Introduction

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This centennial provided an important opportunity to think about the role the 1908 Canons have played in shaping our profession and shaping how others view our profession. And I think it’s difficult to talk about where we are now and where we are going without knowledge of the evolution of the ethical standards that presently govern us as lawyers. So while many important discussions have focused on lawyers’ relationships with the courts, other lawyers, and clients (and tomorrow the panel will discuss lawyers’ relationships with the public), I would like to spend a little time tracing the development of ethical standards for attorneys.

Looking back—briefly—at the history of legal ethics governance in the United States, a number of broad themes emerge. Without trying to provide an exhaustive list, I will mention four. Number one: the lawyer as independent ethical actor versus the lawyer as advocate. Number two: broad principles of ethics versus detailed rules. Number three: self-regulation by the legal profession versus regulation by the government. Number four: uniform rules or standards applicable to all or most attorneys versus rules that vary depending on the place or nature of an attorney’s practice. Not surprisingly, views on these issues have tended to change over time in accordance with broader social and intellectual trends.

During the colonial era, as you might expect, American lawyers who were trained under the English system brought English notions of proper attorney conduct to this country, but lawyers as a class were often distrust. In the very early days, some colonies attempted to prohibit professional lawyers or imposed very strict restrictions, such as limiting the number of attorneys who could represent a client. These restrictions gave way, but every colony had some form of regulation addressing attorneys’ fees. There were a few colonial bar associations, and some of these had
rudimentary standards of conduct, such as a ban on champerty. But it is safe to say that at the time of the adoption of the Constitution there were few formal dictates or guidelines regarding attorney conduct.

During the nineteenth century, however, formal standards began to emerge. Two of the most important developments were, first, the scholarship of David Hoffman, George Sharswood, and other leaders in the emerging field of formal legal education and, second, the famous New York Field Code.

The first published American treatment of legal ethics is found as an appendix to David Hoffman’s treatise on legal education, which was first issued in 1817 and then expanded in 1836. Hoffman developed a list of 50 “Resolutions in Regard to Professional Deportment,” and Hoffman urged lawyers to repeat all of these resolutions twice a year. Hoffman’s resolutions addressed many of the core duties of lawyers, including litigation fairness, competence, loyalty, reasonable fees, and service to the poor. But Hoffman’s resolutions went beyond what we would regard as ethics rules or standards today. For example, one resolution advised attorneys to cultivate “a passion for my profession” or to “abandon it.” Another resolution was to avoid “morbid timidity” and to act with “self possession,” “calmness,” and “steady assurance.”

There has been a revival of interest in Hoffman in recent years because of his views regarding the limits of an attorney’s duties to clients. For example, one of his resolutions counseled young attorneys to advise a client to abandon a case or claim that “ought not to be sustained.” Another counseled against pleading the statute of limitations if the client could otherwise pay a valid debt. He referred to the invocation of this defense under such circumstances as “knavery.”

George Sharswood, who taught at the University of Pennsylvania, published the influential “An Essay on Professional Ethics” in 1854, and this work, like Hoffman’s, not only treated many core issues of professional ethics, as we see the field today, but also addressed questions of proper gentlemanly behavior—for example, that an attorney should “carefully aim to suppress everything like excitability or irritability.”

The work of Hoffman and Sharswood was precatory, but the 1850 Field Code had operative legal effect. Drafted by David Dudley Field, the code is well known for its contributions regarding civil procedure, but the code also addressed questions of attorney conduct. Section 511 of the 1850 code set out eight duties of a lawyer. Among these were the duty to
maintain respect for the courts and judicial officers, “to counsel or main-
tain such actions, proceedings, or defenses, only, as appear to him legal
and just, except the defense of a person charged with a public offense,”
ever to mislead a court, to preserve the confidences of clients, not to
courage either the commencement or continuance of an action or pro-
ceeding from any motive of passion or interest, and never to reject, for any
personal considerations, the cause of the defenseless or oppressed. By the
end of the nineteenth century, at least 17 states had adopted some form
of the Field Code’s statement of attorney duties.

