of Canon 17 is a paraphrase of the last sentence of Section 5 of the Alabama Code, *compare infra* App. (Canon 17), with 1907 Comm. Rep. II, *supra* note 170, at 690–91 (Ala. Code § 5), and Red Book, *supra* note 136, at 53 (regarding the Boston Bar Association's suggested revision of language combined from Sections 5 and 29 of the Alabama Code).

330. *Infra* App. (Canon 17).

331. Red Book, *supra* note 136, at 51–52, 82. However, the last sentence of Canon 18 does not appear to be based on either Section 27 or Section 53 of the Alabama Code. Although the general topic of a “rough tongue” is dealt with in Section 26 of the Alabama Code, the focus on not allowing a lawyer to hide behind the client's wishes echoes the concerns of Thomas H. Hubbard in his Hubbard Lecture: “[H]ow can the standard be maintained if lawyers . . . may discard their own convictions and adopt the assumed convictions of their clients, in the conduct of their causes and may, with impunity, say malicious and false things about their adversaries.” Hubbard & Baldwin, Union Lectures, *supra* note 296, at 20; *see also id.* at 14.

Moreover, the Committee adopted a change in language from Section 27 of the Alabama Code which emphasized even more the lawyer's moral autonomy. The first sentence of Section 27 stated that “[a]n attorney is under no obligation to minister to the malevolence or prejudices of a client.” 1907 Comm. Rep. II, *supra* note 170, at 701. Canon 18 does not merely release the lawyer from that obligation; it prescribes as the lawyer's ethical duty not to engage in such pandering: “A lawyer . . . should never minister to the malevolence or prejudices of a client . . .” *Infra* App. (Canon 18).

332. *Infra* App. (Canon 18).

The point of Canon 18 is that the lawyer should not be subject to his client's demand to treat the opposing party or adverse witnesses unfairly, nor pander to his client's prejudices or animosity in the trial of his case. The lawyer has his own professional duty to treat both the opposing party and adverse witnesses fairly and with due consideration, and the lawyer should not delegate to the client the authority to decide how to treat them.

In language virtually identical to the above-quoted language of Section 30 of the Alabama Code,³³³ Canon 24 affirms the lawyer's authority, and rejects the client's right, to control the incidental matters pending trial based upon "his own sense of honor and propriety."³³⁴ In stating that "no client has a right to demand that his counsel shall be illiberal"³³⁵ concerning the incidental matters pending trial, Canon 24 uses a concept traditionally associated with such honor and propriety—the generous attitude of a well-bred gentleman whose broadened "liberal" attitudes have been developed through a "liberal" education based upon the classics—in supporting the lawyer's right to determine from the standpoint of his broader and less self-interested perspective how to act regarding such matters.

In several respects, the Canons clearly surpass the Alabama Code in the effort to strengthen and support the lawyer's moral autonomy in the attorney-client relationship. First, Canons 30 and 31 establish the lawyer's gate-keeping authority. Canon 30 makes gate-keeping with respect to litigation the responsibility of the lawyer, not the client. Sounding in its last sentence like a precursor to *Federal Rule of Civil Procedure 11*'s certification,³³⁶ Canon 30 states:

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.³³⁷

333. See *supra* note 304 and accompanying text.

334. *Infra* App. (Canon 24). The Committee acknowledged that Canon 24 derives from Section 30 of the Alabama Code. Index and Synopsis of Canons, *infra* App. The slight change in wording was based upon Dickinson's suggestion to the Committee. Red Book, *supra* note 136, at 47.

335. *Infra* App. (Canon 24).

336. See Fed. R. Civ. P. 11. Rule 11 is an elaboration of Canon 30. Under Canon 30, the lawyer's appearance in Court is "deemed equivalent to an assertion on his honor that in his opinion" certain things are true, while under Rule 11(a) of the Federal Rules of Civil Procedure it is the lawyer's signature on certain documents presented to the Court that constitutes such a certification. The four propositions certified under Rule 11 are, in effect, a detailed specification of Canon 30's "assertion" that the case of the attorney's client "is one proper for judicial determination." *Infra* App. (Canon 30).

337. *Infra* App. (Canon 30).

Although the first sentence of Canon 30 is based upon Section 14 of the Alabama Code,³³⁸ the last sentence of Canon 30 was based upon the following proposal by Hubbard to the Committee: “His appearance in Court should be deemed equivalent to an assertion, on his honor, that in his opinion his client is justly entitled to some measure of relief refused by his adversary.”³³⁹ The final language changed the nature of the certification, requiring only that the client’s case was “one proper for judicial determination.”³⁴⁰ As Simeon Baldwin pointed out in an article advocating state and local bar associations to adopt the A.B.A. Canons and the accompanying oath:

The [lawyer] pledges himself not to counsel or maintain any suit or proceeding which shall appear to him to be unjust, nor any defence except such as he believes to be honestly debatable under the law of the land. The burden assumed as to actions is not to satisfy oneself that a suit is just, before bringing it, but not to bring it if satisfied that it is unjust—an obligation much less onerous; while as to defences it is enough if they seem to him honestly to present a question which, under the law, may be fairly made a subject of discussion on the trial. In both cases, the client has the benefit of the doubt.³⁴¹

This final language change was perhaps the most hotly discussed topic among the members of the Canons Committee and was the result of extended discussions among Hubbard, Thayer, Alexander, and Stetson.³⁴² In Alexander’s view,

338. Index and Synopsis of Canons, *infra* App.

339. Red Book, *supra* note 136, at 29, 107. That proposal, in turn, reflects Hubbard’s earlier proposal to the same effect in his 1903 Lecture at Albany Law School, *see supra* note 313 and accompanying text.

340. *Infra* App. (Canon 30). That substantive language change occurred after the preliminary draft was sent out for comment, but before the Committee proposed the final version of Canon 30 at the 1908 A.B.A. annual meeting. Compare Tenn. Twenty-Seventh Meeting, *supra* note 153, at 45 (May 1908 first draft), with *Infra* App. (final version of Canon 30).

341. Baldwin, *New American Code*, *supra* note 142, at 545; but *see* Carle, *supra* note 13, at 29 (viewing the change in the language Hubbard proposed as diminishing the lawyer’s duty to do justice).

342. A review of the correspondence of Ezra Thayer with other Committee members during the spring and summer of 1908 reveals that the final language was proposed by Thayer in a letter to Stetson (July 16, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 488, after a meeting the previous day in New York City attended by Alexander, those two men, and probably Hubbard and Dickinson. *See* Letter from Thayer to Alexander (July 18, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 492 (discussing a 3 to 2 vote at the meeting on July 15, 1908). At the meeting the day before, the last sentence of Canon 30 stated: “His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client is entitled to a judicial determination of the questions involved.” Letter from Thayer to Stetson, in the Thayer Archives at Harvard University Law School Vol. 5, at 488. Thayer considered that “too mild an assertion” and, accordingly, proposed the alternative language which, he believed, had more bite because it focused upon whether the client’s entire case merited judicial consideration, thereby requiring a disclaimer that the case was “supported by perjured witnesses or false documents.” *Id.*; *see*

Canon 30 “raise[d] some of the most vital questions concerning the proper relations of the lawyer to his client.”³⁴³

Canon 31 reiterates the lawyer’s gate-keeping responsibility for litigation, but expands the lawyer’s moral accountability to include transactional matters as well. The Alabama Code was entirely silent on that issue.³⁴⁴ Paraphrasing language newly proposed by Hubbard to the Committee,³⁴⁵ Canon 31 provides:

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer’s responsibility. He cannot escape it by urging as an excuse that he is only following his client’s instructions.³⁴⁶

The “right to decline employment,” described in the first two sentences of Canon 31, enables the lawyer to elect not to represent clients with respect to lawsuits or transactions that are likely to require a zealous lawyer to engage in conduct that would offend the lawyer’s conscience. The last three sentences of Canon 31 impose ultimate moral accountability on the lawyer, but only after supporting his moral autonomy by establishing his ultimate right to walk away from prospective clients.

Second, Canon 22 is a particularized description of the lawyer’s duty of candor to the court that is based upon Section 5 of the Alabama Code.³⁴⁷ However, Canon 22 includes additional types of misleading conduct that is prohibited by that duty.³⁴⁸

also Letter from Thayer to Jacob M. Dickinson (July 29, 1908), in the Thayer Archives at Harvard University Law School, Vol. 6, at 15.

343. Red Book, *supra* note 136, at 30. For an excellent description of the role of this gate-keeping responsibility in legal professionalism and an economic analysis of the lawyer as gatekeeper with respect to strategic litigation, *see, e.g.*, Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990).

344. Although the Committee indicated in its 1908 Report that Canon 31 was derived from Section 13 of the Alabama Code, Index and Synopsis of Canons, *infra* App., Section 13 of the Alabama Code had nothing to do with transactional work. Section 14 stated only: “An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.” 1907 Comm. Rep. II, *supra* note 170, at 695.

345. Red Book, *supra* note 136, at 107. That proposal reflects, in turn, Hubbard’s comments in his Hubbard Lecture. *See supra* notes 309–13 and accompanying text; *see also* Hubbard & Baldwin, Union Lectures, *supra* note 296, at 17, 21.

346. *Infra* App. (Canon 31).

347. Jones, Canons, *supra* note 14, at 490.

348. For example, the second paragraph of Canon 22 includes one example of improper conduct not included in the counterpart listing in Section 5 of the Alabama Code: “in argument to assert

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.³⁴⁹

As the last sentence of Canon 22 makes clear, the content of the lawyer's professional duties, including specifically his duty of candor and fairness, is shaped by the lawyer's special role in the administration of justice—his status as an "officer of the law."³⁵⁰ The lawyer's status as an officer of the court also links the duty of candor and fairness particularized in Canon 22 with the more general statement in Canon 15 that "[t]he office of attorney does not permit, much less does it demand

as a fact that which has not been proved." *Infra* App. (Canon 22); *cf.* 1907 Comm. Rep. II, *supra* note 170, at 690–91 (Ala. Code § 5). The third paragraph of Canon 22, concerning candor in dealing with facts, also has no basis in the Alabama Code. *Compare infra* App. (Canon 22), *with* 1907 Comm. Rep. II, *supra* note 170, at 690–91 (Ala. Code § 5). The subject matter of that third paragraph is discussed in, and may be based upon, Sharswood's *Ethics*. See Sharswood, *supra* note 129, at 111–12. The available records of the Committee's deliberations do not indicate the source of this third paragraph. See Red Book, *supra* note 136, at 15–17.

349. *Infra* App. (Canon 22).

350. *Infra* App. (Canon 23). Thus, for example, Canon 23 makes "[a]ll attempts to curry favor with juries . . . unprofessional." Fawning, pretended solicitude, and flattery are not intrinsically immoral. They become "unprofessional" under the Canons, however, because they undermine the function of the jury in the administration of justice to make determinations based upon the facts, not subjective emotions, and, as an officer of the court, the lawyer therefore has a duty not to engage in such conduct with juries.

of him for any client, . . . any manner of fraud or chicanery.”³⁵¹ Because he is an officer of the court, those Canons admonish, the lawyer should not act dishonestly or unfairly vis-à-vis the opposing party or opposing counsel any more than he should mislead a court.

Third, Canon 16 makes the lawyer responsible for trying to control his client’s conduct during litigation:

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.³⁵²

The Alabama Code did not deal with this issue at all.³⁵³ The first sentence of Canon 16 was based upon Simeon Baldwin’s editing of Section 37 of the Code of Legal Ethics of the Michigan State Bar Association.³⁵⁴ The second sentence was proposed by William Draper Lewis,³⁵⁵ then Dean of the Department of Law at the University of Pennsylvania.³⁵⁶ Once again, the Canons contemplate that lawyers may be forced to use their ultimate recourse vis-à-vis their clients—withdrawal of representation—to protect their moral autonomy against an uncooperative client.

Canon 32, the final Canon, states “[t]he Lawyer’s Duty in [the] Last Analysis”:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all

351. *Id.*

352. *Id.*

353. The Canons Committee acknowledged this silence in the Alabama Code, indicating in its 1908 Report that Canon 16 derived from Section 37 of the Code of Legal Ethics of the Michigan State Bar Association. Index and Synopsis of Canons, *infra* App.

354. Red Book, *supra* note 136, at 61; *see supra* note 353.

355. Red Book, *supra* note 136, at 61.

356. *Id.* at 4; *see also supra* note 145.

a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.³⁵⁷

This Canon is unprecedented. The Canons Committee acknowledged that it was not based upon the Alabama Code.³⁵⁸ Although in its 1908 Report the Committee listed Section 52 of the Kentucky Code as something considered in drafting Canon 32,³⁵⁹ the scope of Section 52 is much more limited than the full scope of Canon 32. Like the fourth sentence of Canon 32, Section 52 is concerned only with lawyers counseling a violation or evasion of statutory law.³⁶⁰

Around the turn of the twentieth century, this issue of counseling a violation or evasion of statutory law often arose in the context of corporate challenges to the constitutionality of a statute or its proper application. Thus, Canon 32 is, at least in part, the Committee's most direct response to Roosevelt's concern with corporation lawyers. That response reflects the influence of the corporation lawyers on the Committee, particularly Stetson and Howe, and the subjectivity of the *Canons'* vision of conscientious lawyering.

Members of the Committee were concerned about the destructive influence of corporate wealth and power. By the summer of 1908, both Brewer and Tucker had spoken out against corporations and corporation lawyers.³⁶¹ In its comments about the *Canons'* first draft, the Boston Bar proposed a Canon criticizing the conduct of some corporation lawyers because it believed it was "the duty of the bar to hold to obloquoy and contempt lawyers who . . . prostitute their calling" so as "not to let the glamor of their success blind us to their iniquities."³⁶² Transferring into a different context the moralistic sentiments of Hoffman's Resolution XII that the client "shall never make me a partner in his knavery,"³⁶³ the Boston Bar proposed the following Canon specifically regarding corporation lawyers:

It is quite as wicked, unworthy and dishonorable for a member of the bar to assist a rich and powerful corporation in evading the law, in defrauding investors, in corrupting a legislature or city counsel or in working an injury of any kind to the public or to an individual merely because he has been or wishes to be employed as counsel, as it would be for him to do similar things in his own business and for his own personal benefit. For the duty to be an upright and public-spirited citizen, which rests upon a lawyer even more than on a layman, only increases with the importance of the business in his charge, and no employment, no success, no fees, no

357. *Infra* App. (Canon 32).

358. Index and Synopsis of Canons, *infra* App.

359. *Id.*

360. 1907 Comm. Rep. II, *supra* note 170, at 712–13.

361. See *supra* notes 316–17 and accompanying text.

362. Red Book, *supra* note 136, at 123.

363. 1907 Comm. Rep. II, *supra* note 170, at 719.

opportunities for money-making, can justify or excuse a member of the bar for becoming a partner in his client's knavery.³⁶⁴

That proposal, so hostile to corporation lawyers as a group, had no chance of adoption by a Committee so populated by lawyers whose practices then or previously included the representation of railroads and industrial corporations.³⁶⁵ Even though the Committee rejected that proposal, its emphasis on the special duties of the lawyer to be "an upright and public-spirited citizen" still can be found in the last sentence of Canon 32.

On the other hand, at least two of the Committee members were outspoken in defense of corporation lawyers. In comments that Alexander excerpted and presented to the Committee,³⁶⁶ Howe defended corporation lawyers on the theory that everyone's legal interests deserved to be tested in the adversary system:

It is lamentably common nowadays for politicians and journalists to scold at what they call "corporation lawyers."

...Corporations have a right to the service and advice of counsel, and the larger they are the more important it is that they should have the benefit of such services; and yet, if we are to believe demagogues and yellow journalists, it is a kind of offense for a member of the bar to be what they call a "corporation lawyer."

In the course of Federal and state legislation it often occurs that acts, which claim to be laws, are unconstitutional. The corporations against which they are directed are bound to take the opinion of counsel, and to raise the question of constitutionality in such form as may be proper, and the fact that such statutes have been frequently found to be unconstitutional is a sufficient answer to the slur on corporation lawyers. It seems to me that a code of Professional Ethics might recognize the fact that, the more numerous and important corporations become, the more it is the right and duty of the American lawyer to give them advice and to defend them against illegal attack.³⁶⁷

Stetson also publicly defended corporation lawyers. In a 1907 speech to honor his friend and fellow corporate lawyer, William Birch Rankine, Stetson contended that "between high moral standards and the ascertainment of the just rights of corporations and their administrators there is no necessary divorce."³⁶⁸ "To test and to construe a law by its express terms, rather than by a popular impression of its

364. Red Book, *supra* note 136, at 123–24 (internal quotation marks omitted).

365. Committee members Dickinson, Howe, Hubbard, Jones, Peck, and Stetson, among others, represented railroads and industrial corporations. *See* Carle, *supra* note 13, at 34–37.

