

GUIDING THE PROFESSION: THE 1887 CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION

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I. INTRODUCTION

Recent law school graduates may be familiar with the ethical codes governing lawyers' conduct only through a short burst of study in anticipation of taking the Model Professional Responsibility Exam, a two-hour, fifty-question multiple choice test of their knowledge of the American Bar Association Model Code of Professional Responsibility, the 1983 Model Rules of Professional Conduct, and the 1990 Model Code of Judicial Conduct.¹ Frenzied test takers are unlikely to know that the Model Code of Professional Responsibility and the Model Rules of Professional Conduct owe much of their content to the first code of ethics for lawyers officially adopted in the United States: the 1887 code of ethics of the Alabama State Bar Association.²

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1. See Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 384 (1996).

2. In 1908, the American Bar Association [ABA] adopted the first national code of ethics, the Canons of Professional Ethics, which drew heavily from the structure and content of the Alabama Code. See MARY LOUISE RUTHERFORD, *THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* 89 (1937) ("The foundation of the Canons of Ethics, adopted by the [American] Bar Association in 1908, was the Code of Ethics adopted by the Alabama State Bar Association December 14, 1887, formulated by Judge Thomas Goode Jones . . ."); Andrea F. McKenna, *A Prosecutor's Reconsideration of Rule 3.10*, 53 U. PITT. L. REV. 489 n.1 (1992) ("The Alabama Code became the foundation of the Canons of Professional Ethics adopted by the American Bar Association in 1908."); see also Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO. J. LEGAL ETHICS 241, 242 (1992) (stating that the ABA Codes "have retained much of the subject matter the Canons adopted from Sharswood, departing from the Canons only in the mechanism, for enforcing ethical standards"). The Alabama Rules were

Although the Alabama Code's historical primacy is widely acknowledged, the Alabama effort has been given scant attention in academic literature. Most references to the Code merely state that its author, Thomas Goode Jones, based the Code on the writings of George Sharswood, a University of Pennsylvania Law School professor who delivered lectures on ethics summarized and published in his 1854 *Essay on Professional Ethics*.³ Only Thomas Goode Jones' son has written an article exclusively treating the Alabama Code, and that article limits its scope to a description of his father's drafting of the Code and an analysis of a few of its provisions.⁴ This Article seeks to remedy this historical oversight.

The Alabama Code grew out of a national trend that saw the increased professionalization of the legal community in the post-Civil War era. Nevertheless, it is puzzling that the trend towards the professionalization of law practice, which saw its earliest and most highly developed expression in Northern cities, should have produced its first effort at ethical self-regulation in a rural Southern state. The records of the Alabama State Bar Association reveal not only the motives behind the national trend towards legal professionalization, but also the profound influence the Civil War wrought in the life rhythms of the South.

Recovering from an event that had devastated their economy, their society, and their professional structures, the members of the Alabama Bar Association attempted to restore order, stability, and a higher moral standard into the practice of law. In

based on the writings of George Sharswood. See text accompanying note 3, *infra*.

3. See, e.g., Katherine A. Smith, *Truth or Dare: The Rules of Professional Conduct and Stretching the Discovery Boundaries*, 16 MISS. C. L. REV. 455, 460-61 (1996) ("The Alabama State Bar Association adopted the first code of professional ethics in 1887. This code was based on Sharswood's lectures at the University."); Vincent Robert Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOK. L. REV. 539 n.1 (1988) (stating "the Alabama Code of Ethics . . . drew heavily on Sharswood's writings . . ."); Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1304 n.297 (1992) ("In 1887, Alabama adopted a code of legal ethics based largely upon Sharswood's lectures.").

4. The Jones essay has been published twice. See Walter Burgyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW. 483 (1932); Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History*, 2 ALA. LAW. 247 (1941).

furtherance of these ends, the Association sought to increase the standards of admission to the Alabama Bar, improve the quality of legal education available in the state, and heighten the ethical standard of the practicing Bar, both through effective disbarment procedures and the promulgation of a code of ethics.

Thomas Goode Jones, the author of the Alabama Code, epitomizes this reformatory spirit. This Article will examine his career and the proceedings of the Alabama State Bar Association as manifestations of the movement towards professionalization of the law. Finally, the article will compare the content of the provisions of the Alabama Code to its predecessors, including Sharswood's *Essay*, and to the state ethical codes it inspired.

II. THE NATIONAL CONTEXT OF THE ALABAMA CODE

A. *The Rise of Professionalism*

"The Law as a pursuit is not a trade. It is a profession. It ought to signify for its followers a mental and moral setting apart from the multitude, a priesthood of Justice."⁵

Although not immediately apparent from such exalted phrases, professionalism, broadly defined, denotes self-regulation of professional membership and conduct.⁶ Professions confer on their members a sense of status and a sense of community.⁷ In the United States, the legal community has regulated itself largely through bar associations.

Although some bar associations existed at the beginning of the nineteenth century, the professionalization of the American legal tradition began in earnest in the 1870s.⁸ The Association

5. John H. Wigmore, *Introduction* to ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* xxi (1915).

6. See Croft, *supra* note 3, at 1267. But see DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 40 (1994) (stating professions have been characterized by the two central characteristics of specialized knowledge and social responsibility).

7. See Croft, *supra* note 3, at 1268 ("Autonomy and self-regulation contribute to the second overarching characteristic of professional institutions: a sense of professional community.").

8. Croft, *supra* note 3, at 1286-87; ALBERT P. BLAUSTEIN & CHARLES O. POR-

of the Bar of the City of New York, for example, was founded in 1870,⁹ and the American Bar Association in 1878.¹⁰ Fundamentally, the founders of bar associations like the ABA were largely reformers who sought to "uphold the honor of the profession."¹¹ According to one scholar, this phrase "was the euphemism for raising standards of legal education and admission to the Bar, one of the primary motivations for founding the ABA."¹² The legal profession had lost considerable prestige in the first half of the nineteenth century; bar associations had disbanded, and standards of admission to the Bar had plummeted.¹³ In 1800, for example, fourteen of the nineteen states required a mandatory period of preparation for admission to the Bar; in 1860, only nine of thirty-nine jurisdictions had such a requirement.¹⁴ In many states, there was outright hostility to the notion of a Bar at all. Indiana liberally extended the license

TER, *THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION* 288 (1954) ("The professional idea had gone through a cycle from growing recognition to gradual loss and then virtual abandonment The great rise begins in the 1870's"); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 277 (1950) (stating that in the 1870s the heightening of standards for admission to the bar was "part of a general movement in which old callings regained professional status and new ones sought it").

9. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* 254 (1953).

10. HURST, *supra* note 8, at 287.

11. This phrase was one of the stated objects in the ABA Constitution. See RUTHERFORD, *supra* note 2, at 13. There is, however, a body of literature that contends that the ABA was not founded with a reformatory spirit but instead to cement the power of the elite over an increasingly democratized profession. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 39 (1976) ("Bar associations expressed an impulse toward professional cohesion. Bar admissions standards were tightened, and ethical norms were promulgated to define and deter deviance."). But see Gerald W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 110 (Gerald W. Gawalt ed., 1984) (stating bar leaders in Massachusetts "were full participants and often leaders in the headlong drive toward a modern heterogeneous, industrial, institutional society").