The modern era of legal ethics standards began in the 1880s when
the newly formed Alabama Bar Association set out to develop a “short,
concise Code of Legal Ethics, stamped with the approval of the Bar.” The
Alabama Code went beyond the earlier-mentioned works in several im-
portant particulars. It had provisions dealing with the duty of confiden-
tiality, an instruction to report the wrongdoing of other lawyers, and a duty
to refrain from pretrial publicity.

The work of the Alabama State Bar Association was so successful that
it became the foundation for the American Bar Association national stan-
dards of conduct. 1908, when the canons were passed, was a period of flux
for legal practice. During the late nineteenth century and the early twen-
tieth century, the structure of legal practice was changing from the small
town, all-purpose lawyer, to the bigger and more specialized law firms of
the kind we are intimately familiar with today. With this change in busi-
ness models for the legal practice came the need for a uniform code of
ethics that would govern across geographical boundaries.

Major themes of the progressive era were regulation on a national
scale, improvements based on advancements in learning, and
professionalization, and therefore the development of a modern, compre-
hensive, national compilation of standards of attorney ethics was very much
in accordance with the spirit of the times. The American Medical Asso-
ciation had drafted a revised code of professional ethics in 1903 and it was
natural for the ABA to follow suit. In addition, the ABA perceived a
nationwide problem regarding public opinion about lawyers. An illustra-
tion of this trend is provided by a remark that President Teddy Roosevelt
made at a college commencement address in 1905. He disparagingly re-
ferred to lawyers as “hired cunning” because they had thwarted what he
viewed as the public interest by their lucrative representation of corpora-
tions and wealthy entrepreneurs.
After President Roosevelt’s speech, ABA President George Peck appointed a five-man committee to consider the feasibility of drafting a code of ethics. The committee reported back after a year, recommending that a code be drafted. The committee expanded its membership to 14, to include (among others) the outgoing and incoming ABA Presidents, United States Supreme Court Justice David Brewer, and Thomas Goode Jones, the author of the Alabama Bar Association’s Code.1

The committee’s plan, in the words of Justice Brewer, was to prepare “a body of rules, few in number, clear and precise in their provisions, so there can be no excuse for the violation, to be given operative and binding force by legislation or action of the highest courts of the states.” The goal then—at least from the perspective of some of the drafters—was not to create a purely aspirational code, but to create a set of rules that would be enforced against members of the legal profession who failed to conduct themselves according to the dictates of the code.

In undertaking this project, the committee did not start from scratch. The committee’s secretary prepared an extensive annotation of the leading American nineteenth-century legal ethics authorities.

The annotation was sent to all of the committee members, the entire ABA membership, and to each state bar association, soliciting comments. After receiving more than 1,000 letters of comment—imagine if they had e-mail!—the committee transformed the Alabama code into a new form called the “Canons of Ethics.”

Despite the fact that there were only 32 original canons, they cover the gamut of professional duties and relationships. For example:

- Canon #1 prescribes the lawyer’s duty to the courts
- Canon #4 discusses the lawyer’s duty to provide services to the poor
- Canon #6 covers conflicts of interest
- Canon #7 prohibits encroaching on another lawyer’s business
- Canons #12-14 treat attorneys’ fees

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1. The rest of the committee members were Lucien Hugh Alexander, Justice David Josiah Brewer, Frederick V. Brown, Jacob Dickinson, Franklin Ferris, William Wirt Howe, Thomas Hamlin Hubbard, James Graham Jenkins, Thomas Goode Jones, Alton Brooks Parker, George Record Peck, Francis Lynde Stetson, Ezra Ripley Thayer, and Henry St. George Tucker.
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- Canon #22 lays out the duties of candor and fairness to courts, clients, and other lawyers
- Canon #26 addresses lawyer conduct before bodies other than courts
- Canon #27 indicates that solicitation of business through advertising is unprofessional
- Canon #32—the final canon—states that “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.”

These canons that I’ve just listed as examples are not extremely detailed and don’t attempt to regulate every professional aspect of a lawyer’s conduct. But we can see that in this early attempt to set ethical parameters, the committee touched upon each of the core duties: fairness, competence, candor, loyalty, reasonable fees, and a responsibility for the greater social good.