366. *See* Red Book, *supra* note 136, at 122–23.

367. *Id.*

368. Response of Francis Lynde Stetson Before the Niagara Board of Trade 4 (Apr. 29, 1907) (on file with author).

meaning,” Stetson stated, “should not expose one to just criticism.”³⁶⁹ Two years later, when giving his presidential address to the New York State Bar Association, Stetson pointed out a few court cases in which a corporation’s challenge to a statute was criticized as an evasion of the law, but ultimately upheld by the courts.³⁷⁰ Then, taking a more aggressive position, he suggested that corporation lawyers can play a positive role in making corporations more morally responsible:

The privilege and the opportunity of lawyers advising corporations and combinations, and their creators and managers, is to aid in the process of developing a managerial soul, and of infusing it into corporate action, and thus to promote the righteousness that shall exalt the nation. . . . This praiseworthy disposition may be developed and stimulated by the judicious and helpful advice of the corporation lawyers. If in the discharge of this conscientious duty we shall be tactful and persistent we may help to establish for our corporations a higher standard of methods and morals. . . .³⁷¹

Undergirding Stetson’s positive vision of corporation lawyers was his insistence that “[t]he lawyer must respect the moral law.”³⁷²

Canon 32 reflects Stetson’s views regarding corporation lawyers.³⁷³ The first sentence makes corporation lawyers the equal of other lawyers—no better, no worse—and imposes upon them the same moral and political obligations as “ministers” of the laws. Canon 32 underscores that quasi-religious dimension in the attorney-client relationship, stating in the third sentence that the lawyer “advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law.”³⁷⁴ With respect to the lawyer’s counseling a client about the scope or constitutionality of statutes, Canon 32 follows the approach taken by the Committee’s two outspoken corporation lawyers

369. *Id.* at 3.

370. Francis Lynde Stetson, *The Lawyer’s Livelihood*, in 32 Proceedings of the New York State Bar Association 169, 182–84 (1909).

371. *Id.* at 189.

372. *Id.* at 185.

373. Thayer appears to suggest that Stetson bears special responsibility for Canon 32, when he states in a letter to Stetson that “the new Canon is yours.” Letter from Thayer to Stetson (July 16, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 488. That letter does not identify the Canon to which Thayer is referring, but by process of elimination it appears to be Canon 32. The only other completely unprecedented Canons were Canon 2, regarding judicial selection, and Canons 30 and 31, which were based upon Hubbard’s proposals at page 107 of the *Red Book*. There is nothing to suggest that Stetson had anything to do with the proposal or content of Canon 2. Moreover, the content of Canon 32 very closely parallels Stetson’s ideas about corporation lawyers both before and after the Canons were adopted. *See supra* notes 368–72 and accompanying text. Finally, in 1909, when he expressed support to the New York State Bar Association for the Canons as a whole, the only Canon he specifically discussed was Canon 32. Stetson, *supra* note 370, at 185.

374. *Infra* App. (Canon 32).

and also by Tucker in his earlier Hubbard Lecture, finding in the lawyer's conscience the ethical limits on challenging statutes: "He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent."³⁷⁵ In this context, "conscientiously" refers to the lawyer's innermost belief, his deepest and best moral judgment. And, in its very last sentence, echoing the Boston Bar proposal, Canon 32 expresses the view that a lawyer's ultimate professional fulfillment depends upon his personal integrity—the lawyer's duty to his client "as an honest man"—and his civic virtue—his duty "as a patriotic and loyal citizen": "But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."³⁷⁶

In sum, the Canons begin with the Alabama Code's recognition of the importance of the lawyer's conscience and its rejection of Lord Brougham's view of zealous representation, but the Canons expand significantly upon those ideas, developing a much more extensive vision of conscientious lawyering by strengthening and increasing support for the lawyer's moral autonomy in the attorney-client relationship. The Canons' goal is to improve the administration of justice by making the lawyer, as an officer of the court with special obligations for the administration of justice, more morally accountable. That, in turn, is designed to enhance the prestige of lawyers as a group, restoring the legal profession to its place as, in De Toqueville's view, the American aristocracy.

B. The Implications of the Vision of Conscientious Lawyering

The above-described vision of conscientious lawyering established in Canons 15, 16, 17, 18, 22, 24, 30, 31, and 32 had direct implications for two ethical issues addressed in the Alabama Code: (1) the lawyer's duty to represent a criminal defendant; and (2) the lawyer's duty to avoid conflicts of interest. With respect to both issues, the Canons adopted provisions that differed from the relevant provisions of the Alabama Code in ways that reflected the Canons' greater emphasis on and support for the lawyer's moral autonomy.

1. Defending a Criminal Defendant

Canons 15, 30, and 31 establish the lawyer's right to choose, based upon his own views of right and wrong, which clients and causes to represent, as well as the lawyer's obligation not to bring civil cases or to assert defenses that, in his view, are not sufficiently meritorious to warrant judicial determination. The Canons emphasize the ethical significance of those decisions by lawyers and the importance of a lawyer's professional conscience in making them. The Canons' approach of

375. *Id.*; see also *supra* notes 367–72 and accompanying text.

376. *Infra* App. (Canon 32).

making lawyers morally accountable for their decisions about which clients to represent, which cases to undertake, and which rights and defenses to assert is directly implicated by the questions of whether it is ethical to represent a person accused of a crime who the lawyer knows or believes to be guilty as charged and, if so, how zealously to represent him.

Both Canon 4 and Section 56 of the Alabama Code dealt with this question in the particular circumstance of a court-appointed representation of an indigent criminal defendant. Under both, the court-appointed lawyer “ought not to ask to be excused for any trivial reason.”³⁷⁷ The two provisions differ, however, in the attitude to be taken towards the indigent prisoner. Section 56 provides that the court-appointed lawyer “should always be a friend to the defen[s]eless and oppressed.”³⁷⁸ In contrast, Canon 4 exhorts a more distanced and professional stance: the court-appointed lawyer “should always exert his best efforts in [the indigent prisoner’s] behalf.”³⁷⁹

Section 13 of the Alabama Code addressed the issue of representing a criminal defendant outside the context of a court-appointment:

An attorney cannot reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and honorable means to present such defenses as the law of the land permits, to the end that no one may be deprived of life or liberty, but by due process of law.³⁸⁰

Section 13 was fully consistent with Sharswood’s *Ethics*.³⁸¹

The members of the Committee disagreed over the issues posed by Section 13. Howe presented comments supporting the retention of Section 13’s approach.³⁸²

377. *Id.* (Canon 4). Section 56 contains the same language, except that it uses the word “light” instead of “trivial.” 1907 Comm. Rep. II, *supra* note 170, at 712.

378. 1907 Comm. Rep. II, *supra* note 170, at 712.

379. *Infra* App. (Canon 4).

380. 1907 Comm. Rep. II, *supra* note 170, at 695. This provision was adopted verbatim by two of the ten other bar associations that adopted ethics codes in the twenty years before 1907. *See id.* Six bar associations adopted this provision with the word “honorable” changed to “lawful.” *Id.* The bar associations in Wisconsin and Kentucky rejected Alabama’s approach, changing the words obligating a lawyer—“cannot reject the defense”—to read “is not bound to reject the defense.” *Id.*

381. *See* Sharswood, *supra* note 129, at 90–92. David Mellinkoff views Alabama Code Section 13 “as a clear distillate of Sharswood principle.” Mellinkoff, *supra* note 272, at 177; *see also supra* text accompanying notes 206–09.

382. Howe summarized his view as follows:

It seems to be proper that a Code of Professional Ethics should recognize the fact that a lawyer has the right and is even charged with the duty of defending the criminal, provided always that he defend him without misstating facts or misquoting law. He should be careful not to misrepresent the facts, nor to misquote the law; but, having these rules in mind, he may defend the accused with all of his powers of argument and eloquence.

Red Book, *supra* note 136, at 27. Howe’s comments were based upon a paper he presented to the Indiana Bar Association in July 1899, which discussed at length the relation of “the Moral Conscience

Other Committee members disagreed. Thayer believed that a lawyer has the “right,” but not the “duty,” to represent a criminal defendant that he knows or believes to be guilty, and that the lawyer who undertakes such a defense should have the right, but not the duty, to decide whether to defend as zealously as he would if he believed the accused to be innocent or if his guilt or innocence were unclear.³⁸³

In the end, the Committee proposed, and the A.B.A. adopted, the first paragraph of Canon 5, which represents a compromise between these views:

It is the right of the lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.³⁸⁴

Thus, Canon 5 gives the lawyer, in the exercise of his conscience, the right to determine whether to defend an accused person, even if the lawyer knows or believes him to be guilty. But it also imposes an affirmative obligation upon the lawyer, if such a defense is undertaken, to represent the accused as zealously as if the lawyer believed him to be innocent.

The language of the second sentence of Canon 5 was taken almost verbatim from Section 13 of the Alabama Code, upon which Canon 5 is based.³⁸⁵ The first sentence of Canon 5, however, marks a significant change from Section 13. Section 13 prohibited an attorney from “reject[ing] the defense of a person accused of a criminal offense, because he knows or believes him guilty,”³⁸⁶ while the first sentence of Canon 5 gives the lawyer the right, but not the duty, to undertake the defense of a criminal defendant the lawyer knows or believes is guilty. That change was proposed by the Boston Bar Association, even though Thayer, a member of that Association, had dissented from that proposal.³⁸⁷

This change from Section 13 of the Alabama Code reflects the Committee’s greater concern for the lawyer’s moral autonomy—his right to determine, as a

to the duties of the advocate,” particularly with respect to the advocate’s duty to “defend a man whom you believe to be guilty.” William Wirt Howe, *Professional Ethics*, 5 Va. L. Reg. 509, 513, 515 (1899).

383. Red Book, *supra* note 136, at 28–29.

384. *Infra* App. (Canon 5). The second paragraph of Canon 5, which was added after the Committee sent out the preliminary draft of the Canons for comment, in May 1908, provides: “The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.” *Id.* Compare Tenn. Twenty-Seventh Meeting, *supra* note 153, at 39 (May 1908 first draft of Canon 5), with *infra* App. (final version of Canon 5).

385. 1907 Comm. Rep. II, *supra* note 170, at 695.

386. *Id.*

387. Red Book, *supra* note 136, at 28–29.

matter of personal conscience, whether to represent a criminal defendant whom he knows or believes to be guilty. This connection between giving lawyers the right, but not imposing the duty, to defend a person accused of a crime, and preserving a lawyer's moral autonomy, would have been known to the Committee Members. In a 1902 book on legal ethics, George Warvelle had stated his belief that a lawyer should not "decline a retainer merely because he may believe the accused to be guilty,"³⁸⁸ but that to impose a duty on lawyers to defend an accused would undermine their moral autonomy:

[A lawyer] is under no obligation to palliate and defend iniquity of any kind in a court of justice, or to undertake a cause which his soul abhors, and his condition would be that of an abject and miserable slave if, as some would contend, he were to be at the command of every miscreant who might choose to employ him.³⁸⁹

Thus, as David Mellinkoff later recognized, the Canons provide lawyers with a double defense against public criticism in their dealings with the criminally accused. First, Canon 5, coupled with the general statement in Canon 31 that a lawyer "has a right to decline employment," clearly supports the lawyer's right to decline to represent a criminal defendant that a lawyer believes is guilty, even though Canon 4 exhorts lawyers "assigned as counsel for an indigent prisoner . . . not to ask to be excused for any trivial reason."³⁹⁰ Second, Canon 5 provides a moral justification for a lawyer who agrees to represent a criminal defendant:

As a practical matter, Canon 5 was not intended to convince lawyers to defend anyone who wanted a defense, but to remind non-lawyers that a lawyer was not necessarily a moral delinquent if he did. Occasionally lawyers would speak of a "right and obligation to defend persons charged with crime." What they were really trying to tell the world in Canon 5 was that lawyers had a right to defend, regardless of what they or the community thought of an accused man, and that a system of justice required at least that much.³⁹¹

In short, the change from Section 13 of the Alabama Code to Canon 5 reflected the Committee's commitment to the lawyer's right, in the exercise of his moral autonomy, to choose whether to represent an unassigned criminal defendant he knew or believed to be guilty. At the same time, this change provided an ethical defense, based upon the legitimate needs of the administration of justice, for those lawyers whose conscience allowed them to represent criminal defendants that they knew or believed to be guilty.

388. GEORGE W. WARVELLE, *ESSAYS IN LEGAL ETHICS* 133 (2d ed. 1920).

389. *Id.* at 132.

390. Mellinkoff, *supra* note 272, at 178.

391. *Id.* at 179–80 (footnote omitted).

2. *Avoiding Conflicts of Interest*

Underlying the ethical rules regarding conflicts of interest is, among other things, a view about the proper relationship between the lawyer and his current and former clients. The attorney-client relationship is generally considered to require (1) a lawyer's duty of loyalty to a current client that, absent informed consent, permits no conflicting interests, whether professional interests based upon obligations to other clients or the lawyer's own personal, social, or business interests, and (2) a lawyer's duty, absent informed consent, to preserve the sanctity of confidential information imparted by a current or former client. The degree of moral autonomy accorded in the attorney-client relationship has implications for both the lawyer's duty of loyalty and his duty of client confidentiality. Not surprisingly then, while the Canons strengthened and increased support for the lawyer's moral autonomy in comparison to the Alabama Code, the Canons show less concern than the Alabama Code with conflicts of interest.

This diminished concern is reflected in the fact that of the thirty-two Canons only Canon 6 concerns conflicts of interest, whereas five sections of the Alabama Code—Sections 22, 23, 25, 31, and 34—deal with that subject.³⁹² Nor is it possible to view Canon 6 as the combination of those five sections of the Alabama Code. First, as the Canons Committee acknowledges in its 1908 Report, Canon 6 is based on Sections 22, 25, and 34 of the Alabama Code; it is not based upon Section 23 or Section 31.³⁹³ Moreover, as shown below, there are issues dealt with in those five sections of the Alabama Code that do not appear in Canon 6 at all.

Canon 6 contains three paragraphs:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests

392. This comparison does not include the conflict of interests inherent in business transactions between lawyers and their clients. But, with respect to that sort of conflict of interest as well, the Alabama Code shows greater concern than the Canons. Section 38 of the Alabama Code focuses on a lawyer's business dealings with his client: "Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject matter of their litigation, so long as the relation of attorney and client continues." 1907 Comm. Rep. II, *supra* note 170, at 704. This provision was adopted by nine other state bar associations in their ethics codes. *Id.* The Canons Committee narrowed the focus of this provision, dealing in Canon 10 only with the conflict of interest that develops when a lawyer acquires an interest in the "subject matter of the litigation." *Infra* App. (Canon 10); *see also infra* notes 450–54 and accompanying text. There is no attempt in the Canons to regulate other business dealings, such as loans or other transactions, between the lawyer and his client, which is within the ambit of Section 38. *See infra* App.

393. Index and Synopsis of Canons, *infra* App.

when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.³⁹⁴

Each of these three paragraphs is a shortened version of a section of the Alabama Code.

The first paragraph of Canon 6 is based upon Section 34 of the Alabama Code, which provided:

An attorney is in honor bound to disclose to the client at the time of retainer, all the circumstances of his relation to the parties, or interest or connection with the controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite parties will hinder or seriously embarrass the full and fearless discharge of all his duties.³⁹⁵

The first paragraph of Canon 6 is a slightly reworded version of the first sentence of Section 34,³⁹⁶ but it does not include the second sentence regarding the lawyer's obligation not to represent a client because of personal or professional obligations to or relations with an opposing party.³⁹⁷ The second paragraph of Canon 6 makes it "unprofessional to represent conflicting interests,"³⁹⁸ but that appears to prohibit only the representation of conflicting client interests. Thus, neither Canon 6, nor any of the other Canons, carries forward the Alabama Code's prohibition of conflicts of interest caused by the lawyer's non-representational relations with an adverse party in a lawsuit or transaction, such as conflicts caused by a lawyer's personal, social, or business interests. This is a significant omission, especially since Section 34 was adopted by nine other state bar associations.³⁹⁹

The second paragraph of Canon 6 is based upon Section 25 of the Alabama Code, which concerns concurrent client conflicts:

An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts. Even then such a position is embarrassing, and ought to be avoided. An attorney represents conflicting interests within the meaning of this rule, when it is his duty, in behalf of one of his clients,

394. *Infra* App. (Canon 6).