12. 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, 88 (Gerard W. Gawalt ed., 1984).

13. See RUTHERFORD, *supra* note 2, at 8-9 (describing the disappearance of bar associations in the period following the Revolution to the Civil War).

14. POUND, *supra* note 9, at 227-28.

to practice law to all voters of "good moral character."¹⁵ In Roscoe Pound's words, "in this era of decadence it was assumed . . . that the [B]ar was not to be regarded as a profession, with requirements for admission such as public policy may prescribe, but as a mere private, money-making occupation."¹⁶ Only the Philadelphia Bar Association (formerly the Law Association of Philadelphia), founded in 1802, seems to have survived the period from the 1830s to the 1870s.¹⁷ The foundation of the Bar of the City of New York in 1870, however, marks a sea change in the progress towards an organized Bar. By 1888, three-fourths of the states had bar associations.¹⁸ The Alabama State Bar Association was founded in 1878.¹⁹

Bar associations in the United States generally advanced goals similar to those articulated by the American Bar Association:²⁰ "Its object shall be to advance the science of jurisprudence, promote the administration of justice and the uniformity of legislation and of judicial decision throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among members of the American Bar."²¹ Upholding the honor of the profession frequently included raising standards for admission to the Bar, improving the quality of legal education, and promulgating ethical codes.²² Indeed, legal education expanded and improved in the latter decades of the nineteenth century. In 1875 there were twenty-four law schools; by 1900 there were fifty.²³ In 1885 Massachusetts became the

15. POUND, *supra* note 9, at 226.

16. POUND, *supra* note 9, at 232.

17. POUND, *supra* note 9, at 244-46.

18. RUTHERFORD, *supra* note 2, at 9-10.

19. TONY FREYER & TIMOTHY DIXON, *DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1944*, 70 (1995).

20. See BLAUSTEIN & PORTER, *supra* note 8, at 284.

21. CONSTITUTION OF THE AMERICAN BAR ASSOCIATION, *quoted in* RUTHERFORD, *supra* note 2, at 13.

22. See Matzko, *supra* note 12, at 88; see also RUTHERFORD, *supra* note 2, at 41 (stating that in the years 1870-1880 the most significant contributions to the reform of bar admission standards were made by organized bar associations). The medical profession provides a similar story. It adopted a national ethical code in 1847. Croft, *supra* note 3, at 1265-68.

23. BURTON J. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS OF HIGHER EDUCATION IN AMERICA* 84 (1978).

first state to require a written Bar exam.²⁴ Bar associations played important roles in these efforts.²⁵

Nevertheless, ethical codes were not the first order of business for most bar associations. After all, the ABA did not promulgate its own ethical code until twenty years after its founding. The need for ethical codes did not merely reflect the professionalization of the legal community; it was also a reaction to the rapid democratization of the profession in the late decades of the nineteenth century.

B. The Democratization of American Legal Practice

The loosening of standards of admission to the Bar beginning in the 1830s caused a democratization of the profession. A study of the Massachusetts Bar, for example, reveals that in 1840 seventy percent of the lawyers were children of professionals, but between 1870 and 1890 that figure dropped to forty percent.²⁶ Similarly, in that period only fifty-eight percent of lawyers admitted to the Massachusetts Bar were college graduates, compared to seventy percent in the years before 1840.²⁷ Some scholars view the founding of bar associations, the raising of Bar admission standards, and the promulgation of ethical codes as efforts to restrict the further democratization of the Bar and to cement the power of elite lawyers over the profession. In their view, corporate lawyers

capitalized upon historical circumstance to hitch professional values, which they were advantageously located to define, to the service of social stratification and corporate profit. Its priorities—more precisely, the priorities of its clientele—shaped professional education, career patterns, ethics, mobility, and the availability and distribution of legal services—indeed, the very meaning of law and justice.²⁸

24. Jarvis, *supra* note 1, at 374.

25. See HURST, *supra* note 8, at 6 ("After 1870 . . . [l]awyers formed voluntary, selective bar organizations, and a handful of the bar, together with law teachers, saved standards of education and admission to the bar from collapse.").

26. Gawalt, *supra* note 11, at 102.

27. Gawalt, *supra* note 11, at 105.

28. AUERBACH, *supra* note 11, at 21. Of the ABA's later adoption of the Canons of Professional Ethics, based on the Alabama Code of Ethics, Auerbach writes, "The

An article written in 1908, when the ABA was considering its own ethical code, argues that "such 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."²⁹

In 1906 the ABA Committee on Professional Ethics, advocating adoption of a national code of ethics, expressed a similar viewpoint.

We cannot be blind to the fact that, however high may be the motives of some, the trend of many is 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. With the influx of increasing numbers, who seek admission to the profession mainly for its emoluments, have come new and changed conditions.³⁰

Unsurprisingly, these new codes reinforced rather than threatened the power of the legal elites. Indeed, some historians have pointed out that the ethical codes that were eventually adopted focused on problems like ambulance chasing, which did not threaten the livelihood of the upper echelons of the Bar.³¹

The Alabama State Bar adopted its Code of Ethics in 1887 against this national backdrop. Alabama's actions, however, cannot be fully understood without first examining the character and career of the man who proposed and drafted the code.

Canons, reflecting values appropriate to a small town, were easily adaptable to an equally homogeneous upper-class metropolitan constituency, where they served as a club against lawyers whose clients were excluded from that culture: especially the urban poor, new immigrants, and blue-collar workers." AUERBACH, *supra* note 11, at 42 (citing BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 129-30 (1970)).

29. George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 *THE GREEN BAG* 57 (1908).

30. 31 REPORT OF THE THIRTIETH MEETING OF THE AMERICAN BAR ASSOCIATION, HELD AT PORTLAND, MAINE, Aug. 26-28, 1907, at 682 (1907).

31. Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 58 (1988).

III. THOMAS GOODE JONES

This is a cautionary tale for any lawyer who belittles the need to research opposing witnesses at trial. Thomas Goode Jones had been a witness to the signing of a valuable piece of land in Montgomery, Alabama, whose ownership was litigated there forty years later. Under cross examination by a young New York lawyer, Thomas Jones made a reference to the conveyance of the deed in fee simple. The lawyer stated "I suppose you must have some little smattering knowledge of the law. You must know a little law, or otherwise you would not have used the expression, 'fee simple.'"³² Jones replied

Well, I studied law in winter quarters around Richmond. Later I studied law in a night class taught by Chief Justice Abram J. Walker of Alabama, was admitted to the Bar, wrote the First Lawyer's Code of Ethics ever adopted in the United States, have represented countless clients in cases involving questions of Constitutional law, have been Speaker of the House of Representatives, Member of the Constitutional Convention of 1901, and now am a Federal Judge in Alabama.³³

In addition to these posts, Jones was elected twice to the governorship of Alabama, served as President of the Alabama State Bar Association, fought heroically in the Civil War, carried General Lee's truce flag to General Grant at Appomatox, and fathered thirteen children.³⁴ Born in 1844 in Vineville, Georgia, he moved to Alabama in 1850 and was admitted to its Bar in 1866.³⁵ He also served as reporter of the decisions of the Alabama Supreme Court from 1870 to 1884 and enjoyed a distinguished and profitable legal practice, including acting as attorney for the Louisville & Nashville Railroad Company.³⁶

32. This story is related in Walter B. Jones, *Anecdotes About Governor Thomas G. Jones of Alabama*, in IN MEMORIAM, THOMAS GOODE JONES (1844-1914); GEORGENA BIRD JONES (1846-1921) 9, 21 (1956).