One of the indications of the committee’s success is that:

- by 1910 (just two years after their promulgation), 22 states had adopted the canons
- by 1914, 31 state bar associations had adopted the canons with little or no change and, by 1924, all the state bar associations had adopted the canons.

Even more fascinating—at least from my perspective—is that although the ABA ultimately added 15 new canons to the original 32, only seven of those original canons were ever amended and only one was changed substantially.

This is not to say that the canons were perfect. In fact, as early as 1924, some ABA members questioned the form and function of the canons, and thereafter members regularly raised concerns about the canons.

Interestingly, one of the initial complaints was that they spoke to specific issues and did not give broad, fundamental principles of legal ethics. However, that concern soon transformed into a criticism that the canons were too general. In a 1934 speech, Justice Harlan Fiske Stone argued that in order for the legal profession to serve “as the guardian of
the public interest,” it must appraise the changing conditions of the law-
yer and society and the “appraisal must pass beyond the petty details of
form and manners which have been so largely the subject of our codes of
ethics.” The canons, in Justice Stone’s view, were “generalizations designed
for an earlier era.”

By the middle of the twentieth century, there was growing consensus
that the ABA canons needed more meaningful revision. In 1964, the
ABA President-elect Lewis Powell asked for the appointment of a com-
mittee to study the “adequacy and effectiveness” of the ABA canons. The
resulting committee concluded that the canons needed substantial revi-
sion. The drafting committee reformulated the canons into the Model
Code of Professional Responsibility, and, in August, 1969, the ABA House
of Delegates approved the Model Code.

The Model Code had a pretty novel format for the time. It was made
up of three parts:

- First, the canons. There were nine of them and they were very
  broad statements of primary principles of professional ethics.
- Each of the nine canons then had two subparts: the ethical con-
siderations and the disciplinary rules. The Ethical Considerations
  had extended commentary that gave meaning to each broadly-
  phrased canon. The Disciplinary Rules were black letter rules stat-
ing “the minimum standards by which a lawyer must abide.”

For the first time, the ABA included in the preamble to the code that
a violation of the disciplinary rules would subject the lawyer to discipline.
As had been the case with the 1908 canons, virtually every state adopted
the Model Code in some form.

The next revision took place in 1983, when the ABA adopted new
Model Rules of Professional Conduct. These rules were in restatement form,
meaning that the conduct standards were set out in rules, with comments
following each rule. The new format was intended to give better guidance
and clarity for enforcement. In addition to the new format, there were
new rules as well. As an example, the ABA added provisions addressing
law firm practice. For the first time, the ethical rules recognized that cli-
ents are not always individuals and not always located in a single jurisdic-
tion.
In April 1997, the ABA began once again to consider comprehensive changes to the Model Rules. The project was called “Ethics 2000” and it made changes to virtually every rule or comment in the Model Rules. For example:

1. The Ethics 2000 amendments substituted a single standard of “informed consent.”
2. They also stated the lawyer’s pro bono duty somewhat more strongly than the original Model Rules had.
3. They better articulated the standards of lawyers with regard to fees and litigation candor.
4. Ethics 2000 improved the conflicts rules too, entirely restructuring the general rule on concurrent conflicts of interests, in order to make conflicts analysis more straightforward.

At least 44 states and the District of Columbia have adopted a version of the Model Rules, and the remaining states have some other form of standards for lawyers. Also, a number of federal courts have directly adopted the Model Rules as their governing standards.

Some commentators, however, argue that despite the widespread adoption of the Model Rules, in actuality a lawyer’s duties today are likely to vary with the lawyer’s specialty, the tribunal or agency before which the lawyer practices, the state or states in which the lawyer is acting, and other factors. This commentary claims the promulgation of the ALI’s Restatement of the Law Governing Lawyers has drawn attention to the fact that much of the law concerning attorney conduct cannot be found in codes such as the Model Rules.

Whether these observations are correct or not, there is obviously still much work to be done in the field of legal ethics, and I hope that this conference will contribute to that endeavor.