395. 1907 Comm. Rep. II, *supra* note 170, at 703.

396. *See supra* note 236 and accompanying text.

397. *See infra* App. (Canon 6).

398. *Id.*

399. 1907 Comm. Rep. II, *supra* note 170, at 703.

to contend for that which duty to other clients in the transaction requires him to oppose.⁴⁰⁰

The first and third sentences of this Section were substantially adopted in paragraph two of Canon 6, but the second sentence of this Section was eliminated for reasons that were unstated,⁴⁰¹ even though this Section was adopted verbatim by seven state bar associations and in substance by three others.⁴⁰² In dropping that second sentence, Canon 6 evidences some disregard for the problem of concurrent client conflicts, since it neglects to carry forward the Alabama Code's admonition to avoid concurrent conflicts of interest despite consent by both parties after full disclosure.

The third paragraph of Canon 6 is based upon Section 22 of the Alabama Code, which describes the impact of the duty of client confidentiality⁴⁰³ for conflicts of interest involving former clients:

The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the client's interests, in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material, in a subsequent suit, as the basis of any judgment which may injuriously affect his rights, the attorney cannot appear in such cause, without the consent of his former client.⁴⁰⁴

This provision was adopted completely by eight other state bar associations in their ethics codes, and the Missouri State Bar Association adopted the first sentence.⁴⁰⁵ Nonetheless, based apparently on the recommendation of Committee member Dickinson and the Boston Bar Association, Canon 6 eliminated the second sentence of Section 22,⁴⁰⁶ which stated the reason for disqualification and provided that the conflict of interest could be cured by client consent.

400. *Id.* at 700.

401. *See* Red Book, *supra* note 136, at 50.

402. 1907 Comm. Rep. II, *supra* note 170, at 700.

403. Section 21 of the Alabama Code describes the lawyer's duty of client confidentiality: "Communications and confidences between client and attorney are the property and secrets of the client, and can not be divulged except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy." *Id.* at 698. This provision was adopted in the ethics codes of each of the other ten state bar associations. *Id.* Thomas Goode Jones had adopted it from the attorney's oath of office codified at Section 872 of the 1867 Alabama Code, which, in turn, had been based upon the Field Code of Procedure proposed in New York roughly twenty years earlier. Marston, *supra* note 14, at 499–500, 506. Despite the widespread acceptance of Section 21, the Canons did not contain any specifically prescribed duty of client confidentiality. *See infra* App.

404. 1907 Comm. Rep. II, *supra* note 170, at 698–99.

405. *Id.* at 699.

406. Red Book, *supra* note 136, at 48.

Moreover, two sections of the Alabama Code concerning conflicts of interest are not taken up at all in the Canons. First, Section 23 of the Alabama Code describes the duty a lawyer owes not to undo his own legal work on behalf of a former client:

An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere conveyancer, and was not consulted as to the facts, and unknown to him, the transaction amounted to a violation of the criminal laws, he may assail it on that ground, in suits between third persons, or between parties to the instrument and strangers.⁴⁰⁷

This provision was incorporated in the ethics codes of nine other state bar associations,⁴⁰⁸ yet it was not carried forward in the Canons,⁴⁰⁹ leaving them without any provision concerning the duty of loyalty owed a former client. The only stated basis for the omission of a provision based upon Section 23 was the comment of Elmer McDonald, a lawyer from Minnesota,⁴¹⁰ who stated that Section 23 should not be adopted because the issue of whether to attack his own instrument “should be left to the good judgment and wise, honest discretion of the attorney.”⁴¹¹

Second, Section 31 of the Alabama Code gave priority to the oldest client in a litigation between two current clients of a lawyer: “Where an attorney has more than one regular client, the oldest client in the absence of some agreement should have the preference of retaining the attorney, as against his other clients in litigation between them.”⁴¹² Michigan adopted the same provision,⁴¹³ but the Canons adopted no preference for the oldest client. Two lawyers recommended that the Canons Committee reject Section 31, contending that the attorney should be disqualified from representing either client without the consent of both of them.⁴¹⁴ One lawyer suggested that the lawyer should have discretion as to which client to represent.⁴¹⁵ Committee member Dickinson also rejected Section 31, stating that the rule could work a hardship on an attorney because it “might operate so as to give one who brings him but little business the right to retain him as against those whose business is far more lucrative.”⁴¹⁶

The elimination of some or all of the five sections of the Alabama Code specifically concerning conflicts of interest suggests the Canons Committee’s lesser

407. 1907 Comm. Rep. II, *supra* note 170, at 699.

408. *Id.*

409. *See* Index and Synopsis of Canons, *infra* App.

410. Red Book, *supra* note 136, at 4.

411. *Id.* at 48.

412. 1907 Comm. Rep. II, *supra* note 170, at 702.

413. *Id.*

414. Red Book, *supra* note 136, at 55.

415. *Id.*

416. *Id.* at 54.

concern with such conflicts. In the twenty-first century, when conflicts of interest make up such a large part of legal ethics, the Canons' lack of emphasis on conflicts of interest may seem particularly strange. However, such a de-emphasis on conflicts is consistent with, if not the logical outcome of, an ethic for lawyers whose fundamental vision of representation emphasizes the lawyer's moral autonomy in the attorney-client relationship. In giving the lawyer more control and discretion over the representation of a client, the Canons legitimate a certain distance from the interests, emotions, and concerns pressing upon the client. The Canons give the lawyer the space—*in fora conscientia*—to decide for himself whether and in what respect to accept, and how to deal most appropriately with, those client interests, emotions, and concerns. By lessening the direct impact of those interests, emotions, and concerns upon lawyers in their representational capacity, the Canons logically push toward an ethical view allowing lawyers to reconcile within their own consciences the differing interests of their clients or even their own differing interests with their clients.

This tension between the *Canons*' strong support for the lawyer's moral autonomy in the attorney-client relationship, and a lessened concern with conflicts of interest, is highlighted in Clyde Spillenger's insightful exploration of the ethical issues raised about Louis Brandeis's independent lawyering in the 1916 Senate Committee hearings on Brandeis's nomination to the United States Supreme Court ("1916 Hearings").⁴¹⁷ Spillenger describes the lawyerly independence Brandeis sought in his public representations as the result of both his personal character and the Mugwump-Progressive political culture to which he subscribed, rather than an explicit commitment to any particular theory of lawyering.⁴¹⁸ Nonetheless, that lawyerly independence, which Brandeis himself described in his above-mentioned 1905 speech, *The Opportunity in the Law*,⁴¹⁹ bears a great similarity to the moral autonomy envisioned in the Canons, because both emphasized the sovereignty of personal conscience.⁴²⁰ For example, even when offered lucrative matters, Brandeis

417. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 *YALE L.J.* 1445, 1498–1522 (1996).

418. *Id.*

For Brandeis, the habit of nonaffiliation did not emerge from a role-specific conception of the lawyer's proper attitude, but in fact constituted an essential element of his approach to political action of all kinds—one that was well adapted to Mugwump-Progressive political culture, as well as responsive to his own preferred way of functioning in the world.

Id. at 1469. "[A]utonomy was not simply a lawyering ethic but was native to Brandeis's character. . . ." *Id.* at 1449. "That aspiration to autonomy was not only native to Brandeis's temperament, but also highly honored by the political culture of his time." *Id.* at 1452. "[O]ne fundamental attribute of Mugwumpery that Brandeis retained was an unqualified commitment to personal independence." *Id.* at 1454. "The Mugwump . . . offered as his paradigm of citizen participation in governance the hermetically sealed and uncompromisingly expressed conscience of the upright individual." *Id.* at 1490. "[H]is style in . . . lawyering had as much to do with a chosen mode of self-presentation as with larger ideals of the good lawyer. . . ." *Id.* at 1522.

419. See *supra* notes 62–67 and accompanying text.

420. See *supra* notes 67, 319–76 and accompanying text.

apparently needed to satisfy himself, based upon his own moral and political views, of the justness of the representation.⁴²¹

In describing the 1916 Hearings, Spillenger investigates, among other things, that aspect of the attack on Brandeis's fitness to become a Supreme Court Justice that was based upon the contention that Brandeis acted unethically because, in effect, he permitted his own moral and political views to intrude improperly in the attorney-client relationship. As Spillenger explains:

The 1916 hearings were virtually one long inquiry into claims that, on various occasions, Brandeis had violated the ethical norms of law practice. And almost all of the charges played on a common theme—that Brandeis did not measure his duties as advocate according to the interest of an individual client, to whom he owed unqualified loyalty; in more modern terms, he had become embroiled in conflicts of interests and had failed to pursue his clients' interests with the zeal required by the canons of the bar. But the “conflicts of interest” here were of an idiosyncratic kind: Brandeis was accused essentially of permitting his own vision to interfere with what should have been a deferential loyalty to his clients. . . . Austen G. Fox, who presented most of the evidence against Brandeis during the hearings, suggested to Amos Pinchot that “[t]he trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients. He always acts the part of a judge toward his clients instead of being his client's lawyer, which is against the practices of the Bar.”⁴²²

Assuming that the ethical concerns of those elite lawyers who lobbied against Brandeis's nomination were genuine and not merely a pretext for other, less exalted reasons for their opposition, such as anti-semitism, Spillenger's description of these ethical concerns can be read in two interesting ways. On the one hand, what Spillenger has described may be the elite bar's criticism of the conscientious lawyering envisioned by the Canons from the standpoint of a more client-dominated view of

421. Spillenger, *supra* note 417, at 1475, describes the 1916 testimony of Waddill Catchings, a lawyer from Sullivan & Cromwell representing the Harriman railroad interests, who was surprised that when he sought to retain Brandeis to represent those interests in connection with a proxy fight involving the Illinois Central Railroad, Brandeis wanted to be persuaded of the “justness” of the client's cause before he would take on the lucrative representation:

I . . . had to lay the situation before Mr. Brandeis, and I may say that the hardest interview I had during the whole campaign was with Mr. Brandeis in convincing him of the justness of our cause, so to speak.

....

... [H]e had to be satisfied of the justness of our position. It was an unusual experience. I had occasion to retain other lawyers and no one ever raised that question.

Id. (quoting 1 Ray M. Mersky & J. Myron Jacobstein, *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916–1975*, at 338, 344 (1977)).

422. *Id.* at 1500 (footnotes omitted).

lawyering consistent, or at least more consistent, with the view of zealous representation expressed in Lord Brougham's speech.⁴²³ From that perspective, Brandeis was being called to account for the de-emphasis on conflicts of interest that is implicit in any vision of independent lawyering that emphasizes, as do the Canons, the lawyer's moral autonomy in the attorney-client relationship.

On the other hand, if we assume that the elite lawyers raising those ethical concerns embraced the Canons' vision of conscientious lawyering, as other members of the A.B.A. did, then their ethical concerns can be read as evidencing some limits on the privileged status of the lawyer's conscience under the Canons. From that perspective, the ethical concerns of those elite lawyers suggest that even according to the Canons, the lawyer's conscience is only one among four voices that needs to be taken into account in order to fulfill a lawyer's ethical duties. In addition to a duty to his own moral and political views, a lawyer has a duty to (1) the courts and the legal system generally; (2) his client; and (3) his own economic self-interest.⁴²⁴ Thus, the ethical concerns of those elite lawyers may reflect their view that the *Canons'* vision of conscientious lawyering requires a lawyer to integrate the duty to his conscience with three other sets of obligations, and that in his practice Brandeis gave too much priority to his own moral and political views and not enough to the duty to his client.

C. The Canons's Attack on Commercialism

Just as Roosevelt considered wealth to have undermined the independence of corporation lawyers, members of the Committee viewed the increasing commercialism pervading the legal profession as a general threat to the moral autonomy of the lawyer in the attorney-client relationship.⁴²⁵ In essence, the lawyer's own economic self-interest, heightened by the client's interests and emotions and supported

423. Spillenger is somewhat ambiguous in his description of the view of lawyering adopted by those critical of Brandeis. On the one hand, he describes them as lagging behind Brandeis's more modern view of lawyering "that has partially supplanted the image of lawyers as adversarial litigators that structured the set of legal-ethical norms prevalent in Brandeis's day." *Id.* at 1523. This suggests that the critics adopted an older, more traditional view of the attorney-client relationship. *Id.* at 1501 n.190. On the other hand, he describes Austen Fox, for example, as "reflect[ing] the changed self-image of the mainstream bar, from a nineteenth century conception of representation as moral and public to one that regarded it as private and professional." *Id.* at 1501. Such a statement reflects a more modern view of lawyering as compared to Brandeis's more gentlemanly nineteenth-century view. *See id.* at 1492 n.167. The ambiguity in Spillenger's description may be a result of the existence, both before and after 1916, of a tradition of lawyering consistent with Lord Brougham's views. *See supra* notes 271–73, 292–96 and accompanying text; *infra* 524–32 and accompanying text.

424. *See supra* note 270 and accompanying text.

425. The commercialism to which the members of the Canons Committee were reacting had at least two sides: first, a concern about the increasingly powerful presence of corporations, which, as reflected in Roosevelt's 1905 speech, were viewed with hostility around the turn of the twentieth century because they threatened the perceived public interest; and, second, a concern about the values of the mass of private practitioners who, under the force of economic necessity, were imbued, as the Committee's 1906 Report had stated, with less worthy motives and whose efforts to attract clients resembled the practices of tradesmen. *See supra* note 68 and accompanying text.

by the general commercialism of the times, could undermine the autonomy of the lawyer's conscience. Consequently, alongside the vision of conscientious lawyering, a second major element of the Canons was to continue and expand upon the Alabama Code's proscription of certain commercial practices and attitudes among attorneys. That element did not just support the Canons' vision of conscientious lawyering; it also emphasized the distinction between a profession and a trade, which was important to maintaining and enhancing the status of the profession and the personal self-esteem of its members.⁴²⁶

The Canons distinguish the practice of law as a profession from the practice of law as a trade, based in part on the role that lawyers and judges play in the administration of justice. In its Preamble, in the prominent positioning of the Canons regarding judges, and in the numerous other Canons that link the conduct of ethical lawyers to the goal of justice, the Canons trumpet that republican theme.⁴²⁷

The Canons' Preamble emphasizes the legal profession's role in the administration of justice:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have

426. Sharswood's description of the decline of the legal profession in Rome from an "honorable office to a money-making trade" emphasizes the class-based nature of the decline. *See* Sharswood, *supra* note 129, at 142. He quotes from Gibbon: "The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of the freedmen and plebians, who, with cunning rather than with skill, exercised a sordid and pernicious trade." *Id.* at 141 (quoting 2 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 214 (London, Bohn 1854)). Similarly, in contrasting the rule prohibiting barristers from suing their clients for a fee, with the lack of such prohibition applicable to the lower strata comprised of attorneys and solicitors, *id.* at 142–44, Sharswood distinguishes the upper strata of England's legal profession from its lesser counterpart and emphasizes that lawyers who are themselves entitled to greater social status conduct themselves in conformity with an anti-commercial ethos. His clear implication is that lawyers who avoid too great a concern with money are entitled to consider themselves—and to be considered by others—as gentlemanly members of an elite profession, while those lawyers who adopt a more commercial ethos are practitioners engaged in a lower-class trade.

427. The republican theme running through the Canons is explored in Pearce, *Republican Origins*, *supra* note 3, at 241. The importance of this republican theme should not be underestimated, since it fulfilled many of the purposes underlying the adoption of the Canons and some of the important goals implicit in the A.B.A.'s professionalism project. On the basis of this republican theme: (1) the A.B.A. argued to the lay public that lawyers and judges played a special political and social role in American government and, therefore, that the legal profession should be held in high esteem and accorded special privileges and prerogatives; (2) the A.B.A. explained to the lay public, its members, and other lawyers why the adoption of the Canons was in the public interest, why the lay public should care about and defer to them, and why its members and other lawyers should live their professional lives in accordance with the Canons' vision and requirements; and, (3) the A.B.A. provided its members and other lawyers a sense of identity, self-esteem, and meaning in being a lawyer around the turn of the twentieth century. In an earlier article, I underestimated the continuing influence of republicanism around the turn of the twentieth century. *See* Altman, *supra* note 174, at 1056, 1059.

absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.⁴²⁸

Although sharing that republican theme with the Preamble to the Alabama Code of Ethics,⁴²⁹ the language of the Canons' Preamble, especially its last two sentences, is drawn directly from the beginning of the Canons Committee's 1906 Report and Lucien Alexander's 1905 paper.⁴³⁰

The importance of this republican theme is evident also in the prominence given to judges in the Canons. Perhaps following a suggestion from Dean Costigan of the Nebraska Law School that the first part of the Canons concern duties owed to the courts, judicial officers, and jurors,⁴³¹ the first three Canons concern judges. Canon 1 describes the lawyer's duty to adopt a respectful attitude toward judges.⁴³² Canon 2 describes the lawyer's duty to support the non-partisan selection of independent and competent judges.⁴³³ Canon 3 describes the lawyer's duty to exhibit a "self-respecting independence" from judges.⁴³⁴ Giving these duties priority of place, the Canons emphasize the importance attached to fair and impartial justice and the crucial role of lawyers and judges in the administration of justice.