33. *Id.*

34. *Id.* at 10-11; see also Frank M. Dixon, *Thomas Goode Jones*, in IN MEMORIAM, *supra* note 32, at 52, 54.

35. Dixon, *supra* note 34, at 53-54.

36. John Witherspoon DuBose, *A Historian's Tribute to Thomas Goode Jones*, 14 ALA. LAW. 46, 57, 59 (1953). Many founding members of the ABA, too, were wealthy railroad lawyers. See Michael De L. Landon, *Another False Start: Mississippi's Sec-*

Furthermore, Jones is widely characterized as a man of honor.³⁷ He first gained national fame in 1874 when he delivered a speech on Confederate Memorial Day that was extensively reported in the national press and advocated reconciliation with the North. Jones declared, "Honor to noble foes is the warrior's highest courage. We can bequeath to our children nobler legacies than discords and hates."³⁸

Jones' philosophical views dim the luster of these accomplishments: He advocated a racial hierarchy anathema to ideals of equality and justice. A eulogy delivered by a subsequent governor of Alabama about Jones frankly acknowledges Jones' role in post-Reconstruction Alabama:

After the close of the Civil War he was one of the leaders of our people in their struggles to restore good government and maintain their civilization, and by his eloquence, his courage and his wise counsels, and statesmanship, he rendered material assistance in leading our State back from the slough of dishonor and corruption to the high secure ground of White Supremacy, security and safety.³⁹

During Jones' tenure as governor, Alabama passed laws segregating blacks and whites on common carriers.⁴⁰ Jones helped draft the 1901 Alabama Constitution that established racial segregation as a fundamental principle of social organization in the state.⁴¹ The historical record is contradictory on whether Jones supported or protested black disenfranchisement.⁴²

ond State Bar Association, 1886-1892, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 187 (Gerald W. Gawalt ed., 1984). In this sense, as in many others, Jones greatly resembled other leaders of the Bar.

37. See, e.g., *NORTHERN ALABAMA: HISTORICAL AND BIOGRAPHICAL ILLUSTRATED* 602 (photo. reprint 1976) (1888) (describing Jones as "[o]f irreproachable integrity and stainless character").

38. DuBose, *supra* note 36, at 61; George R. Farnum, *Thomas Goode Jones: Warrior, Jurist and Apostle of Unity*, 29 *A.B.A. J.* 719, 720 (Dec. 1943); see also Jones' obituary, *N.Y. TIMES*, Apr. 30, 1914, at 10 (describing the Memorial Day speech).

39. Emmet O'Neal, *Death of Thomas Goode Jones, in IN MEMORIAM, supra* note 32, at 27.

40. Malcolm Cook McMillan, *Thomas Goode Jones, 1844-1914, Warrior Statesman and Jurist, in IN MEMORIAM, supra* note 32, at 45, 48.

41. See FREYER & DIXON, *supra* note 19, at 68, 78.

42. Compare FREYER & DIXON, *supra* note 19, at 118 ("In the 1901 constitutional convention [Jones] supported the disenfranchisement of the state's African Ameri-

Despite this conservative, racist vision, Jones was a reformer throughout his career.⁴³ While governor of Alabama, he campaigned strenuously against the peonage system.⁴⁴ He strongly opposed lynching and mob violence,⁴⁵ fought for equal funding for black and white schools,⁴⁶ campaigned to grant the Alabama governor the power to remove negligent sheriffs,⁴⁷ and instituted reform measures in the state's finances, court system, quarantine system, and the inspection of mines.⁴⁸

Furthermore, Jones sought fair treatment for blacks. While advocating separate facilities for whites and blacks, he believed the quality of these facilities should be literally equal.⁴⁹ Jones' insistence that the racial segregation laws be administered as fairly as possible towards blacks earned him Booker T. Washington's support when President Theodore Roosevelt was considering Jones' appointment to the federal bench.⁵⁰ Jones also sought better education for blacks and fought for equal funding for black schools.⁵¹ In his 1890 inaugural address as governor, Jones declared it "unwise and unconstitutional for a government to sponsor unequal benefits to citizens on the basis of race."⁵² Walter Jones, Thomas Jones' youngest child, tells an anecdote related to him by Judge William Hunt of California, who was with Teddy Roosevelt on the last night of his presiden-

cans"), with Aucoin, *infra* note 45, at 46 ("Jones was a member of a small minority in the South who wished not only to maintain suffrage for African-Americans, but to enforce that right without regard to race"); McMillan, *supra* note 40, at 49 ("He opposed the grandfather clause [in the Alabama State Constitution] and maintained that the same standards for the suffrage should apply to the whites and Negroes alike.").

43. Jones shared this characteristic with other leading members of bar associations. See *supra* note 11 and accompanying text.

44. FREYER & DIXON, *supra* note 19, at 117-19. Peonage was a slavery-like system that held laborers to virtually inescapable debt-labor contracts. FREYER & DIXON, *supra* note 19, at 117-19.

45. Brent Jude Aucoin, *Thomas Goode Jones, Redeemer and Reformer: The Racial Politics of a Conservative Democrat in Pursuit of a "New" South, 1874-1914*, 48-49 (1993) (unpublished M.A. thesis, Miami University (on file with the Miami University Library)).

46. Dixon, *supra* note 34, at 54.

47. McMillan, *supra* note 40, at 49.

48. Aucoin, *supra* note 45, at 5.

49. Aucoin, *supra* note 45, at 6.

50. FREYER & DIXON, *supra* note 19, at 68.

51. Dixon, *supra* note 34, at 54.

52. Aucoin, *supra* note 45, at 27.

cy. That evening, President Roosevelt described the presidential appointment that had given him the most satisfaction:

[I]t was that of a Confederate veteran, former Governor Thomas Goode Jones, to be a Federal Judge in Alabama. Appointing him, and the courageous way in which he conducted himself, has given me more satisfaction than any other Presidential appointment I have made.⁵³

Roosevelt, who had publicly proclaimed the equality of the races, must not have felt Jones' racist positions disqualified him from distinguished service as a federal judge.

Nevertheless, it is disturbing that the man who drafted the first code of legal ethics adopted in the United States should have held views that today seem patently offensive. Jones' desire to strengthen and ennoble the legal profession through the promulgation of an ethical code likely did not include widening the scope of that profession to include African Americans, women, or other subordinated groups.

IV. THE ADOPTION OF THE ALABAMA STATE BAR'S CODE OF ETHICS

The Alabama State Bar Association was founded in 1878, fewer than two years after the end of Reconstruction. On December 13, 1878, forty Alabama lawyers sent out a request to the Bars of each of the Alabama counties requesting that they appoint a delegate to attend the first Convention of the Bar of the State on January 15, 1878.⁵⁴ The Constitution of the Association declared: "[T]he purposes and objects of [this] Association [shall be]: To advance the science of jurisprudence, promote the administration of justice throughout this State, uphold the honor of the profession of the law, and establish cordial intercourse among the members of the Bar of Alabama."⁵⁵ By the time of

53. Jones, *supra* note 32, at 24. For a description of the political context of Roosevelt's nomination of Jones, see FREYER & DIXON, *supra* note 19, at 68.