Finally, a number of other Canons also link the ethics of legal practice with the goal of justice. Canon 5 makes it the primary duty of the prosecutor "to see that justice is done."⁴³⁵ Canon 15 acknowledges the lawyer's concern with "the justice of [the client's] cause."⁴³⁶ Canon 19 proscribes the lawyer from testifying "[e]xcept when essential to the ends of justice."⁴³⁷ Canon 20 condemns newspaper publications by lawyers that "prejudice the due administration of justice."⁴³⁸ Canon 22 recognizes that "the lawyer [is charged] with the duty of aiding in the administration of justice."⁴³⁹ Canon 29 imposes upon the lawyer the duty "to improve not only the law but [also] the administration of justice."⁴⁴⁰

428. *Infra* App. (Preamble).

429. *Cf.* 1907 Comm. Rep. II, *supra* note 170, at 685–86 (Preamble to Alabama Code).

430. *See supra* note 99 and accompanying text.

431. *See Red Book, supra* note 136, at 129–30. The prominent position of these first three Canons also may reflect the high proportion of judges or former judges on the Committee.

432. *Infra* App. (Canon 1); *see also infra* notes 545–47 and accompanying text.

433. *Infra* App. (Canon 2); *see also infra* notes 548–50 and accompanying text.

434. *Infra* App. (Canon 3).

435. *Id.*; *see also supra* note 384.

436. *Infra* App. (Canon 15); *see also supra* notes 320–28 and accompanying text.

437. *Infra* App. (Canon 19).

438. *Infra* App. (Canon 20).

439. *Infra* App. (Canon 22); *see also supra* notes 347–50 and accompanying text.

440. *Infra* App. (Canon 29); *see also infra* notes 534–541 and accompanying text. On the other hand, the Canons Committee deliberately left out of Canon 29 the explanation of the close interrelationship between the legal profession and the administration of justice in Section 8 of the Alabama

An anti-commercial attitude consistent with both goals—supporting the vision of conscientious lawyering and distinguishing law as a profession from law as a trade—is evident in the Canons’ treatment of two major topics in legal ethics regarding the market for legal services: (1) the financial dimensions of an existing attorney-client relationship; and (2) the efforts of lawyers to obtain clients.⁴⁴¹

1. *The Financial Dimensions of the Attorney-Client Relationship*

Paraphrasing various sections of the Alabama Code,⁴⁴² Canon 12 concerns the lawyer’s obligations in setting his fee:

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them[.] A client’s ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

Code: “for [the legal profession] is so interwoven with the administration of justice that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the state and his fellowman.” 1907 Comm. Rep. II, *supra* note 170, at 692. This same explanation was included in the codes of ethics of ten other state bar associations. *Id.* at 692–93. Although Canon 29 was based upon Section 8 of the Alabama Code and incorporated the first clause of that section almost verbatim, the Committee chose not to include this explanation. The omission was suggested by Charles Boston, a New York lawyer quite well known for his work in legal ethics, who believed the explanation was unnecessary. Red Book, *supra* note 136, at 20; Miller, *supra* note 143, at 394, 397–98.

441. Historian Jerold Auerbach has suggested that the Canons’ anti-commercialism also conceals an ethnic and class bias against the mass of private practitioners in urban settings who tended to be Jewish or Catholic and from immigrant or lower class backgrounds and whose clients tended to be blue-collar workers, new immigrants, or members of the urban poor. Auerbach, *supra* note 12, at 50–52. Whether the Committee’s members harbored such motives in drafting the Canons is less clear than the disparate impact Auerbach demonstrates regarding the effects of the Canons’ anti-commercial provisions on such private practitioners, as opposed to the elite practitioners in corporate law firms, especially as the Canons were interpreted and subsequently enforced by bar associations. That same disparate impact is described in Philip Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 254–66 (1968).

442. Canon 12 derives from Sections 48, 49, 50, and 52 of the Alabama Code. *See infra* App. (Canon 12); 1907 Comm. Rep. II, *supra* note 170, at 708–09 (Ala. Code). The first two sentences of the first paragraph of Canon 12 paraphrase Section 48 of the Alabama Code. *Compare infra* App. (Canon 12), with 1907 Comm. Rep. II, *supra* note 170, at 708 (Ala. Code § 48). The third sentence of the first paragraph of Canon 12 is drawn from Section 52 of the Alabama Code. *Compare infra* App. (Canon 12), with 1907 Comm. Rep. II, *supra* note 170, at 710 (Ala. Code § 52). The second paragraph of Canon 12 is based upon a combination of Sections 49 and 50 of the Alabama Code. *Compare infra* App. (Canon 12), with 1907 Comm. Rep. II, *supra* note 170, at 709 (Ala. Code §§ 49–50). The third paragraph of Canon 12 is taken, almost verbatim, from the last sentence of Section 50 of the Alabama Code. *Compare infra* App. (Canon 12), with 1907 Comm. Rep. II, *supra* note 170, at 709 (Ala. Code § 50).

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.⁴⁴³

Separated from the second paragraph for special emphasis,⁴⁴⁴ the third paragraph of Canon 12 describes the lawyer's fundamental orientation in his financial dealings with his client. It distinguishes the legal profession, whose end is justice, from a trade, whose end is "mere money-getting,"⁴⁴⁵ and it makes that distinction the overarching principle regarding the financial relationship between a lawyer and his client. In effect, the third paragraph of Canon 12 requires the lawyer to employ the criteria enumerated in the second paragraph when setting his fee, with that overarching principle in mind.

The last sentence of the second paragraph further defines the nature of those enumerated criteria: they are "mere guides in ascertaining the real value of the service." In focusing on the "value" of the lawyer's legal services, Canon 12 adopts a way of thinking about legal fees that incorporates both moral and market considerations. The financial relationship with a client is not, strictly speaking, a transaction for profit and it certainly is not viewed as an opportunity to make as much money as the market will bear. Indeed, the first paragraph of Canon 12 clearly states that "[a] client's ability to pay cannot justify a charge in excess of the value of the service." In focusing on the "value" of the lawyer's legal services, the Canons seem to contemplate an equal exchange, the giving of money equal in value to the services rendered. Neither the lawyer, nor the client, should take advantage of the other. The first paragraph of Canon 12 makes that explicit: "In fixing fees,

443. *Infra* App. (Canon 12).

444. The Canons Committee divided Section 50 of the Alabama Code into the second and third paragraphs of Canon 12, giving the last sentence of Section 50 special prominence by making it an entirely separate paragraph and placing it last. *See supra* note 442.

445. *Infra* App. (Canon 12).

lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them.”

The lawyer’s right not to be taken advantage of by his client is reinforced by Canon 14, regarding disputes with clients over legal fees: “Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.”⁴⁴⁶ This provision also combines both moral and market considerations. Although drawn from Section 47 of the Alabama Code,⁴⁴⁷ Canon 14 goes beyond that section in establishing the lawyer’s “right to receive reasonable recompense.” No such “right” is stated in the Alabama Code. In establishing such a “right,” the Canons differentiate the American lawyer from the English barrister who, at least in 1908, could not sue to collect a fee because a barrister’s legal fee was “strictly in the nature of pure *honoraria*.”⁴⁴⁸ In this respect, the Canons depart from what Sharswood viewed as the purer professionalism of an earlier era, when lawyers’ fees generally retained their honorary character and there were strict limitations on the circumstances when a lawyer could sue a client to obtain his fee.⁴⁴⁹

A lawyer’s conscience is a treacherous guide when the lawyer has a personal financial stake in the outcome of a lawsuit. Consistent with that observation and the longstanding rules against champerty,⁴⁵⁰ Canon 10 prohibits lawyers from “purchas[ing] any interest in the subject matter of the litigation which he is conducting.”⁴⁵¹ Although Canon 10 is related to the more general topic of business transactions with clients discussed in Section 38 of the Alabama Code,⁴⁵² the

446. *Id.*

447. *Id.*; see also 1907 Comm. Rep. II, *supra* note 170, at 708. The wording change in Section 47 was based upon suggestions to the Committee by Simeon Baldwin and Committee member Dickinson. Red Book, *supra* note 136, at 63.

448. See Red Book, *supra* note 136, at 68.

449. Sharswood explained that “at one time . . . an attorney could not recover, without an express promise, anything beyond the trifling and totally inadequate sum provided in the fee bill.” Sharswood, *supra* note 129, at 145. Sharswood quotes Coleridge’s Table Talk, Vol. 2, regarding the connection between that “ancient rule” and professionalism:

I should be sorry to see the honorary character of the fees of barristers . . . done away with. Though it seems to be a shadowy distinction, yet I believe it to be beneficial in effect. It contributes to preserve the idea of a profession, of a class which belongs to the public, in the employment and remuneration of which no law interferes, but the citizen acts [as] he likes, in “foro conscientiae.”

Id. at 145 n.1.

450. See generally Max Radin, *Maintenance By Champerty*, 24 CAL. L. REV. 48 (1935).

451. *Infra* App. (Canon 10).

452. Section 38 of the Alabama Code provided:

Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject matter of their litigation, so long as the relation of attorney and client continues.

1907 Comm. Rep. II, *supra* note 170, at 704; see also *supra* note 240.

Committee indicated that Canon 10 was not based upon Section 38, but rather on Hoffman's Resolution XXIV,⁴⁵³ which deals at length with a resolution "against purchasing, in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, has been fully established."⁴⁵⁴

For similar reasons, contingency fees were viewed as a serious threat to the Canons vision of conscientious lawyering. For example, the Boston Bar Association advised the Committee that contingency fees were antithetical to the lawyer's independence from his client, because, in effect, the lawyer became the client's partner-in-interest:

By means of such a contract he may get more than his professional services are worth. The excess is to be attributed to the risk which he runs of getting little or nothing in return for his time and trouble. To this extent his relation to the client is not that of a legal adviser, but a partner in a business venture. The evil tendencies of such dealings with the client are plain. They tend to promote litigation and to degrade the practice of the law from an honorable profession to a mere money-getting trade; they involve a transaction between counsel and client in which their interests are opposed, in which the lawyer's knowledge and experience give him an advantage, and in which he is tempted to overreach the client; a speedy settlement may yield the lawyer a return out of all proportion to the labor expended, and this may tempt him to advise such a settlement for his own benefit and against the real interest of his client; moreover the lawyer becomes to all intents and purposes a party in the cause which impairs his capacity to advise wisely and exposes him to all the temptations to which parties are exposed to be unfair or dishonorable in the preparation and trial of their cases.⁴⁵⁵

This view echoed Sharswood's earlier negative assessment of contingency fees.⁴⁵⁶ Other commentators advised the Committee that contingent fees encouraged other

453. Index and Synopsis of Canons, *infra* App.

454. 1907 Comm. Rep. II, *supra* note 170, at 725. Indeed, in the May 1908 first draft, Canon 10 closely tracked the language of Section 38 of the Alabama Code. Compare Tenn. Twenty-Seventh Meeting, *supra* note 153, at 40 (May 1908 first draft), with 1907 Comm. Rep. II, *supra* note 170, at 704 (Ala. Code § 38). The Committee changed that language to conform more closely to Hoffman Resolution XXIV in the version it proposed, and that was adopted, at the 1908 A.B.A. annual meeting. Compare 1907 Comm. Rep. II, *supra* note 170, at 724–25 (Hoffman Resolution XXIV), with *infra* App. (final version of Canon 10). But see Marston, *supra* note 14, at 505–06 (arguing that Canon 10 is based on Section 38 of the Alabama Code).

455. Red Book, *supra* note 136, at 72–73.

456. Sharswood discountenanced contingent fees. Although he recognized their legality and their utility, Sharswood, *supra* note 129, at 154–59, he regarded contingent fee arrangements as "a very dangerous tendency" for the attorney's relationship with his client, Sharswood, *supra* note 129, at 153, because "[t]hey are no longer attorney and client, but partners." *Id.* at 160–61.

[This] changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating

unethical conduct, such as ambulance chasing, paying for the solicitation of cases, bringing frivolous lawsuits, and suborning perjury.⁴⁵⁷ Alexander considered the issue of contingent fees to raise “vital questions.”⁴⁵⁸

While recognizing that contingency fees “lead to many abuses,” the Alabama Code merely expressed a distaste for such arrangements.⁴⁵⁹ As originally drafted by the Canons Committee, Canon 13 followed Section 51 of the Alabama Code in recognizing their abuses, but it sought to impose unprecedented judicial scrutiny over such arrangements even where lawful: “Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the Court.”⁴⁶⁰ Several commentators, including Committee member Howe, proposed the idea of judicial supervision over contingent fee arrangements.⁴⁶¹

Canon 13 was the most controversial Canon. It was the only Canon about which the members of the Committee publicly disagreed.⁴⁶² Other members of the Committee, such as Thayer, also opposed contingent fees on principle, but subscribed to the proposed Canon because “more than one prominent member of [the] Committee said that he had used them in his own practice.”⁴⁶³ Of the more than

his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and would find it difficult to persuade himself, no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it.

Sharswood, *supra* note 129, at 161. Sharswood also was concerned about the effect of a contingent fee arrangement upon the lawyer’s professional character: “It turns lawyers into higglers with their clients.” *Id.*

457. See, e.g., Red Book, *supra* note 136, at 73–76 (comments of the New York State Bar Association), 77–81 (comments of an unnamed judge); see also Final Report, *supra* note 133, at 571 (citing Report of the Special Committee on Contingent Fees, 31 Rep. of the New York State Bar Ass’n 99–124 (1908)).

458. Red Book, *supra* note 136, at 81.

459. 1907 Comm. Rep. II, *supra* note 170, at 710. Section 51 of the Alabama Code stated: “Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred.” *Id.*

460. *Infra* App. (Canon 13).

461. Red Book, *supra* note 136, at 70–81. Howe advised the Committee: “In my opinion a contract for a contingent fee should be governed by some rule, should be reported without delay to the court, and should be subject to its regulation and approval, upon the same theory that is followed in some cases of probate and receivership.” *Id.* at 71. Many of the comments about the Canons’ first draft suggested that the nature of the proposed judicial supervision be defined, Final Report, *supra* note 133, at 571, but the Committee refused the suggestion, explaining in its 1908 Report that “[w]e have not attempted to particularize concerning the proposed court control, as we believe that to be rather a matter for legislative and judicial action than for incorporation into a canon of ethics.” *Id.*

462. See *supra* note 155 and accompanying text.

463. Letter from Thayer to George Nutter (May 29, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 393. The fact that Committee members conducted themselves in practice in a manner contrary to the dictates of a proposed Canon was considered very important by the Committee. In its meeting in Washington in the spring of 1908, the Committee “decided . . . that

one thousand replies to that preliminary draft, more than two hundred concerned Canon 13.⁴⁶⁴

During the discussion of the Canons at the A.B.A. Annual Meeting in August 1908, “[t]he question of contingency fees provided the only significant debate,”⁴⁶⁵ and Canon 13 was the only Canon modified as a result of that discussion.⁴⁶⁶ The debate on Canon 13 was led by Thomas J. Walsh, who later became a progressive senator from Montana.⁴⁶⁷ He moved to strike Canon 13 on several grounds: (1) it created two classes of lawyers—those who accepted contingent fee cases and those who did not—and placed a stigma on those who did; (2) it ignored the decisions of courts that contingent fee arrangements were not only lawful, but laudatory; (3) it ignored the substantial justice achieved by contingent fee arrangements in the context of personal injury and death cases resulting from industrial and railroad accidents affecting workers and people otherwise unable to retain counsel; (4) it was based upon the view that contingent fee arrangements lead to many abuses, yet the major abuse—ambulance chasing—was the subject of a separate Canon, and another abuse—perjured testimony—was likely to be more common among the defendants in such cases than the plaintiffs; and, (5) it required judicial supervision of such arrangements, which was both offensive to any self-respecting lawyer and also unlikely to uncover any abuse.⁴⁶⁸

Although Walsh succeeded in eliminating the language in Canon 13 stating that “contingent fees lead to many abuses,” he did not succeed in convincing the A.B.A. delegates that judicial supervision over such fee arrangements was, as he believed, unfair, unnecessary, and discriminatory. In response to Walsh’s presentation and a Minnesota delegate’s horror story about a lawyer’s contingent fee of fifty percent and a runner’s ten percent cut, which left a poor woman with little or

views of ethics held even by a substantial minority of [the] committee were too respectable for the committee to condemn.” Letter from Thayer to Dickinson (July 1908), in the Thayer Archives at Harvard University Law School, Vol. 6, at 15. The Committee recognized the futility of adopting Canons that “prescribe[d] a rule as to which honorable and reputable attorneys are not in such accord as would insure general censure in case of violation.” *Id.*

Thayer also held the view, perhaps shared by others, that controversial or unsettled ethical issues should not be the subject of the Code: “So far as the Code is concerned I think it ought only to deal with matters which are pretty clear.” Letter from Thayer to George Nutter (May 29, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 393. The Boston Bar Association agreed. Red Book, *supra* note 136, at 93.

Thus, the Canons were deliberately conventional. They were drafted so as not to conflict with the actual practice of the Committee members and, by extension, other elite lawyers. In this respect, the Committee adopted the view that too demanding an ethical standard would undermine the Canons’ moral authority and their efficacy. *See infra* note 532 and accompanying text.

464. Final Report, *supra* note 133, at 571.

465. Pearce, *Republican Origins*, *supra* note 3, at 245 n.24 (citing Sharswood, *supra* note 129, at 61–85).

466. *See infra* notes 467–72 and accompanying text.

467. Auerbach, *supra* note 12, at 46.

468. Discussion Upon Canons, *supra* note 1, at 61–75.

no recovery,⁴⁶⁹ A.B.A. President Dickinson, also a Committee member, proposed an amendment.⁴⁷⁰ As modified by Dickinson, Canon 13 would continue to provide for judicial supervision, but the reason for such supervision would be explained in terms of protecting a client from a rapacious lawyer: “Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.”⁴⁷¹ The delegates adopted Canon 13 as modified by Dickinson’s amendment.⁴⁷²

The strong emotions surrounding the issue of contingency fees are reflected in the comments of Committee member Thayer, who wrote to Alexander after the Canons had been adopted that “we are lucky to get off as we did considering the place where the meeting was held. If it had been on the Atlantic seaboard, it would have been a very different thing.”⁴⁷³ Apparently, Thayer considered the elite lawyers in Seattle and the Northwest to be much more supportive of contingent fees than the A.B.A.’s members in Boston and the Northeast.

2. Advertising and Solicitation of Clients

How a lawyer comes to represent a client may have an impact on the nature and development of the ensuing attorney-client relationship. Thus, around the turn of the twentieth century, it was commonly believed that a lawyer who acted like a tradesman in getting a client—for example, by advertising his “wares,” underbidding his competition, or exaggerating his experience or competence—would be less likely to act “professionally” in representing that client.⁴⁷⁴ Having obtained the client through commercial means, a lawyer might be less apt to view the attorney-client relationship and his role within it as a morally autonomous and fully accountable agent because the client had been viewed, at least initially, simply as a revenue source.⁴⁷⁵

469. *Id.* at 76–77.

470. *Id.* at 79–80.

471. *Infra* App. (Canon 13).

472. Discussion Upon Canons, *supra* note 1, at 80–85.

473. Letter from Thayer to Alexander (Sept. 14, 1908), in the Thayer Archives at Harvard University Law School, Vol. 6, at 43.

474. The Committee on Legal Education of the Wisconsin State Bar Association, which suggested the adoption of a code of ethics, quoted approvingly from a judicial opinion which stated this point succinctly: “The ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shop keeper advertises his wares.” Proceedings of the Wisconsin State Bar Association 11 (1900). In a letter to the Canons Committee, the Boston Bar Association stated: “It can hardly be expected that a lawyer who obtains his original employment by means of an abuse of confidence will maintain throughout the litigation that fidelity to the interests of his client which ought to characterize all a lawyer’s dealings.” Red Book, *supra* note 136, at 45.

The concerns of elite lawyers that commercialism was undermining the morality of lawyer conduct were mixed with other motives as well. See *infra* notes 496–500, 561–77 and accompanying text.

475. 1906 Comm. Rep., *supra* note 21, at 601; see *supra* notes 443–72 and accompanying text.

The Alabama Code considered certain efforts to solicit clients unethical. Section 16 of the Alabama Code viewed as unprofessional both the “special solicitation of particular individuals to become clients” and the “[i]ndirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part.”⁴⁷⁶ Section 20 of the Alabama Code viewed it as unprofessional “to volunteer advice to bring a lawsuit” except in situations when “ties of blood, relationship or trust, make it an attorney’s duty.”⁴⁷⁷

The Canons continued these prohibitions, but added new prohibitions on client-getting activities. For example, Canon 27 continued the prohibition on personal solicitation in Section 16 of the Alabama Code,⁴⁷⁸ but also established a new general prohibition on lawyer advertising:

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer’s positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.⁴⁷⁹

In generally prohibiting lawyer advertising, Canon 27 marked a major change in American legal ethics. Section 16 of the Alabama Code and its counterpart in the codes of ethics of all the other state bar associations, except Kentucky, stated that “[n]ewspaper advertisements [and] circulars . . . tendering professional services to the general public, are proper.”⁴⁸⁰ The code of ethics of the Kentucky Bar

476. 1907 Comm. Rep. II, *supra* note 170, at 696.

477. *Id.* at 698.

478. Canon 27 was based on Section 16 of the Alabama Code. *Compare infra* App. (Canon 27), with 1907 Comm. Rep. II, *supra* note 170, at 696. Section 16 stated that “special solicitation of particular individuals to become clients ought to be avoided.” *Id.*

479. *Infra* App. (Canon 27).

480. 1907 Comm. Rep. II, *supra* note 170, at 696.

Association considered such lawyer advertising “not improper [but] to be dealt in sparingly.”⁴⁸¹ Canon 27, on the other hand, makes such lawyer advertising “unprofessional.” Thus, the Alabama Code and the Canons take diametrically opposing views on newspaper and circular advertising to the public.⁴⁸² None of the earlier well-known sources on legal ethics had suggested such a general prohibition.⁴⁸³ Indeed, certain lawyers who were regarded as exemplars of ethical practice—for example, David Hoffman and Abraham Lincoln—were known to have engaged in advertising.⁴⁸⁴

In establishing a prohibition on lawyer advertising, the Canons adopted a position on advertising close to that governing the English barrister.⁴⁸⁵ This reinforced the American lawyer’s association with the views of English gentlemen that underlay the distinction between a profession and a trade. Thus, Canon 27’s reference to the “traditions” and “tone of our high calling” is more of an appeal to that class-based distinction than a description of contemporary practice in the American legal profession.⁴⁸⁶

481. *Id.*

482. *But see* Marston, *supra* note 14, at 506 (noting that Canon 27’s rule regarding advertising is “clearly patterned on the Alabama Code”).

483. For example, neither Hoffman’s *Resolutions* nor Sharswood’s *Ethics* dealt with either advertising or solicitation. *Id.* at 502–03.

484. Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 19 n.65 (1999) (citing Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed To Advertise: A Market Analysis of Legal Service*, 58 N.Y.U.L. REV. 1084, 1085 n.2 (1983)) (noting Hoffman’s advertising in 1835 with a testimonial from Chief Justice John Marshall); AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING, *LAWYER ADVERTISING AT THE CROSSROADS* 31–32 (1995) (Lincoln’s advertising). Lawyer advertising was common in the nineteenth century. *Id.* at 30.

485. According to Edward S. Cox-Sinclair, an English barrister practicing in London, “[t]he rule [of the Alabama Code] that newspaper advertisements, circulars, and business cards tendering professional services to the general public are proper, is precisely contrary to that in England.” Red Book, *supra* note 136, at 3, 33. George P. Costigan, Dean of the College of Law at the University of Nebraska, published a February 1908 article, which ascribed the antipathy towards lawyer advertising to the respected practice of English barristers:

The professional feeling against the solicitation of business seems to have arisen from the distinction in England between attorneys and counselors on the one hand, and barristers on the other. “The latter were to be sought only because of their learning and skill, it being undignified to seek employment in any manner.” Being employed by the attorneys and counselors, the barristers did not need to advertise; and the American lawyer, who is attorney, counselor and barrister combined, has inherited the prejudice against advertisement which governed barristers.

Id. at 32 (quoting Costigan, *American Code*, *supra* note 128). Costigan and other commentators seem to suggest that some lawyers did advertise and that some thought it appropriate; but others thought it inappropriate. *Id.* at 34–36.

486. The use of the term “calling” not only has overtones of the class-based distinction between a profession and a trade, but also reverberates with religious overtones. Although by the late nineteenth century the term “calling” was used to refer generally to a person’s occupation, it had a

Besides continuing Section 20's prohibition on volunteering legal advice to bring a lawsuit,⁴⁸⁷ Canon 28 also established new prohibitions on paying third parties to solicit cases or provide favorable recommendations of counsel:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services.⁴⁸⁸

In establishing these new prohibitions, the Canons were not reversing the course of pre-existing ethical views, as they did with respect to lawyer advertising; they were extending the anti-commercialist attitude underlying the distinction between a profession and a trade to proscribe conduct that previously had not been so prevalent. Thus, in considering the issues posed by Section 20 of the Alabama Code and Canon 28, Alexander remarked: "Hoffman is silent on this subject—it is significant that when he wrote, early in the nineteenth century, no canons on these points were deemed necessary."⁴⁸⁹ The new prohibitions on runners and other paid agents to solicit cases and recommend counsel were proposed by Committee

distinctly religious meaning in sixteenth- and seventeenth-century continental Calvinism and English Puritanism. See BALTZELL, *PURITAN BOSTON*, *supra* note 61, at 63–64, 74–76. William Perkins, an influential seventeenth-century Puritan, explained that "God is the General, appointing to every man his particular calling and as it were his standing: and in that calling he assigns unto him his particular office; in performance whereof he is to live and die." *Id.* at 75 (quoting *PURITAN POLITICAL IDEAS*, 1558–1794, at 37 (Edmund S. Morgan ed., (1965))). Canon 32, which talks about lawyers as "minister[s]" of the law echoes the religious metaphors of Tucker's 1905 presidential address and the Canons Committee's 1906 Report. See *supra* notes 71–72, 100–05 and accompanying text. The concept of a conscience also has a religious origin. See *supra* note 319 and accompanying text. Furthermore, the use of the term "Canons" to refer to a code of ethics itself has a religious resonance. See Abel, *supra* note 4, at 686 n.257 (observing that the term "Canons" has an "ecclesiastical ring").

487. Canon 28 was derived from Section 20 of the Alabama Code. 1907 Comm. Rep. II, *supra* note 170, at 698.

488. *Infra* App. (Canon 28).

489. Red Book, *supra* note 136, at 46.

member Howe,⁴⁹⁰ and the Boston Bar Association.⁴⁹¹ Given its strong prohibition against lawyers paying agents to solicit cases and recommend them as counsel, Canon 28 was used, along with Canon 13, as the basis for the organized bar's subsequent attack in the early twentieth century on personal injury lawyers.⁴⁹²

Canon 7 attacked lawyers' efforts to steal clients from other lawyers. The first two paragraphs of Canon 7, which concern situations in which a client suggests hiring additional co-counsel and differences of opinion subsequently arise between co-counsel, are derived from Sections 39, 43, and 44 of the Alabama Code.⁴⁹³ The third paragraph of Canon 7, however, prohibits lawyers from interfering with

490. Howe's proposal focused on "runners":

There is a ragged fringe to every learned profession, and the profession of law is not exempt. Men are admitted to the bar and are tempted and yield to temptation. They become, for example, what are called, for convenience, 'shysters,' calaboose lawyers' and 'ambulance chasers.' They promote suits for personal injuries and promote them in such a way as to lead to scandal and perjury of the worst kind. It seems to me that a Code of Professional Ethics might notice this fact, and denounce it as a modern development of a very alarming kind. Such abuses should be dealt with by bar associations or committees, and by the courts. It is well known that many of these shysters, who bring personal injury suits, employ 'runners' who at once pursue the injured person, induce him to put the case in the hands of their employer and have it prosecuted upon a large contingent fee, whether the real facts will maintain a claim or not. It makes little difference whether the defendant is legally liable or not, the theory being that if a judgment cannot be obtained, at least a compromise may be induced. This whole business has grown to be a shameful abuse and might be dealt with in some proper way by a Code of Professional Ethics.

Id. at 43–44.

491. The Boston Bar Association focused not only on the employment of "runners," but also upon third parties whose character as paid agents for the lawyer to whom the case is referred is concealed:

The other evil practice to which we refer is the practice of entering into a partnership or arrangement with a physician, nurse, hospital attendant, apothecary, hackman, policeman, railway employee, or other person who is likely to be brought into contact with people who sustain personal injuries, to give him some fee or reward in consideration of his steering the injured person into the lawyer's office. This latter practice is even more objectionable than the employment of runners, because the runner usually approaches the injured person in his true character. A doctor or nurse, on the other hand, pretends to give the injured person disinterested advice in respect to the employment of counsel. His true character as an agent of the lawyer is concealed from the injured person. It can hardly be expected that a lawyer who obtains his original employment by means of an abuse of confidence will maintain throughout the litigation that fidelity to the interests of his client which ought to characterize all a lawyer's dealings. This dirty practice ought, we think, to be stamped with the express disapproval of the profession in any Code of Ethics which may be adopted.

Id. at 45.

492. See Auerbach, *supra* note 12, at 41–50.

493. Index and Synopsis of Canons, *infra* App. The Committee suggested that Canon 7 was based also upon Section 42 of the Code of Legal Ethics of the Georgia State Bar Association. *Id.*

pre-existing attorney-client relationships with the intent to steal another lawyer's client, a subject not dealt with by the Alabama Code:

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.⁴⁹⁴

The need for such a prohibition was suggested by Howe, who viewed efforts by lawyers to steal away an already-existing client of another lawyer as part of the increasing commercialism in the profession:

We are apt to speak of the old times as a kind of Golden Age, but I really think that fifty years ago, when the Bar was less commercial than it is now, there was much less effort to get away the business of other lawyers and supersede them in their clientage than there is now. It seems to me that at the present there are members of the Bar who are altogether too active in trying to entice away clients that belong to their brethren, and the moment they try such action they are tempted to do many things that ought to be considered unprofessional.

I think the Committee might well say that such an attempt to obtain business—by enticing away the clients of other lawyers in an underhand way, which is quite common nowadays—is thoroughly unprofessional and ought to be forbidden in a Code of Ethics.⁴⁹⁵

Thus, the Canons expanded the anti-commercialism in the Alabama Code far beyond its prior limits: contingent fee arrangements were allowed, but were now subjected to judicial supervision; personal solicitation continued to be prohibited, but advertising generally became unethical; payments to “runners” and other third parties to solicit cases or favorable recommendations were now prohibited; and poaching other attorneys' clients was also prohibited. Through these changes in the normative standards of lawyering, the Canons supported their vision of conscientious lawyering and both fostered and responded to the distinction, expressed in both Section 50 of the Alabama Code and Canon 12, between the law as a profession serving justice and the law as a money-getting trade.

At the same time, however, the Canons' prohibition of lawyer advertising and certain forms of client solicitation had a disparate impact on different groups of lawyers. The Committee's members and the other elite lawyers who were A.B.A.

494. *Infra* App. (Canon 7). The Committee added this entire third paragraph after sending out for comment the preliminary draft of the Canons in May 1908. *Compare* Tenn. Twenty-Seventh Meeting, *supra* note 153, at 40 (May 1908 first draft of Canon 7), with *infra* App. (final version of Canon 7).

495. Red Book, *supra* note 136, at 127.

members did not depend for their livelihood on advertising and personal or paid solicitation of clients. Lawyers like Stetson, Dickinson, Thayer, and Howe already had established reputations as superior practitioners among the wealthy and influential business community. Clients sought them out; they did not need to look for clients. But their professional situation was very different from that of lawyers with immigrant backgrounds or younger lawyers or even journeymen lawyers new to an urban environment. For these practitioners occupying the bottom strata of the legal profession, there was no guarantee of enough clients eager and able to pay for their services and, therefore, earning a living as a lawyer was a struggle. Affluent clients did not rush to seek their assistance. Consequently, those practitioners were forced to initiate efforts to attract such clients. Advertising and personal and paid solicitation were ways to do so. In order to get paid for their legal services on behalf of clients who had deserving cases, but lacked the financial resources, those practitioners used contingent fee arrangements. The Canons' prohibition of such "commercialism" made their professional lives even more difficult.