54. See REPORT OF THE ORGANIZATION AND OF THE FIRST, SECOND AND THIRD ANNUAL MEETINGS OF THE ALABAMA STATE BAR ASSOCIATION 3-4 (Montgomery, Smith & Armstrong 1882) [hereinafter ANNUAL MEETINGS I-III].

55. ALABAMA STATE BAR ASSOC. CONST. art. I, reprinted in ANNUAL MEETINGS I-III, *supra* note 54, at 8.

the first annual meeting on December 4, 1879, eighty-one people had joined the Association.⁵⁶ Thomas Goode Jones' name does not appear in the annual reports until 1881, where he is listed as chairman of the Committee on Judicial Administration and Remedial Procedure.⁵⁷

From its beginnings, the Alabama State Bar Association played an important role in Alabama legal circles. In the nineteenth century, most Alabama federal judges were members, although two-thirds of the state's lawyers had not joined the organization.⁵⁸ The Bar Association primarily drew its constituents from urban areas, although the state's urban population did not surpass thirty-five percent until after 1940.⁵⁹ The Association, like the ABA, advocated an ambitious reform agenda, including increasing judicial independence and instituting uniformity in the legal process.⁶⁰ Historians have described the organization's philosophy as promoting a "practical conservative-activist jurisprudence."⁶¹ It is instructive to compare Alabama's thriving Association with that of Mississippi. Although Mississippi established the first state bar association in the country in 1821,⁶² that organization had dissolved by 1825. Mississippi again instituted a bar association in 1886, which also had a short life span, terminating in 1902. The Mississippi Bar's reform efforts apparently foundered on the issue of race and the struggle to maintain white supremacy.⁶³ The records of the Alabama State Bar's annual meetings, however, are curiously devoid of reference to race, except for occasional attacks on the practice of lynching.⁶⁴

56. ANNUAL MEETINGS I-III, *supra* note 54, at 27.

57. ANNUAL MEETINGS I-III, *supra* note 54, at 164.

58. FREYER & DIXON, *supra* note 19, at 72.

59. FREYER & DIXON, *supra* note 19, at 72.

60. FREYER & DIXON, *supra* note 19, at 132.

61. FREYER & DIXON, *supra* note 19, at 61.

62. De L. Landon, *supra* note 36, at 187.

63. See De L. Landon, *supra* note 36, at 198.

For virtually all [Mississippi lawyers]—including the leaders of the bar association, though their horizons were broader—race relationship and the problem of keeping the black man in his place were the overriding concern. And conservatism in that regard would tend to encourage resistance to reform in regard to everything else, including the law, for almost another century in the Magnolia State.

De L. Landon, *supra* note 36, at 198.

64. This absence is true at least through 1887. See, e.g., ANNUAL MEETINGS I-

A. *Chronology of the Adoption of the Alabama Code*

By 1881, the membership of the Alabama Bar Association had climbed to 127 lawyers.⁶⁵ In his Report of the Committee on Judicial Administration and Remedial Procedure, which he read to the Association on December 28 of that year, Jones first proposed the code of ethics, along with a host of other reform measures. Reflecting the national trend towards greater professionalization discussed in Part II of this article, Jones sought to increase the caliber of the Bar by expelling unethical practitioners. He wrote, "[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."⁶⁶ He questioned, however, the efficacy of proceeding with this course without clear guidelines available to members of the Bar.

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 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.⁶⁷

Jones thus tapped into one of the classic hallmarks of professional status: a self-regulating organization that provides a code of conduct for its members. The Association passed a resolution

III, *supra* note 54, at 170 (decrying the effects of lynching). The vehemence of the Association's opposition to the practice of lynching should not be minimized. Referring to lynch mobs as "Judge Lynch," the Chairman of the Executive Committee declared that the practice "ought to make all of us of the legal profession . . . hang our heads in shame at our failure to discharge the duties devolved upon us in making the laws and in administering justice according to law." ANNUAL MEETINGS I-III, *supra* note 54, at 170; *see also* PROCEEDINGS OF THE FOURTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 77 (Montgomery, Barrett & Co. 1883) [hereinafter FOURTH ANNUAL MEETING] (lamenting the practice of "[m]obocracy" which includes the court of Judge Lynch who: "[H]as achieved a national reputation. Acquired by his merciless executions, it must be confessed that it has been at the expense of well organized society.").

65. ANNUAL MEETINGS I-III, *supra* note 54, at 168.

66. ANNUAL MEETINGS I-III, *supra* note 54, at 235.

67. ANNUAL MEETINGS I-III, *supra* note 54, at 235.

stating that a committee should be appointed to "prepare and draft such bills as in their discretion may be necessary to carry said suggestions into effect."⁶⁸

In a delay not explained by the meeting records, the Chairman of the Central Council of the Bar Association did not move until the next meeting to appoint a committee of three lawyers, with Jones as Chairman, to report a Code of Ethics to the next meeting of the Association, which would take place in 1883.⁶⁹ The Chairman did not name the other two members of the committee because he wanted to "take a little time."⁷⁰ The Chairman, however, took over a year and had failed to name the committee before the next annual meeting,⁷¹ at which time he finally named Colonel Richard Orrick Pickett and Colonel Daniel Shipman Troy to the posts.⁷² Although apparently able lawyers, they did not take an active role in drafting the code.⁷³

By the time of the next annual meeting, Jones was able to report that much "preparatory work" had been done, including sending letters to "many eminent lawyers and judges" asking for suggestions.⁷⁴ He had not, however, been able to complete the code and reported it would be done in time for the next annual meeting.⁷⁵ However, at the next two meetings, Jones, who by then had been elected to the Alabama legislature, was too busy with his duties in that body to present the code he had written.⁷⁶ In 1886, a surely discomfited Jones had to acknowledge to the assembled members of the Bar at the annual meeting

68. ANNUAL MEETINGS I-III, *supra* note 54, at 173.

69. FOURTH ANNUAL MEETING, *supra* note 64, at 20.

70. FOURTH ANNUAL MEETING, *supra* note 64, at 20.

71. PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 6 (Montgomery, Barrett & Co. 1883) [hereinafter FIFTH ANNUAL MEETING].

72. Jones, *supra* note 4, at 483.

73. Jones, *supra* note 4, at 483.

74. PROCEEDINGS OF THE SIXTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 21 (Montgomery, Barrett & Co. 1884) [hereinafter SIXTH ANNUAL MEETING].

75. *Id.*

76. PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 9 (Montgomery, Barrett & Co. 1885) [hereinafter SEVENTH ANNUAL MEETING]; PROCEEDINGS OF THE EIGHTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 33 (Montgomery, Barrett & Co. 1886) [hereinafter EIGHTH ANNUAL MEETING].

that the only draft of the code had blown off his desk that morning and out a window.⁷⁷ "It was on my desk at dinner time, but can not be found now."⁷⁸ He was therefore prevented from presenting it until the following year.