Although some elite lawyers in the early twentieth century were motivated by racial and ethnic prejudices in their actions to stamp out commercialism in the legal profession,⁴⁹⁶ and although the Canons' attack on commercialism subsequently had a disparate impact on the racial and ethnic minorities that occupied the lower strata of the legal profession at the time,⁴⁹⁷ there is no direct evidence that the Committee members were motivated by such prejudice. But despite the Committee's genuine concern with the corrupting influence of commercialism on the Canons' vision of conscientious lawyering,⁴⁹⁸ it is undeniable that the Committee, and most likely the other elite lawyers who were A.B.A. members, deliberately sought to differentiate themselves from the lawyers at the lower rungs of the profession who engaged in conduct, such as contingent fee arrangements, advertising, and solicitation of clients, that was subject to abuse and that sometimes ended in fraud and overreaching.⁴⁹⁹ By condemning such commercialism as unethical, the Canons claimed for the Committee and other elite lawyers the moral high ground. By condemning such commercialism as trade-like behavior, the Canons claimed for the Committee and other elite lawyers the status of gentlemen engaged in a profession.⁵⁰⁰

496. See Auerbach, *supra* note 12, at 43–46, 48, 52; *cf. id.* at 94–101, 112–29 (discussing discriminatory intent in raising educational requirements for bar admission in the early twentieth century).

497. *Id.* at 43–46, 48, 52.

498. See *infra* notes 561–64 and accompanying text; see also Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C.L. REV. 1003, 1026 (1994) ("For many lawyers supporting the adoption of a code of ethics, the issue of contingent fees was at least as much about professional independence as about the exclusion of Jews (or Catholics or others) from the legal profession.").

499. See *supra* notes 106–16 and accompanying text; see also Auerbach, *supra* note 12, at 50, 52.

500. See Max Radin, *Contingent Fees in California*, 28 CAL. L. REV. 587, 588 (1940) (explaining that contingent fees were "deplored because tradesmen speculated, and lawyers were gentlemen, and not tradesman").

D. Enforcement of the Canons

By the turn of the twentieth century, the system of lawyer discipline had remained essentially the same for more than a century. Since colonial times, virtually the only method of dealing with unethical lawyers was through a disciplinary procedure modeled “close[ly] and self-conscious[ly]” on English proceedings against barristers.⁵⁰¹ Typically, the lawyer-respondent was served with an order to show cause why the lawyer should not be disbarred for the offending conduct described in the petition or accompanying affidavits.⁵⁰² The petitioners generally were lawyers or judges who had witnessed the allegedly wrongful conduct; bar associations and their standing committees on professional discipline did not prosecute disciplinary proceedings until the turn of the twentieth century.⁵⁰³ Less frequently, professional discipline was the result of a summary contempt proceeding, generally used when the lawyer’s offending conduct occurred in the presence of the court itself.⁵⁰⁴ In both types of proceedings, however, the usual sanction was disbarment.⁵⁰⁵ Sometimes suspensions were imposed in lieu of disbarment for less offensive conduct, but “[l]esser sanctions were quite rare [and] some courts den[ie]d that they possessed the power to impose any sanction less than suspension.”⁵⁰⁶

Before the advent of the 1908 Canons, a large percentage of the cases in which lawyers actually were sanctioned were commenced only after the lawyer-respondent was convicted of a crime.⁵⁰⁷ Sometimes lawyers were sanctioned in cases of otherwise outrageous behavior where no conviction had been obtained.⁵⁰⁸ In some of those cases, the grounds for discipline were based upon an informal understanding among the legal community of proper lawyerly conduct:

Reliance was placed primarily upon what the courts uniformly projected as a community-wide sense of decorum and good character, instead of the modern emphasis upon a codal formulation of all grounds for lawyer discipline. . . . [F]or over a hundred years after the revolution there were no ‘codes’ of prohibited and permitted conduct. Courts would occasionally refer to the oath required of lawyers on admission to the bar, but those oaths were invariably quite general in form and could hardly have provided either guidance to a questioning lawyer or restraint on a court inclined otherwise to impose discipline.⁵⁰⁹

In other cases, state statutes prohibiting the alleged conduct were invoked, but almost always those statutory proscriptions were too general to provide any meaningful

501. Wolfram, *Legal Ethics I*, *supra* note 15, at 474 & n.28.

502. *Id.* at 474.

503. *Id.* at 476.

504. *Id.* at 475–77.

505. *Id.* at 475.

506. *Id.* at 475 & n.34.

507. *Id.* at 480–81.

508. *Id.* at 481–82.

509. *Id.* at 479 (footnotes omitted).

guidance to the respondent lawyer.⁵¹⁰ As a result, courts often seemed to rely, in the end, on an informal understanding about what was proper lawyer conduct and what was not.⁵¹¹

Not surprisingly, therefore, as the Canons project gathered steam, lawyers besides the Committee members looked hopefully towards the new A.B.A. code as the basis for improving the system of lawyer discipline.⁵¹² William Draper Lewis, Dean of the Department of Law at the University of Pennsylvania,⁵¹³ observed that “[u]nder our present system practically only those convicted of crime can be disbarred, and disbarment is the only punishment that can be given.”⁵¹⁴ He believed that “as long as our present Board of Censors [of the Law Association of Philadelphia] can only move in open court for a man’s disbarment, a great many practices which undermine the integrity of the members of our profession will go unpunished.”⁵¹⁵ Thus, he proposed, “the code should provide for a board to be appointed by the judges or by a Bar Association designated by the judges, which committee shall have power, subject to an appeal to the court, to impose fines and permanent or temporary suspensions from the right to practice in the courts.”⁵¹⁶

Charles Boston⁵¹⁷ expressed a similar need for the Canons to contain provisions regarding enforcement:

The code should not only be the expression of proper ideals of professional practice, but should contain canons that would indicate and insure the enforcement of its principles in practice. For that reason, it should be not only the code of voluntary associations of lawyers, similarly minded, but should be the law of the state, with proper penal and disciplinary provisions; and then, too, there should be means provided for making the enforcement of the law certain in proper cases.⁵¹⁸

510. *Id.* at 479–80.

511. *Id.* Wolfram describes this informal understanding as follows:

Jurisdictions seem to have contented themselves with the position that no more precise specification of prohibited wrongs was necessary because a lawyer of suitable learning and character would be well aware of what was permitted and prohibited. Proper professional deportment was something that was thought to accompany virtue, or at least something to be learned during apprenticeship to a reputable lawyer.

Id. at 479–80.

512. The Committee viewed the improvement of the lawyer disciplinary process as one of the reasons why the A.B.A. should promulgate a code of ethics. *See* 1906 Comm. Rep., *supra* note 21, at 602; *see also supra* notes 501–12 and accompanying text.

513. Lewis is described *supra* note 145.

514. Red Book, *supra* note 136, at 124.

515. *Id.*

516. *Id.*

517. Boston is described *supra* notes 143, 440.

518. Red Book, *supra* note 136, at 120 (quoting Boston, *supra* note 123, at 229).

Boston went so far as to sketch out a proposal for something approximating a bar association disciplinary committee.⁵¹⁹

From the very beginning, the members of the Committee recognized that the Canons, like any national code of legal ethics, could not accomplish all of its purposes unless it was adopted by state and local bar associations and supplemented with some form of enforcement mechanism at the state or local level. As described above, Tucker implied that idea in his 1905 presidential address⁵²⁰ and the Committee invited the adoption of disciplinary procedures based on the Canons in its 1906 Report.⁵²¹ In 1907, Justice Brewer wrote to Committee Secretary Alexander that the ethical rules to be adopted by the Committee should “be given operative and binding force by legislation or action of the highest courts of the states.”⁵²² But it was Hubbard, in his 1903 lecture on legal ethics at Albany Law School, who best explained the need for an enforcement mechanism to counteract the leverage wielded by clients upon whom lawyers were economically dependent for their livelihood.

Hubbard understood that the vision of conscientious lawyering that he was proposing as the appropriate basis for legal ethics, and which subsequently was adopted for the Canons, would be unpopular with clients, because they would want their litigation and transactions conducted, both procedurally and substantively, in accordance with their partisan interests and personal wishes. “It is probable that clients would dislike to have litigation determined and conducted in the manner here suggested,” he told the Albany Law School students.⁵²³ At the same time, Hubbard acknowledged that his proposed ethics of conscientious lawyering conflicted with much of current legal practice, which, in his view, was permitted by the prevailing conception of legal ethics.⁵²⁴

519. Boston proposed the following:

I would have a body, composed of practicing lawyers similar to a court for the trial of impeachments, by which any complaint of any infraction of the code could be heard summarily and a warning or reprimand administered, and with the power, in flagrant cases, to recommend suspension or disbarment, and pursuant to such recommendation, to become relator against the accused is [sic] a proper judicial proceeding in which he would be entitled to a full hearing *de novo* and without prejudice; and with the right to review by *certiorari* its proceedings ending in a warning or reprimand.

Red Book, *supra* note 136, at 120 (quoting Boston, *supra* note 123, at 229).

520. Tucker, *Address*, *supra* note 54, at 387; *see also supra* notes 78–79 and accompanying text.

521. 1906 Comm. Rep., *supra* note 21, at 602–03; *see also supra* notes 130–31 and accompanying text.

522. 1907 Comm. Rep. I, *supra* note 132, at 63. Brewer’s suggestion concerned the lawyer’s oath, however, not the Canons. *But cf.* Carle, *supra* note 13, at 9 (noting that Brewer’s comments concerned a code of ethics).

523. Hubbard & Baldwin, *Union Lectures*, *supra* note 296, at 20.

524. *See supra* note 310 and accompanying text.

Agreeably to the ethics of the profession as now understood, the lawyer may, *and under penalty of losing his clients, must*, take into court such cases as the client directs. He may, *and, at the same risk, must*, conduct them in court with all the temper, prejudice, and personal rancor of the client. He must conduct them in substance according to the wishes of the client. He may personate the client; speak as he thinks the client would speak, or would like to have him speak, and, discarding his own convictions and the restraints of his own conscience, shape his conduct by what he assumes to be, yet which may not be, the conscience of his client.⁵²⁵

Because his proposed view of conscientious lawyering conflicted with how many lawyers understood the rules of legal ethics and how many more actually practiced, Hubbard recognized that lawyers who sought to practice in accordance with the ethics of conscientious lawyering would be at a competitive disadvantage in the market for legal services:

[I]f the lawyer refuses to bring a suit at the direction of the client, he cannot be compelled by legal process to bring it. The process to which the client resorts is to take his business to another lawyer. And the ethics of the profession permit the second lawyer, as they would have permitted the first, to commence the suit against his own belief, or even knowledge, that it has no foundation in law or justice, if the client insists that it shall be brought.⁵²⁶

“The client’s power to control . . . is fortified by the circumstance that he is the employer and the lawyer employee” and, thus, a lawyer who practiced as Hubbard, and later the Canons, proposed, acted “under penalty of losing his clients.”⁵²⁷

Hubbard concluded that the adoption of his view of conscientious lawyering would not be successful just by convincing lawyers that it was right, because clients would seek out lawyers who practiced in a manner that gave them more control: “The change of methods here urged will not be effected by the lawyer unaided. Many prefer the existing methods. Those who do not are unable to adopt the better method without consigning their clients to those who do.”⁵²⁸ After rejecting public opinion and “adjudications . . . upon the relative rights of lawyer and client” as ineffective mechanisms for implementing a change to an ethics of conscientious lawyering,⁵²⁹ Hubbard proposed the adoption of an “oath administered to the lawyer on his admission to the bar and the enforcement of that oath by corresponding rules of the court.”⁵³⁰ Thus, Hubbard recognized that successful implementation of the vision of conscientious lawyering required an enforcement mechanism to combat

525. Hubbard and Baldwin, *Union Lectures*, *supra* note 296, at 18 (emphasis added).

526. *Id.* at 14–15.

527. *Id.* at 16.

528. *Id.* at 21.

529. *Id.*

530. *Id.*

the economic power of the client in the market for legal services. The Committee heard the same conclusion from other commentators.⁵³¹ Absent some new mechanism to enforce the Canons' provisions, the market for legal services was likely to undermine the Canons' vision of conscientious lawyering and its anti-commercialism and create, with respect to ethical practice, a "race to the bottom."⁵³²

Not surprisingly, therefore, another important element of the Canons consists of provisions relating to the profession's self-regulation. Although, for the reasons stated by Tucker and others, the Canons themselves did not describe the details of those enforcement mechanisms,⁵³³ they did contain provisions intended to make it a lawyer's obligation to take actions to enforce the Canons' substantive provisions. Almost all of these provisions regarding the profession's self-regulation marked an advance over the Alabama Code.

Canon 29, entitled "Upholding the Honor of the Profession," is the centerpiece of the Canon's concern with lawyers' self-regulation. First, it states the general

531. See *supra* notes 512–19 and accompanying text.

532. See C.A. Kent, *Legal Ethics*, 6 MICH. L. REV. 468, 475 (1908).

It is hard for him, as, indeed, for all men, to have a morality much higher than that of their competitors. In general, he will think as those around him think, or, at the most, as the best men around him think. If he has a morality much higher he will be likely to lose all employment. Suitors will not retain attorneys who are unwilling to use all means for success generally thought reputable.

Id.; see WOLFRAM, MODERN LEGAL ETHICS, *supra* note 19, at 49 ("Once a number of lawyers defy a code rule (or are believed by other lawyers to have taken a negative stance), the rule will be widely ignored because of competitive pressures and a sense of unfairness."). *Id.*

David Luban has formulated the problem in terms of a "Prisoner's Dilemma" in which lawyers personally inclined to conduct themselves in accordance with more stringent ethical standards are dissuaded from doing so by the knowledge that they will be disadvantaged in the market for legal services by the presence of other lawyers with less stringent ethical standards. David Luban, *Professional Ethics: A New Code for Lawyers?*, HASTINGS CENTER REP., June 1980, at 11, 15. This situation "tend[s] to drive the behavior of the profession toward its lowest common denominator, more or less independently of what lawyers really want." *Id.* at 15. From this perspective, says Luban, the function of enforcing ethics codes is to "allow[] lawyers to behave 'well' safely, without worrying that they will be punished for their restraint by other lawyers unilaterally defecting from high standards." *Id.*

This same perspective counsels the drafters of normative statements about lawyer conduct to make those norms within reach of most lawyers, lest those norms be impossible to enforce. *Id.*; see also David Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 461 (1981). In keeping the Canons conventional, see *supra* note 463, the Canons Committee made an effort to ensure that the Canons did not impose ethical standards that were too high or unaccepted by elite lawyers.

The United States Supreme Court also has observed that unrestrained market competition can have a demoralizing effect on professional conduct. See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 336 (1952); *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611–13 (1935).

533. See *supra* notes 78–79, 520–21 and accompanying text.

principle, already articulated in Section 8 of the Alabama Code,⁵³⁴ that lawyers “should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.”⁵³⁵

Second, Canon 29 establishes the lawyer’s duty to assist in bar admissions decisions by seeking to deny admission to those candidates for licensure who are unfit in terms of their education or moral character: “The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education.”⁵³⁶ The Alabama Code was silent on the issue of a lawyer’s duty with respect to bar admissions.⁵³⁷ In making it a lawyer’s ethical duty to assist in restricting the admission of lawyers to those qualified by education and moral character, Canon 29 supported the long-standing efforts of the A.B.A. to bar entry to the profession to unfit candidates.⁵³⁸

Third, Canon 29 paraphrases the lawyer’s general obligation, stated in Section 11 of the Alabama Code,⁵³⁹ to report unethical conduct by other lawyers: “Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession. . . .”⁵⁴⁰ Canon 29 then expands beyond the scope of Section 11 by particularizing that duty with respect to perjury: “The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.”⁵⁴¹

Canon 28, which, as previously described,⁵⁴² prohibits the use of runners and other paid third parties that solicit cases and recommend counsel, also imposes

534. Section 8 of the Alabama Code provided:

An attorney should strive at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the state and his fellowman.

1907 Comm. Rep. II, *supra* note 170, at 692.

535. *Infra* App. (Canon 29).

536. *Id.*

537. Neither Section 8, nor Section 11 of the Alabama Code, upon which Canon 29 is based, mentions bar admissions or a lawyer’s duty regarding them. Index and Synopsis of Canons, *infra* App.; 1907 Comm. Rep. II, *supra* note 170, at 692, 694.

538. *See supra* notes 91–98 and accompanying text. Unfortunately, Canon 29’s “moral character” requirement was linked to similarly vague requirements in state statutes regarding admission to the bar that were used later in the twentieth century as a justification for admissions decisions that discriminated against members of ethnic minorities and the lower class and those with less conventional lifestyles and political views. *See generally* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *YALE L.J.* 491 (1985).