At the Tenth Annual Meeting of the Association, held in 1887, Jones finally read the proposed Code of Legal Ethics.⁷⁹ With only two modifications, including striking the proposed rule "[a]n attorney should not conduct his own cause,"⁸⁰ the Code was adopted.⁸¹ Although at the time it only represented 395 of the 795 lawyers in Alabama, the Association ordered 1000 copies of the code and mailed one to every lawyer and judge in the state.⁸² When the President of the Association retired that year, he declared:

I have always been a zealous member of the Association and have always had the greatest faith in its power of doing good, and I see now, after many years of waiting, that it will accomplish what it started out to do, reformation in the law, advancement of the science of jurisprudence, and the upholding of the Bar in this State.⁸³

77. Jones, *supra* note 4, at 488 (explaining what had transpired).

78. PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 51 (Montgomery, Barrett & Co. 1887) [hereinafter NINTH ANNUAL MEETING].

79. PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 8 (Montgomery, Brown Printing Co. 1887) [hereinafter TENTH ANNUAL MEETING].

80. *Id.* at 20.

81. The other rule change consisted of strengthening the prohibition against representing a plaintiff in a case "when [the attorney is] satisfied that the purpose is merely to harass or injure the opposite party." The Association changed the language *permitting* the lawyer to refuse the case to mandating that he "must" decline the matter. *Id.* at 19. Only two other provisions provoked any objections. The first addressed improper attempts to influence judges through personal contacts. See text accompanying note 114, *infra*; ANNUAL MEETING I-III, *supra* note 54, at 235-36. The other proscribed offering illegal evidence before the jury under the pretext of arguing its admissibility. One of the members mistakenly thought this rule would bar good faith presentation of evidence, a misconception Jones quickly corrected. TENTH ANNUAL MEETING, *supra* note 79, at 15-19. Both rules were adopted without modification. TENTH ANNUAL MEETING, *supra* note 79, at 21.

82. TENTH ANNUAL MEETING, *supra* note 79, at 21.

83. TENTH ANNUAL MEETING, *supra* note 79, at 31-32.

B. The Proceedings of the Alabama State Bar Association

This chronology does not explain why the Alabama Association sought to adopt, indeed was the first jurisdiction to adopt, a code of legal ethics. Jones' son vaguely stated that Jones proposed the code of ethics "because of the things he had seen during the course of a varied and extensive practice of some fifteen years."⁸⁴ Nevertheless, it is clear that Jones and the Alabama Association formed an important part of the trend towards legal professionalization described in Part II of this article. In addition, the records of the Alabama Association betray the profound importance the Civil War exerted on the South and suggest why a code of ethics was first adopted in a Southern state rather than in the more industrialized North.

This Article studies the proceedings of the Alabama State Bar Association through the records of its Annual Meetings, which have been published since its debut in 1878. The meetings took place once a year, usually for one to two days. In the years 1879-1887, they consisted of resolutions and motions offered by the members with some ensuing discussion. Oral reports by the committee Chairmen and speeches by members of the Association seem to have taken up the bulk of the proceedings. At the first annual meeting, for example, the group heard an address by their President on important changes in statutory and legislative law in the prior year, reports by the Committees on Jurisprudence and Law Reform, and Legal Education and Admission to the Bar, and papers on the following topics: The Married Woman's Law, Code Pleading and Practice in Alabama, and the Roman Bar.⁸⁵ The addresses, speeches, and papers for each meeting were later published with the meeting minutes by the Bar Association. The content of the papers and reports delivered at these meetings provides crucial context to the Association's adoption of its code of ethics.

The records indisputably reveal a rapidly changing society. The Civil War devastated the economies of the South, including that of Alabama.⁸⁶ Radical Reconstruction had profoundly al-

84. Jones, *supra* note 4, at 248.

85. ANNUAL MEETINGS I-III, *supra* note 54, at 27-33.

86. See ALBERT BURTON MOORE, A HISTORY OF ALABAMA AND HER PEOPLE 604-

tered Alabama's politics. For the first time in the state's history, blacks could vote⁸⁷ and women were granted property rights.⁸⁸ The Ku Klux Klan moved into the state in 1866.⁸⁹ In 1868 the Alabama Senate had thirty-two Republicans and only one Democrat.⁹⁰ In 1874, however, white conservative Democrats returned to power, inaugurating the eighteen-year period now known as "Bourbon Reconstruction."⁹¹ This era, in which the political establishment sought to reconstruct a political structure that would guarantee Democratic interests, including white supremacy,⁹² saw the inauguration of the Alabama State Bar Association and the subsequent adoption of its code of ethics.⁹³

In a speech before the Association in 1883, Jones clearly tied the need for a code of ethics to the social disorder brought about by the Civil War. Advocating the promulgation of the code, Jones explained:

It was to be expected that the demoralization resulting from the war, would make itself felt in the legal profession as it did in all other institutions of our land, and while the Alabama Bar for honesty, ability and talent, equals that of any State in the Union, it has not yet returned to that state of purity, which distinguished it before the war. There are still lawyers whose practices bring reproach upon the profession, and who, not being members of the Association, cannot be reached by any of the rules prescribed for its government. A large number of the profession have not joined the Association for the reason frankly stated by them, that it has not taken any prompt steps to put down these evil practices. If the Association once acts, nearly all of this class will become warm and ardent members.⁹⁴

Similarly, in 1884 the Chairman of the Committee on Legal

05 (1927) ("The war consumed the people's substance. . . . The manufacturing establishments were destroyed outright, or dismantled and sold.")

87. WILLIAMS WARREN ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 244 (1994).

88. *Id.* at 246.

89. *Id.* at 250-51.

90. *Id.* at 249-50.

91. *Id.* at 264.

92. ROGERS ET AL., *supra* note 87, at 264.

93. The Bar Association was founded in 1878; the Code of Ethics was adopted in 1887. See TENTH ANNUAL MEETING, *supra* note 79, at 21.

94. FIFTH ANNUAL MEETING, *supra* note 71, at 7.

Education and Admission to the Bar declared that:

No other commonwealth, and no other people have been so organized and no other body politic has been so constituted as has been the Southern States of the Union since the great upheaval, which a few years since disintegrated our society and remodelled our ideas and habits. . . . It will require many years of wise legislation, supported by a conservative public opinion, to readjust and harmonize the disordered conditions of our political and social organization.⁹⁵

The Alabama Bar Association attempted to improve the low standards of the Alabama Bar, not only by promulgating a code of ethics, but by raising the quality of legal education available in the state. In the speech excerpted above, the Chairman underscored the need for high quality legal education and urged that judges and chancellors, who alone at that time certified whether applicants met the qualifying standard for admission to the Bar, raise that standard as high as possible.⁹⁶ He also requested the Association to consider whether the legislature should be asked to pass a statute specifying a required time period of legal instruction and giving the Association the power to require all interested applicants to submit to a Bar exam that it would administer.⁹⁷ In 1887, another Chairman of the Committee on Legal Education and Admission to the Bar ascribed the low standards governing admission to the Alabama Bar to the effects of the Civil War and the lack of good legal training in the state.

In the want of general high culture among our ancestors, the scarcity of established institutions of liberal learning in our State, before the war and since, and the distressing grinding poverty which has hung like a dark shroud over the South for a quarter of a century, we are able to account for our statutes regulating admission to the Bar.⁹⁸

In fact, like many reformers before and after them, the

95. SIXTH ANNUAL MEETING, *supra* note 74, at 125.

96. SIXTH ANNUAL MEETING, *supra* note 74, at 131.

97. SIXTH ANNUAL MEETING, *supra* note 74, at 131-32.

98. TENTH ANNUAL MEETING, *supra* note 79, at 98. He felt that the low standards of the Alabama Bar were evinced by the fact that "an applicant for license to practice law is seldom rejected." *Id.* at 96.

members of the Association counseled improved education as a panacea for many of the profession's ills. In 1883 the Association passed a resolution stating:

[I]n the opinion of this Association nothing can contribute more to the success of those who desire the honors and emoluments of our profession, and to the efficiency of the Bar as a conservator of true morality and justice, than a thorough education before coming to the Bar, not only in legal principles, but in legal ethics.⁹⁹

The Association believed that, with the demise of the arcane but technical common law pleading system, law offices were not adequate to train lawyers; law schools were needed to inculcate intellectual methods and abstract reasoning.¹⁰⁰ In another lyrical tribute to the power of legal education, the Committee on Legal Education and Admission to the Bar reported in 1883:

At the Law School the student is inspired with a love of his profession, the highest standards of professional excellence are proposed for his adoption, professional courtesy is cultivated, and he is encouraged in spite of apparent impracticability or self-distrust to press on to brilliant success. He is established in principles of morals, and in the love of truth and justice. He is taught to feel his responsibility to society and to the State, and never to become the mere hired instrument to execute the caprice or passions of his client. Thus his office is exalted in his estimation above a mere money-making trade, in which trickery and sharp practice, and knavery are resorted to for success.¹⁰¹

The Chairman of the Committee noted the ongoing progress towards the establishment of institutions devoted to legal education. The law department at Alabama State University, the first in the state, had been founded in 1873.¹⁰² He remarked that forty-eight law schools nationwide taught over three thousand pupils; twenty-four new law schools were established between

99. FIFTH ANNUAL MEETING, *supra* note 71, at 10. At the Tenth Annual Meeting, the Chairman of the Committee on Legal Education labeled ethics "the most important part of all education, and which should occupy the most prominent part in the drilling of young men for admission to the bar—that every lawyer should be *incorruptible in his moral character.*" TENTH ANNUAL MEETING, *supra* note 79, at 105-06.

100. ANNUAL MEETINGS I-III, *supra* note 54, at 255.

101. FIFTH ANNUAL MEETING, *supra* note 71, at 114.

102. FIFTH ANNUAL MEETING, *supra* note 71, at 115.

1870 and 1883.¹⁰³ Given the Association's strong emphasis on the importance of formal legal education in law schools, it is ironic to note that Jones himself studied law at the offices of prominent lawyers and judges but never attended law school.¹⁰⁴

As seen in Part II, this emphasis on raising Bar admission standards, improving legal education, and promulgating ethical codes were major goals of the legal professionalization movement throughout the country. Indeed, as further support for improving standards in the legal profession, the Chairman pointed to the success of the medical association, which had already acted to protect people against "incompetent medical practitioners, quacks and mountebanks" by adopting its own professional code.¹⁰⁵ The Alabama Association's location in a region that had recently undergone tremendous social upheaval and its activist stance towards improving the quality of the legal profession help explain why this Bar should have been the first in the United States to adopt a code of ethics.

The records of the Association abound with statements expressing this spirit of professionalization. The Chairman of the Committee on Legal Education declared:

The organized action of the legal profession, properly exerted, would lead to the creation of more intimate relations among its members than now exist; would sustain the profession in its proper position in the community; would insure better training, a superior education and a higher morality among lawyers; would better regulate admission to the bar; maintain a higher tone; influence constitutional reforms in the judiciary, and bring the legal profession to that exalted standard of honor and respectability and power in the community which should always exist.¹⁰⁶

Jones himself crafted much of the Association's reform agenda

103. FIFTH ANNUAL MEETING, *supra* note 71, at 115.

104. This irony is remarked on in FREYER & DIXON, *supra* note 19, at 93. In a further twist to this story, there is now a law school named for Jones, the Thomas Goode Jones School of Law of Faulkner University in Montgomery, Alabama. See Soozhana Choi, *Faulkner University: Building Moves School Closer to Accreditation*, NAT'L JURIST, Mar./Apr. 1997 at 10.

105. *Id.* at 126.

106. TENTH ANNUAL MEETING, *supra* note 79, at 95-96.

designed to professionalize the state Bar.¹⁰⁷

Jones and the other leaders of the Association recognized that lawyers in Alabama were not well liked as a profession. Attendees of the Third Annual Meeting of the Association heard a paper addressing the unpopularity of the bar.¹⁰⁸ In an uncomfortably modern characterization, the speaker cited evidence of the profession's unpopularity: "recall the innumerable publications, by the lay-press of anecdotes and of practical jokes, in which lawyers are the subject of ridicule"¹⁰⁹ The Association sought to raise the public's esteem of lawyers through effective disbarment procedures. A report from the Executive Committee stated that the Association should take charge of "ejecting unworthy members from the profession."¹¹⁰ The Committee recommended that the Association prosecute and seek to disbar any member of the Alabama Bar that the Committee of Grievances found guilty of conduct "which justifies his prosecution."¹¹¹ At the next annual meeting, the Association appointed a standing committee to address the disbaring of malefacting attorneys.¹¹²

One of the major problems the Association recognized was improper communications between lawyers and judges,¹¹³ not

107. See FREYER & DIXON, *supra* note 19, at 74.

108. ANNUAL MEETINGS I-III, *supra* note 54, at 242.

109. ANNUAL MEETINGS I-III, *supra* note 54, at 242.

110. ANNUAL MEETINGS I-III, *supra* note 54, at 170.

111. ANNUAL MEETINGS I-III, *supra* note 54, at 171. Historians who believe that such statements represented an elite desire to exclude rather than a selfless desire to improve the legal ranks can point to the Committee's statement that such measures were necessary "so as to prevent the ingress of those intellectually or morally unworthy." ANNUAL MEETINGS I-III, *supra* note 54, at 170. Nevertheless, a resolution to seek to disbar incompetent attorneys was adopted at the Eighth Annual Meeting. See EIGHTH ANNUAL MEETING, *supra* note 76, at 40. The Alabama legislature adopted an Act on January 22, 1885, authorizing the Association to initiate and prosecute proceedings for disbaring any practicing attorney in Alabama. See Act of Jan. 22, 1885, Ala. Acts 94 (authorizing the Alabama State Bar Association to institute and prosecute proceedings to disbar practicing attorneys). In 1888, the Association declared to its members: "It is the duty of every member to report to the Central Council any case of any attorney who shall within his knowledge have been guilty of an offense justifying such a proceeding." TENTH ANNUAL MEETING, *supra* note 79, at 66.

112. FOURTH ANNUAL MEETING, *supra* note 64, at 20.

113. See FREYER & DIXON *supra* note 19, at 70 ("State bar judges . . . generally were at the center of a more extensive network of political and social influences, which, according to the Alabama State Bar Association, weakened the independence

surprising in a rural state like Alabama.¹¹⁴ In his first report as Chairman of the Committee on Judicial Administration and Remedial Procedures, Jones identified exploiting personal influence with the judiciary as one of the major abuses committed by members of the Alabama Bar.¹¹⁵ The Alabama Code of Ethics, discouraging "[m]arked attention and unusual hospitality to a judge"¹¹⁶ and condemning private arguments with a judge on the merits of a case,¹¹⁷ clearly reflects Jones' desire to reform these improper influences.