539. Section 11 of the Alabama Code provided: “Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.” 1907 Comm. Rep. II, *supra* note 170, at 694.

540. *Infra* App. (Canon 29).

541. *Id.*

542. *See supra* notes 487–92 and accompanying text.

a specific duty upon lawyers to root out such conduct: “A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.”⁵⁴³ This final sentence in Canon 28 imposes an obligation upon lawyers that did not previously exist under state bar association codes.⁵⁴⁴

Finally, Canons 1 and 2 establish that lawyers have special obligations with respect to the administration of justice that transcend those of other citizens. The last two sentences of Canon 1 state:

Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.⁵⁴⁵

Although Section 2 of the Alabama Code envisioned circumstances when it would be appropriate for a lawyer to criticize judicial conduct,⁵⁴⁶ Canon 1 makes it not only a lawyer’s “right,” but also his “duty” to report improper judicial conduct “to the proper authorities.” No section of the Alabama Code imposed such a duty.⁵⁴⁷

Canon 2 imposes special duties upon lawyers with respect to the selection of judges:

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a

543. *Infra* App. (Canon 28).

544. Canon 28 was derived from Section 20 of the Alabama Code, Index and Synopsis of Canons, *infra* App., but Section 20 contains nothing about disciplinary sanctions in general or disbarment in particular or a lawyer’s obligation to report misconduct of any sort by other lawyers, 1907 Comm. Rep. II, *supra* note 170, at 698.

545. *Infra* App. (Canon 1). The Committee added these two sentences after sending out for comments the May 1908 first draft of the Canons. *Compare id.* (final version of Canon 1) with Tenn. Twenty-Seventh Meeting, *supra* note 153, at 38 (May 1908 draft of Canon 1).

546. Section 2 of the Alabama Code stated:

The proprieties of the judicial station, in a great measure disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticism tends to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been counsel, otherwise than in courts of review, or when the conduct of a judge is necessarily involved in determining his removal from or continuance in office.

1907 Comm. Rep. II, *supra* note 170, at 698.

547. Canon 1 also was based upon Sections 1 and 4 of the Alabama Code, Index and Synopsis of Canons, *infra* App., but neither of those sections imposes such a duty on lawyers. 1907 Comm. Rep. II, *supra* note 170, at 689–90.

business, political or other character, which may embarrass their free and fair consideration of questions before them for decision.⁵⁴⁸

The Alabama Code does not deal at all with “the proper criteria for the selection of judges,”⁵⁴⁹ and does not impose any duty on lawyers with respect to such selection.⁵⁵⁰

Thus, in seeking to regulate the legal profession in order to support its vision of conscientious lawyering and its prohibition of certain commercial practices and attitudes, the Canons go far beyond the exhortation in Section 11 of the Alabama Code to “expose before the proper tribunals corrupt or dishonest conduct in the profession.”⁵⁵¹ The Canons imposed wholly new obligations upon lawyers to prevent unfit candidates from becoming lawyers, to report perjury and the use of runners and paid third parties that solicit cases and recommend counsel, and to submit complaints about judicial misconduct. In support of efforts to improve the administration of justice, the Canons imposed on lawyers both the duty to help select competent, independent judges and also to monitor the conduct of those who occupied the judicial office. These new professional obligations on lawyers marked a major change from the Alabama Code and the ethical codes of the other state bar associations and foretold dramatic changes in the American legal profession. Consequently, the Canons were “[t]he first lawyer code with any possible disciplinary relevance.”⁵⁵² Although it would take decades before American lawyers would become thoroughly and effectively regulated,⁵⁵³ the Canons’ concern with the regulation of lawyer conduct both at the bar and on the bench symbolized a shift in professional self-consciousness the effects of which continue to this day.⁵⁵⁴

Conclusion

Underlying the A.B.A.’s three-year effort to draft and promulgate a national code of legal ethics was the idea that it is possible to articulate and maintain a level of lawyer conduct that is something higher, something better, than the minimal

548. See *infra* App. (Canon 2).

549. Marston, *supra* note 14, at 505.

550. Canon 2 was not based upon any section of the Alabama Code; rather, it derived from Section 55 of the Code of Ethics of the Kentucky Bar Association, 1907 Comm. Rep. II, *supra* note 170, at 713; Index and Synopsis of Canons, *infra* App.

551. See *supra* notes 533–50 and accompanying text.

552. Wolfram, *Legal Ethics I*, *supra* note 15, at 479.

553. Only slowly did the Canons gain much currency as an enforceable specification of explicit grounds for discipline.” *Id.* at 485. “For some decades after the A.B.A. promulgated the Canons, most decisions held that a . . . failure to abide by one of the Canons was not a sufficient ground for disbarment.” *Id.* at 485 n.91.

554. See generally Pearce, *Governing Class*, *supra* note 14 (arguing that professionalism is an ideology that arose in the late nineteenth century and that focuses on the bar’s regulation of lawyer conduct in order to maintain the bar’s socio-political role as the governing class in American society).

normative standards imposed by the criminal law or, what Benjamin Cardozo called twenty years later, the “morals of the market place.”⁵⁵⁵ To lawyers in the twenty-first century, for whom norms of lawyer conduct have become “legalized,”⁵⁵⁶ this may seem overly ambitious. But to members of the Canons Committee, a normative statement regarding lawyer conduct implied something imbued with morality and, in at least some members’ minds, religion as well. Although it is unlikely that any of the Committee members was naive enough to believe that all lawyers would lead their professional lives in conformity with such a normative statement, it does not seem too great a stretch to suggest that those men believed that: (1) gentlemen like themselves and other elite practitioners could create a professional community whose collective stature would be raised and whose individual self-esteem would be enhanced by articulating and then hewing to a code of conduct more elevated than commercial mores; and (2) by example and perhaps also through formal enforcement proceedings against non-conforming lawyers such a higher ethical standard would become more widely observed.

In this respect, modern legal scholars have been somewhat misleading about the purposes behind the A.B.A.’s efforts to make normative statements about lawyer conduct, because they have viewed those efforts through the prism of the A.B.A.’s efforts over the last fifty years. Whereas the A.B.A.’s adoption of the Model Rules did reflect a concern with warding off governmental regulation of the legal profession,⁵⁵⁷ that concern was entirely absent from the Canons project. The Canons were adopted at a time when government regulation of industry was in its infancy and there was no popular or governmental initiative to regulate lawyer conduct or the market for legal services.⁵⁵⁸ Indeed, the A.B.A. sought to formulate a set of standards for regulating the quality of lawyer conduct precisely because,

555. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Cardozo, then Chief Judge of the New York Court of Appeals, was referring to the fiduciary duty of business partners, and emphasizing that “the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd.” *Id.* Since lawyers are fiduciaries for their clients, Cardozo’s memorable phrase from *Meinhard* often has been used to describe the level of conduct expected of lawyers also. See, e.g., *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) (“The attorney’s obligations, therefore, transcend those prevailing in the commercial market place.”).

556. See *supra* note 4.

557. See, e.g., Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 690, 714–20 (1981).

558. See Wolfram, *Legal Ethics II*, *supra* note 4, at 206 (“The early history of American legal ethics gave no indication that lawyers would one day become a highly regulated profession. For the most part, regulation was highly traditional, episodic, and reactive, and was addressed primarily to pathological extremes of lawyer behavior.”). See generally Wolfram, *Legal Ethics I*, *supra* note 15 (describing lawyer regulation before the twentieth century). As Nancy Moore has pointed out, “[t]he professions have not always feared government regulation.” Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 776 n.31 (1987) (“Indeed, at the earliest stages of professionalism, an occupation typically appeals to the government for intervention in order to limit entrance to qualified individuals and to prevent unauthorized practice.”).

in its view, a need for such regulation had arisen⁵⁵⁹ and the existing mechanisms of such control—the criminal law and sporadic lawyer disciplinary proceedings—were inadequate.⁵⁶⁰

The history and content of the Canons also fail to support the view that the A.B.A.'s normative statements of lawyer conduct were intended to achieve better financial rewards for lawyers. Consistent with the vision of conscientious lawyering and the gentleman's understanding of the nature of a profession (as opposed to a trade), Canons 7, 10, 12, 13, 27, and 28, among others, express hostility toward all methods and means of commercialism and competition in the market for legal services and toward lawyers' motives of unbridled or naked self-interest.⁵⁶¹ Those Canons were likely to have expressed the genuine beliefs and values of the Committee members. Those men, many of whose fathers were professionals before them, were old enough, successful enough, and established enough in their careers that their financial circumstances were unlikely to improve measurably, if at all, as the result of the Canons' promulgation.⁵⁶² Having achieved what the English gentleman viewed as a "competence"—sufficient financial means to live like a gentleman⁵⁶³—what these men apparently cared about far more than money was status or "honor"—respect in the eyes of others—and self-esteem.⁵⁶⁴

559. See *supra* text accompanying notes 106–31 and accompanying text.

560. See *supra* notes 501–22, 531–32 and accompanying text.

561. See *supra* Part III.C.

562. See *supra* text accompanying notes 495–500. For example, as a federal judge with lifetime tenure, Justice Brewer's personal financial circumstances were unlikely to change at all as a consequence of the Canons' anti-commercialism, and the same would have been true for the other federal judges on the Committee. Even those in private practice at the time, such as Stetson, were unlikely to benefit, since by the beginning of the twentieth century he was so successful that he refused to take on cases unless his partners would be responsible for the work. DAVIS POLK WARDWELL SUNDERLAND & KIENDL—A BACKGROUND WITH FIGURES 42–43 (Davis Polk & Wardwell 1965). Moreover, the financial prospects of the Committee members who were at least seventy years old in 1908, such as Howe, Hubbard, and Jenkins, see Carle, *supra* note 13, at 38, were unlikely to be changed materially as the result of the passage of the Canons.

563. Reader, *supra* note 111, at 3; see also Whewell, *supra* note 319, at 152 (defining "a Competence" as "so much property as may free a man from solicitude respecting common needs and common enjoyments"). The Oxford English Dictionary defines a "competence" as, among other things, "a sufficiency of means for living comfortably." THE OXFORD ENGLISH DICTIONARY 603 (2d ed. 1989).

564. See *supra* notes 99–110, 114–16 and accompanying text. Of course, in promulgating Canons that adopted a critical attitude toward commercialism and the acquisitive motives underlying it, these men were undertaking self-interested actions. First, in denying the legitimacy of such conduct and motives, they presented their own motives and conduct to others as morally "pure and unsullied." Second, to the extent that other lawyers acted in accordance with the Canons' anti-commercial and anti-acquisitive prescriptions, the members of the Canons Committee were protecting themselves from economic challenge and enabling themselves more easily to maintain a less economically competitive attitude as lawyers. Nevertheless, these self-interested motives co-existed along with the stated interest in purifying the conduct and motives of lawyers generally.

Modern legal scholars are on more solid ground, however, in viewing the Canons, like other A.B.A. normative statements about lawyer conduct, at least partially as an effort at market control.⁵⁶⁵ The Canons clearly aspired to regulate lawyers' conduct and motives.⁵⁶⁶ In that regard, the Canons could be construed as an effort to create a standardized professional commodity—"ethical legal services"—sold in the market for legal services.⁵⁶⁷ Yet, this sort of regulation did not directly define the participants in the market for legal services. The Canons did not create the standards for admission to the bar; those were created by state statutes or court rules.⁵⁶⁸ The Canons did not create procedures for disbarment or suspension from the practice of law; those, too, were created by state statutes or court rules.⁵⁶⁹ The Canons did not prohibit the practice of law by non-lawyers and, in 1908, the Canons contained no provision prohibiting lawyers from assisting others in the unauthorized practice of law;⁵⁷⁰ to the extent such prohibitions existed in 1908, they too were creatures of state law.⁵⁷¹ Although Canons 1, 2, 28, and 29 imposed ethical

565. See, e.g., Abel, *supra* note 4, at 653–67; Rhode, *supra* note 557, at 702–06.

566. See *supra* note 116 and accompanying text.

567. See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 14–15 (1977) (“Inherent in professional codes of ethics is an effort to standardize professional behavior.”).

568. Control over admission to practice has been exercised by the states since colonial times.” Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 *REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y.* 77, 78 (1981). Hazard describes that control over bar admissions during the nineteenth century as follows:

Comprehensive state control over admission to practice was first asserted in the early nineteenth century, primarily with the purpose of overthrowing the bar's monopolistic system of apprenticeship. The power to admit a lawyer to practice was vested in the courts, thereby conferring ultimate authority over the profession in the judiciary as distinct from the bar. The form of admission was the right of audience before the state's courts. Admission to practice as an advocate carries with it authority to counsel and assist clients in the professional functions associated with the office lawyer.

Id. Even today, “bar [admission] is largely the action of an agency of the state.” WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 19, at 46.

569. See *supra* notes 501–11 and accompanying text.

570. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2583 (1999) (“[T]he first ABA Canons of Ethics adopted in 1908 said nothing about UPL.”). It was not until its annual meeting in 1937 that the A.B.A. adopted Canon 47, *id.* at 2584 & n.12, which prohibited lawyers from aiding the unauthorized practice of law. Supp. Rep. of the Standing Comm. on Professional Ethics and Grievances, 62 *A.B.A. Rep.* 761, 767 (1937). Canon 47 stated: “No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.” *Id.*; see also Drinker, *supra* note 3, at 66.

571. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 *AM. B. FOUND. RES. J.* 159, 180 (1980) (stating that at least seventeen states had unauthorized practice of law statutes dating from about 1870 to 1920); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 7 (1981) (“Although some states had enacted unauthorized practice statutes before the 1930s, most dealt only with nonlawyer

requirements upon lawyers to help prevent unfit persons—for example, those who did or would be likely to violate the Canons’ substantive provisions—from becoming or remaining lawyers and judges,⁵⁷² those Canons were not self-sufficient; they depended upon other external enforcement procedures or other bodies of law in order to be implemented. Moreover, even after such enforcement procedures were adopted, the enforcement of the Canons did not affect a sufficient number of lawyers to have a meaningful impact on controlling access to the legal services market.⁵⁷³

As other commentators also have observed, the Canons transformed the difference in lawyers’ practices into a moral distinction, a class division, and, therefore, a differentiation in social rank.⁵⁷⁴ There is no doubt that the Committee and other elite lawyers who were A.B.A. members intended the promulgation of the Canons to elevate their stature both in the eyes of the public and the profession.⁵⁷⁵ As a consequence, the Canons enhanced the stratification within the modern legal profession and gave it a moral and social significance.⁵⁷⁶ In effect, the Canons distinguished elite lawyers from lawyers occupying the lower ranks of the profession. Elite lawyers occupied the moral high ground. They practiced (or at least aspired to practice) ethically—that is, in accordance with the Canons’ vision of conscientious lawyering. They did not stoop to adopt the crass commercial methods of attracting paying clients to support themselves; they did not need to do so. As gentlemen, they practiced a learned profession. In significant ways, the Canons implied, the elite lawyers were different from “the shyster, the barratrously inclined, [and the] ambulance chaser.”⁵⁷⁷ Those lawyers violated the Canons’ vision of conscientious lawyering and acted unethically by practicing in accordance with the morals of the marketplace. They employed commercial methods to seek clients and to get paid by them. They practiced law as lower or even middle-class tradesmen.

appearances in court or with legal activity by certain specified [court] officials such as bailiffs, court clerks, and sheriffs.”). The first bar association to seek to prevent the unauthorized practice of law was the New York County Lawyers Association, which, in 1914, “launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition from title and trust companies.” Denckla, *supra* note 570, at 2583–84. The A.B.A. did not form its own committee to prevent the unauthorized practice of law until 1930. *Id.* at 2584; Rhode, *supra* at 8.

572. See *supra* notes 534–50 and accompanying text.

573. As recently as 1970, the system of lawyer discipline was seen as highly ineffective and in need of major repairs. See A.B.A. Special Comm’n. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970); see also RICHARD L. ABEL, AMERICAN LAWYERS 143–49 (1989) (describing the inadequacy of disciplinary enforcement of the norms regarding lawyer conduct). Richard Abel acknowledges that the A.B.A.’s normative statements regarding lawyer conduct do not have a significant direct bearing on the struggle for market control and that market control is not a declared purpose of the A.B.A. leaders who participate in the drafting and promulgation of such normative statements. Abel, *supra* note 4, at 654.

574. See, e.g., Auerbach, *supra* note 12, at 50, 52; Shuchman, *supra* note 441, at 244.

575. See *supra* notes 99–110, 114–16, 564 and accompanying text.

576. See Auerbach, *supra* note 12, at 6.

577. 1906 Comm. Rep., *supra* note 21, at 601.

In their focus on the A.B.A.'s Model Rules and the Model Code, modern legal scholars have missed an important element of the A.B.A.'s original normative statement about lawyer conduct—the creation of a new normative realm regarding lawyer conduct. Building on the works of Hoffman, Sharswood, and primarily the ethics codes of state bar associations, this normative realm included a broad range of values of varying kinds—moral principles, professional conventions, gentlemanly ideals, and matters of social etiquette and good manners. Some of the Canons, such as Canon 11, concerning a lawyer's handling of trust property,⁵⁷⁸ and Canon 22, regarding the lawyer's duty of candor to the court,⁵⁷⁹ embodied pure moral principles, such as prohibitions against theft or lying. Other Canons, such as Canon 20, regarding trial publicity,⁵⁸⁰ and the Canons establishing the vision of conscientious lawyering,⁵⁸¹ were designed to achieve fairness in the adversary system and, more generally, in the administration of justice. Some Canons, such as those attacking commercialism,⁵⁸² were intended to support the lawyer's moral autonomy and to make the practice of law a gentlemanly profession rather than a lowly trade.⁵⁸³ Other Canons, including Canon 21, regarding punctuality in court⁵⁸⁴ and Canon 25, regarding lawyers' dealings and agreements with opposing counsel,⁵⁸⁵ were simply matters of etiquette and good manners, rules for gentlemen who happen to be lawyers.

578. Canon 11 provided: "Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him." *Infra* App. (Canon 11). That Canon is substantially the same as Section 37 of the Alabama Code, 1907 Comm. Rep. II, *supra* note 170, at 704, from which it was derived, Index and Synopsis of Canons, *infra* App.

579. See *supra* notes 347–50 and accompanying text.

580. Canon 20 provided:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

Infra App. (Canon 20). That Canon was derived from Section 17 of the Alabama Code, 1907 Comm. Rep. II, *supra* note 170, at 696, and Section 17 of the code of ethics of the Wisconsin Bar Association, 1907 Comm. Rep. II, *supra* note 170, at 697; see also Index and Synopsis of Canons, *infra* App.

581. See *supra* notes 319–76 and accompanying text.

582. See *supra* notes 425–500 and accompanying text.

583. See *supra* notes 425–500 and accompanying text.

584. Canon 21 provided: "It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes." *Infra* App. (Canon 21). The duty of punctuality prescribed in the first part of that Canon is substantially the same as Section 6 of the Alabama Code, 1907 Comm. Rep. II, *supra* note 170, at 691, from which it was derived, Index and Synopsis of Canons, *infra* App.

585. Canon 25 provided:

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far

The Committee referred to all of these different sorts of norms under the rubric of “professional ethics.”⁵⁸⁶ The Alabama Code had used the terms “professional” and “unprofessional” in an evaluative manner in a few of its provisions.⁵⁸⁷ The Committee expanded upon that usage, changing the language of the Alabama Code sections whose substantive content was adopted by using the terms “professional” and “unprofessional” to indicate what lawyers should do and what they should not do.⁵⁸⁸ Dickinson suggested that those terms be used instead of expressing a norm in the older, perhaps more puritan, language of a lawyer’s “duty,” or what in a more southern or gentlemanly idiom was “honorable” or “dishonorable,”

as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by the rules of Court.

Infra App. (Canon 25). That Canon is substantially the same as Sections 40 and 41 of the Alabama Code, 1907 Comm. Rep. II, *supra* note 170, at 705, from which it was derived, Index and Synopsis of Canons, *infra* App.

586. 1906 Comm. Rep., *supra* note 21, at 602–04.

587. *See, e.g.*, Sections 5, 17, and 20 of the Alabama Code, 1907 Comm. Rep. II, *supra* note 170, at 690–91, 696, 698. The Canons that derived from those sections of the Alabama Code—Canons 22, 20, and 28, respectively—continue the usage of the term “unprofessional.” *See infra* App.

588. For example, Canon 6 makes it “unprofessional to represent conflicting interests,” but none of the sections of the Alabama Code upon which Canon 6 was based—Sections 22, 25, and 34—used the term “unprofessional” or its opposite, “professional.” Index and Synopsis of Canons, *infra* App.; *see also supra* notes 392–416 and accompanying text. Similarly, Canon 23 states that “all attempts to curry favor with juries by [certain proscribed techniques] are unprofessional,” *see infra* App., instead of stating, as does Section 54 of the Alabama Code, that those techniques “should be avoided.” 1907 Comm. Rep. II, *supra* note 170, at 711. Canon 26, concerning conduct by lawyers acting as lobbyists, makes “unprofessional,” *see infra* App., the same conduct that Section 24 of the Alabama Code refers to as “immoral and illegal.” 1907 Comm. Rep. II, *supra* note 167, at 699. Canon 28 provides that “[s]tirring up strife and litigation is not only unprofessional, but it is indictable at common law,” *see infra* App., substituting the term “unprofessional” for the description of such conduct in Section 20 of the Alabama Code as “disreputable in morals.” 1907 Comm. Rep. II, *supra* note 167, at 698.

Canon 27 uses the terms “unprofessional” to prohibit lawyer advertising and the use of “touters of any kind,” *see infra* App., but this represents a substantive, rather than a linguistic, change from Section 16 of the Alabama Code, which held lawyer advertising generally to be “proper” and which said nothing about such indirect procurement of clients. *Id.* at 696.

However, the Committee’s preference for the term “unprofessional” was not invariable. There were a few times when the Committee chose not to use the term “unprofessional” in the Canons even though it was used in the Alabama Code. For example, Section 28 of the Alabama Code used the term “unprofessional” with reference to lawyers partaking of their client’s ill-feeling towards the opposing party, *id.* at 701, but Canon 17, which carried forward that idea, changes the grammatical structure of Section 28’s prohibition and does not use the term “unprofessional.” *See infra* App. Similarly, although employing the term “unprofessional” twice to condemn other forms of lawyer advertising, Canon 27 does not continue the use of that term to prohibit the indirect advertisement for business by furnishing or inspiring newspaper articles or press notices, *id.* as did Section 16 of the Alabama Code, 1907 Comm. Rep. II, *supra* note 167, at 696, perhaps because the term “unprofessional” already has been used twice in that Canon.

or simply what a lawyer “ought” to do or what was “proper” or “improper.”⁵⁸⁹ Indeed, Dickinson, among others, made an effort—albeit only partially successful—to make consistent use of only one set of evaluative terms,⁵⁹⁰ and “professional” and “unprofessional” were his choice.⁵⁹¹

In this respect, the A.B.A.’s 1908 Canons of Ethics authoritatively established the realm of what we now call legal professionalism. As an A.B.A. member, a lawyer was expected to act in accordance with the Canons, the A.B.A.’s national code of legal ethics. Under the Canons, his conduct was expected to be “professional.” Thus, professionalism and legal ethics were inextricably intertwined: the lawyer who acted as a member of the profession was a lawyer who acted ethically and the lawyer who acted ethically was a true “professional.” The Canons made such legal professionalism a morally robust concept. They proposed a view of lawyering that was morally enriching and demanding: lawyers were morally accountable for their actions, and their moral autonomy in the attorney-client relationship was recognized and supported. Thus, as professionals under the Canons, lawyers were neither hired guns, nor merely competent craftsmen. Unlike Holmes’s “bad man,” they recognized, respected, and acted in accordance with their innermost views of the moral dimensions in the law.

If we think about the Canons in terms of the general wave of professionalization that swept across the burgeoning national market economy in the late nineteenth and early twentieth centuries,⁵⁹² then the importance of this link between ethics and professionalism in the law becomes clearer. By the early twentieth century, it had become commonplace to view a code of ethics as a constitutive element of a profession.⁵⁹³ At that time, a normative code of conduct “higher” than

589. See, e.g., Red Book, *supra* note 136, at 30, 33, 43, 49, 51.

590. Dickinson suggested to the Committee the consistent use of the term “unprofessional”: “I think it better to adhere to one term in animadverting upon wrongful things, and the word ‘unprofessional’ covers the whole field.” *Id.* at 43. Thayer too was concerned about the lack of uniformity in the expressions of condemnation, subsequently sending a letter from Judge Lowell to both Alexander and Dickinson that criticized such lack of uniformity. Letter of Thayer to Dickinson (June 16, 1908), in the Thayer Archives at Harvard University Law School, Vol. 5, at 429.

591. Red Book, *supra* note 136, at 43.

592. See generally BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM* 80–128 (1976) (describing the rise of professionalism in the late nineteenth century); Larson, *supra* note 567, at 104 (finding that “[p]rofessions came of age in America after the Civil War”).

593. Modern sociologists and legal scholars have considered a code of ethics as a defining element of a profession. See, e.g., Larson, *supra* note 567, at x, xiii, xviii, 131, 208; WILBERT E. MOORE, *THE PROFESSIONS: ROLES AND RULES* 113–16 (1970); WOLFRAM, *MODERN LEGAL ETHICS*, *supra* note 19, at 48; Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 11 (1990). That view is widely accepted within the legal profession. For example, in *In Re Lincoln Rochester Trust Co.*, 311 N.E.2d 480 (N.Y. 1974), the New York Court of Appeals distinguished a profession from a business by, among other things, “a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace.” *Id.* at 483; see also *Chase Sci. Res., Inc. v. NIA Group Inc.*, 749 N.E.2d 161, 166 (N.Y. 2001). That is surely the view of the A.B.A. See A.B.A. Comm’n on Professionalism, “... In the Spirit of Public Service”: A Blueprint for the Rekindling of Lawyer Professionalism 64 n.60 (1986). That view could be asserted as soon as

the morals of the marketplace was something that distinguished a profession from a business.⁵⁹⁴

Professionalism in the law began in earnest after the Civil War,⁵⁹⁵ in response to the breakdown of what Robert Wiebe has called the “island communities”⁵⁹⁶ caused by the emergence of that national market economy.⁵⁹⁷ Magali Larson described the situation facing lawyers in the late nineteenth century:

[I]n the urban centers, the increase in numbers and in social diversity of the professional population tended to destroy the diffuse, extra-professional bases for agreement and control. The resulting increase in dissension, unethical practices, and unseemly competitiveness...posed a threat to the collective image of th[is] occupation[.]. Thus, both the concern about their position in an expanding market and the concern about

the A.B.A. adopted the Canons. *See, e.g.*, John Wigmore, *Introduction to ORRIN N. CARTER, ETHICS OF THE LEGAL PROFESSION* (1915).

594. Abel, *supra* note 4, at 644–45 (“[A]n essential claim of professions...is that they hold their members to a standard of conduct higher than that of the lay public.”); Alvin B. Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 *LA. L. REV.* 577, 589 (1975) (noting that “an ethic...morally binding on the conscience of the professional” distinguishes him from a merchant “in an oriental bazaar”). *But see* Potter Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 *BUS. LAW.* 463 (1975).

595. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 254 (1953) (“[T]he era of modern Bar Associations must be held to begin with the Association of the Bar of the City of New York in 1870.”); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925–1960*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION* 150 (Robert L. Nelson et al. eds., 1992) (describing the “last quarter of the nineteenth century [as] the ‘take-off’ period of professionalism [in the law] in the United States”).

596. ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877–1920*, at xiii (1967). Wiebe describes “America during the nineteenth century [as] a society of island communities”:

Weak communication severely restricted the interaction among these islands and dispersed the power to form opinion and enact public policy. Education, both formal and informal, inhibited specialization and discouraged the accumulation of knowledge. The heart of American democracy was local autonomy.... Almost all of a community’s affairs were still arranged informally.

...The health of the nineteenth century community depended upon two closely related conditions: its ability to manage the lives of its members, and the belief among its members that the community had such powers. Already by the 1870’s the autonomy of the community was badly eroded.

Id.

597. Larson, *supra* note 567, at 13, 76, 103, 134, 137. According to Wiebe, the national market system of industrial capitalism separated men “more by skill and occupation than by community [so that] they identified themselves more by their tasks in an urban-industrial society than by their reputations in a town or a city neighborhood.” Wiebe, *supra* note 596, at xiv. The tendency to identify oneself by occupation obviously contributed to enhanced consciousness about oneself as a member of a profession, thus laying the basis for the wave of professionalization that swept across the country late in the nineteenth century, including professionalization in the law. *Id.* at 111–13, 116–17, 127–29.

collective status caused professional leaders to press toward conformity in their exclusive elite groups and associations.⁵⁹⁸

Like other professionals responding anxiously to their decreased status and power in the national urban industrial economy at the beginning of the twentieth century,⁵⁹⁹ members of the A.B.A.'s elite—especially the Canons Committee—initiated and completed the Canons Project. They drafted and promulgated the A.B.A.'s first normative statement regarding lawyer conduct. Thus, the Canons were the capstone of the A.B.A.'s professionalism project and a significant milestone in the development of the modern legal profession.

598. Larson, *supra* note 567, at 134; *see also* RICHARD HOFSTADTER, *THE AGE OF REFORM* 156–64 (1955) (describing the changing position of the legal profession at the turn of the twentieth century).

599. *See* Hofstadter, *supra* note 598, at 148–63 (describing the status anxiety of professionals, including lawyers, as the result of the changed economic conditions at the turn of the twentieth century).

APPENDIX

This appendix presents the finalized version of the Canons of 1908 as promulgated by the A.B.A. Commission and distributed to A.B.A. members in pamphlet form. An original copy of this pamphlet is available in the Library of Congress.

AMERICAN BAR ASSOCIATION**CANONS****OF****PROFESSIONAL ETHICS**

“There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity, in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial as well as the moral courage, which belong commonly to riper years. High moral principle is the only safe guide, the only torch to light his way amidst darkness and obstruction.”

—*George Sharswood.*

“Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere, in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer’s glory. This is equally true of the Bench and of the bar.”

—*Edward G. Ryan.*

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it.”

—*Abraham Lincoln.*

AMERICAN BAR ASSOCIATION

CANONS OF ETHICS

[Note.-The following Canons of Professional Ethics were adopted by the American Bar Association at its thirty-first annual meeting at Seattle, Washington, on August 27, 1908.

The Canons were prepared by a committee composed of

Henry St. George Tucker, Virginia, Chairman.
Lucien Hugh Alexander, Pennsylvania, Secretary.
David J. Brewer, District of Columbia
Frederick V. Brown, Minnesota
J.M. Dickinson, Illinois.
Franklin Ferriss, Missouri.
William Wirt Howe, Louisiana.
Thomas H. Hubbard, New York.
James G. Jenkins, Wisconsin.
Thomas Goode Jones, Alabama.
Alton B. Parker, New York.
George R. Peck, Illinois.
Francis Lynde Stetson, New York.
Ezra R. Thayer, Massachusetts.]

I.

PREAMBLE

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

II.

THE CANONS OF ETHICS

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar

Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

1. The Duty of the Lawyer to the Courts.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges.

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protect earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court.

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner.

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of a Crime.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise,

innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct and indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause.

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice

is subject, by reasons of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations with Opposite Party.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation.

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. Dealing with Trust Property.

Money of the client or other just property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

12. Fixing the Amount of the Fee.

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one

of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees.

Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.

14. Suing a Client for a Fee.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in the mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards the Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. Ill Feeling and Personalities Between Advocates.

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the cause. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants.

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of lawyer as Witness for His Client.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition.

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness.

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury.

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal conduct are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements with Him.

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the

opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing as required by rules of Court.

26. Professional Advocacy Other Than Before Courts.

A lawyer openly, and in his true character, may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. Advertising, Direct or Indirect.

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. Stirring Up Litigation, Directly or Through Agents.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen,

court or prison officials, physicians, hospital *attaches* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or other, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's cause is one proper for judicial determination.

31. Responsibility for Litigation.

No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of

any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and he is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

III.

OATH OF ADMISSION

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the state of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other states of the union¹-duties which they are sworn on admission to obey and for the willful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of.....;

I will maintain the respect due the Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

1. Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, Utah Washington and Wisconsin. The oaths administered on admission to the Bar in all the other states require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not specifically defined by law as in the states named.

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We commend this form of oath for adoption by the proper authorities in all the states and territories.

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32. THE LAWYER'S DUTY IN ITS LAST ANALYSIS. (66; xxi, etc.)*

OATH OF ADMISSSION

* The *Arabic* numerals in the brackets immediately following the synoptic titles of the canons are cross references to the compilation of canons as set forth in Appendix B of the 1907 report of the Association's Committee on Canons of Ethics (A.B.A. reports XXXI, 681-684); the *Roman* numerals are cross-references to *Hoffman's Resolutions*, reprinted as Appendix H of the committee's report (*id.* 717-735).