Beyond seeking to improve legal education and adopting a code of ethics, the Alabama Association exhibited other features consistent with the professionalization movement. Its members obviously took social pleasure from belonging to the group.¹¹⁸ At the Ninth Annual Meeting one of the members remarked:

It seems by our Constitution that one of the objects of this Association is to promote social intercourse and good feeling among the members, and it is almost universally believed that a little wine and some cigars, and a little something to eat has the largest tendency in that direction of any one thing that can be done.¹¹⁹

The Association immediately adopted a resolution that each annual meeting feature a dinner for all members at its expense.¹²⁰ In addition, the Association tried to build a network of contacts with other state bar associations. There are constant

and professionalization of judicial administration.").

114. Apparently this problem extended beyond the bounds of rural states. Cf. Gordon, *supra* note 31, at 57 (stating that the City of New York's Bar Association's reform was in part spurred on by the knowledge that judicial decisions could be bought).

115. ANNUAL MEETINGS I-III, *supra* note 54, at 235-36.

116. No. 3 of the CODE OF ETHICS ALABAMA STATE BAR ASSOCIATION (Dec. 14, 1887), reprinted in HENRY S. DRINKER, LEGAL ETHICS 352-63 app. F (1953) [hereinafter CODE OF ETHICS]. When some of the members of the Association protested this rule, stating this abuse did not happen in Alabama, Jones vehemently protested. "That section was put in the Code in view of well known occurrences in the past, which, if members will recall for a moment, will leave no doubt that such abuses have existed in Alabama. When I mention a name everybody will at once confess that there has been in time past a necessity for having and acting upon such a rule. I refer to Busted. There were others whom I might mention." TENTH ANNUAL MEETING, *supra* note 79, at 13.

117. CODE OF ETHICS No. 15, *supra* note 116, at 356.

118. See Matzko, *supra* note 12, at 80.

119. NINTH ANNUAL MEETING, *supra* note 78, at 52.

120. NINTH ANNUAL MEETING, *supra* note 78, at 53.

references throughout the records of the Association to attempts to locate the addresses of other Bar Associations.¹²¹ The Association attempted, for example, to agitate for uniform action on the "laws of negotiable instruments" but only received replies from two of the thirty-three bar associations to which they had mailed the letter and the proposed bill.¹²²

The Association's most enduring monument to its drive towards professionalism is, of course, its 1887 Code of Ethics. The article next turns to an analysis of the writings by ethics scholars David Hoffman and George Sharswood that Jones consulted when he formulated the Code.

C. Antecedents to the Alabama Code

There is little surviving information about how Jones wrote the code. His debt to George Sharswood has been clearly identified. Jones' son reports that he kept a copy of Sharswood's *Essay on Professional Ethics* on his desk.¹²³ Apparently Jones also consulted the writings of David Hoffman.¹²⁴ An analysis of the writings of these two men underscores some of the major characteristics of Alabama's code.

David Hoffman was born in 1784.¹²⁵ A lecturer at the University of Maryland, in 1817 he published an ambitious guide to

121. See, e.g., SIXTH ANNUAL MEETING, *supra* note 74, at 133.

122. The bars of New Orleans, Louisiana and St. Paul, Minnesota expressed some interest in the bill. See TENTH ANNUAL MEETING, *supra* note 79, at 88-89. The Tenth Annual Meeting also saw an interesting debate over the merits of sending delegates to a national meeting of state bar associations that was to take place May 22, 1888, in Washington, D.C. TENTH ANNUAL MEETING, *supra* note 79, at 24-27, 90-94. One of the members objected to the national association's purpose of "securing a more homogeneous system of laws throughout the country." TENTH ANNUAL MEETING, *supra* note 79, at 91. Another member countered "There cannot be any doubt of the crying necessity of such an organization, (notwithstanding the great antipathy we Southerners have to the nation spelt with a big 'N')." TENTH ANNUAL MEETING, *supra* note 79, at 93-94. The Association appointed ten lawyers and judges to attend the meeting. TENTH ANNUAL MEETING, *supra* note 79, at 168.

123. Jones, *supra* note 4, at 248.

124. See N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 927 (1995) (stating that both Hoffman's and Sharswood's writing influenced the Alabama Code).

125. See Max Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 674 (1979).

legal education, the *Course of Legal Study*.¹²⁶ For many years, Hoffman's *Legal Study* was the standard manual for law students.¹²⁷ In 1836 Hoffman published a second edition of the *Course* and this time included "Fifty Resolutions in Regard to Professional Department," considered the first legal ethical code written for American lawyers.¹²⁸ While certain of the *Resolutions*—advocating courtesy to other lawyers,¹²⁹ responding quickly to all correspondence received,¹³⁰ and admiring instead of envying more successful lawyers¹³¹—look more like etiquette than ethics,¹³² they do clearly portray a system of professional morality.¹³³ For example, Hoffman states that a lawyer should be faithful to his clients,¹³⁴ yet counsels that attorneys should not plead the statute of limitations nor the bar of infancy as defenses to otherwise valid claims.¹³⁵ He maintains that attorneys must independently consult their consciences when conducting their cases and should not press claims that would make bad law.¹³⁶ Hoffman's moral system, then, is explicitly premised on the assumption that men's consciences will accurately reflect shared community norms.¹³⁷

George Sharswood was born in Philadelphia in 1810.¹³⁸

126. *Id.* at 678.

127. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 356 (1911).

128. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752-75 (2d ed. 1836), reprinted in DRINKER, *supra* note 116, at 338-51 App. E [hereinafter RESOLUTIONS].

129. Resolution No. 5, *id.* at 338-39.

130. Resolution No. 36, *id.* at 347.

131. Resolution No. 37, *id.*

132. See Cooper & Humphreys, *supra* note 124, at 926 (describing the *Resolutions*: "this precursor of modern legal ethics often sounds like a primer on civility").

133. Cf. BLEDSSTEIN, *supra* note 23, at 107-08 (contending that some nineteenth century associations "regularly mistitled practical codes of etiquette by referring to them in the lofty name of 'codes of ethics.' The latter prescribed the moral responsibility of a professional to the public, while the former described the conventional forms of intercourse by which practitioners related to each other.").

134. Resolution No. 18, RESOLUTIONS, *supra* note 128, at 342.

135. Resolution No. 12 (statute of limitations); Resolution No. 13 (bar of infancy), RESOLUTIONS, *supra* note 128, at 340.

136. Resolution No. 14, RESOLUTIONS, *supra* note 128, at 340; see also Bloomfield, *supra* note 125, at 687 (stating Hoffman "referred all problems to the practitioner's conscience—that mirror of universal morality").

137. See Bloomfield, *supra* note 125, at 684 (stating Hoffman's *Resolutions* "are most notable for their refusal to separate private from public morality, or to admit that practitioners might ever be guided by norms that did not equally apply to all other citizens").

138. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 24 (5th ed. Phila-

From 1850 to 1868 he served as a professor of law at the University of Pennsylvania and in 1879 became the Chief Justice of the Pennsylvania Supreme Court.¹³⁹ Sharswood published his *Essay on Professional Ethics* in 1854,¹⁴⁰ at which time he was also a sitting judge in the Pennsylvania courts.¹⁴¹ Sharswood's ethical system differs from Hoffman's in that Sharswood divorces the moral responsibility of lawyers from that of society at large and marries it to the client's interest.¹⁴² According to Sharswood, a lawyer owes his client "[e]ntire devotion to [his] interest . . . warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability . . ."¹⁴³ In contrast to Hoffman's belief that attorneys should not press bad claims, Sharswood thought that every client had the right to have his case decided on the law and the evidence. The lawyer "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."¹⁴⁴

Similarly, Sharswood and Hoffman differed in their views of the responsibility of criminal defense lawyers. Hoffman believed that guilty clients were entitled only to "a fair and dispassionate investigation of the facts of their cause, and the due application of the law, all that goes beyond this, either in manner or substance, is unprofessional . . ."¹⁴⁵ Sharswood countered that

delphia, T. & J. Johnson & Co. 1884) *preface* to 32 Rep. ABA i (1907).

139. *Id.* at ii.

140. *Id.*

141. Pearce, *supra* note 2, at 248.

142. See Bloomfield, *supra* note 125, at 687 ("Sharswood thus severed the tie between public and private morality and replaced Hoffman's uniform moral standards with a set of professional norms that often clashed with the attitudes of the man in the street.")

143. SHARSWOOD, *supra* note 138, at 24.

144. SHARSWOOD, *supra* note 138, at 27. Sharswood, however, does not seem to have been entirely easy with the concept of the zealous advocate who consults no morality other than the wishes of his client. For example, he states that "[c]ounsel have an undoubted right, and are 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." SHARSWOOD, *supra* note 138, at 39. For defense counsel, "there may and ought to be a difference made in the mode of conducting a defence against what is believed to be a righteous, and what is believed to be an unrighteous claim." SHARSWOOD, *supra* note 138, at 41. Thus, Sharswood, too, believed in the power of shared community norms to distinguish between right and wrong.

145. Resolution No. 15, RESOLUTIONS *supra* note 128, at 340-41.

lawyers should defend all the criminally accused with the utmost zeal. "It is not to be termed screening the guilty from punishment, for the advocate to exert all his ability, learning, and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner."¹⁴⁶ Even Sharswood, however, drew the line at an attorney's acting as a private prosecutor against a man he believed to be innocent.¹⁴⁷

Like Hoffman, Sharswood did not ignore matters more properly labeled as etiquette. Sharswood portentously underscores, for example, that "[t]he importance of good handwriting cannot be overrated."¹⁴⁸ Sharswood maintains that a lawyer should read "polite literature," study languages, and "cultivate a pleasing style, and an easy and graceful address."¹⁴⁹ In a particularly earnest passage, Sharswood warns:

It may appear like digressing from our subject, to speak of such qualities as attention, accuracy, and punctuality, but like the minor morals of common life, they are little rills which at times unite and form great rivers. A life of dishonor and obscurity, if not ignominy, has often taken its rise from the foundation of a little habit of inattention and procrastination. System is everything.¹⁵⁰

Both Hoffman and Sharswood hail from a moral universe that is distinctly non-commercial. Sharswood declares, "[a] horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses with which any state or community can be visited."¹⁵¹ Hoffman derides strategic behavior in settlement negotiations.

I will never permit myself to enter upon a system of tactics to ascertain who shall overreach the other by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity, suspicion, vigilance to the letter, and all of the other machinery used by this class of tacticians to the vulgar surprise of clients, and the

146. SHARSWOOD, *supra* note 138, at 35.

147. SHARSWOOD, *supra* note 138, at 36.

148. SHARSWOOD, *supra* note 138, at 67.

149. SHARSWOOD, *supra* note 138, at 76.

150. SHARSWOOD, *supra* note 138, at 66.

151. SHARSWOOD, *supra* note 138, at 92.

admiration of a few ill-judging lawyers.¹⁵²

While these high-minded sentiments might have been appropriate for the legal practice of 1836, they seem increasingly less relevant to the late nineteenth century, which saw the rise of sophisticated business lawyers, who primarily acted as corporate advisors and negotiators.¹⁵³

That Sharswood and Hoffman explicitly wrote for a student audience no doubt contributed to the loftiness of their tone and their idealistic view of legal practice.¹⁵⁴ As academic scholarship, their ethical strictures had no enforcement mechanisms beyond moral compulsion and the threat of professional dishonor.¹⁵⁵ These two books designed for students and young practitioners provided Jones with his most important templates when he wrote the Alabama Code of Ethics.

152. Resolution No. 32, RESOLUTIONS *supra* note 128, at 345-46.

153. See Cooper & Humphreys, *supra* note 124, at 924-25 (arguing Sharswood's ethics were not suited for "sophisticated corporate and commercial marketplace"). There was a significant commercialization of the legal profession in the second half of the nineteenth century. In the major industrial centers, lawyers turned increasingly from roles as courtroom advocates to corporate advisors. See Robert T. Swaine, *The Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 91 (1949) (noting that during the 1880s and 1890s lawyers in New York, Philadelphia, Chicago, and Boston "were devoting an increasing part of their practice to office work, drafting legal documents to create, consolidate and reorganize corporations and to effect public issues of securities"); Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS, *supra* note 12, at 50, 59 ("By the mid-1880s, the locus of the most elite practice had decisively shifted from the courtroom to the law office and conference room."). New branches of law developed to accommodate the industrialization of American business, including patent law, corporate law, trusts and estates, and tax law. See Gerard W. Gawalt, *The Impact of Industrialization of the Legal Profession in Massachusetts, 1870-1900*, in THE NEW HIGH PRIESTS, *supra* note 12, at 97, 100.

154. See, for example, Sharswood's exhortation: "Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not in every sense of the word, a good man." SHARSWOOD, *supra* note 138, at 111; see also Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L. REV. 1323, 1325 (1988) (stating both Sharswood's and Hoffman's writings were to "assist the young practitioner").

155. Sharswood says, "the ambition to please the Bar can never mislead [a young lawyer]. Their good graces are only to be gained by real learning, by the strictest integrity and honor, by a courteous demeanor, and by attention, accuracy and punctuality in the transaction of business." SHARSWOOD, *supra* note 138, at 22-23.

V. THE ALABAMA CODE OF LEGAL ETHICS OF 1887

The influence of Hoffman and Sharswood is clearly visible in the code. The high-minded and lofty tone recalls the tenor of those two authors' works. Its preamble reads: "The purity and efficiency of judicial administration, which, under our system, is largely government itself, depend as much upon the character, conduct, and demeanor of attorneys in this great trust, as upon the fidelity and learning of courts or the honesty and intelligence of juries."¹⁵⁶ The next provision of the code, consisting entirely of a quotation from Sharswood, states that only "[h]igh moral principle" provides a safe guide to lawyers; it furnishes "the only torch to light his way amidst darkness and obstruction."¹⁵⁷

Jones adopted some of the rules of etiquette elucidated by Hoffman. The Alabama Code, for example, counsels "punctuality in answering letters."¹⁵⁸ Hoffman highlights the importance of treating witnesses well: "I shall never esteem it my privilege to disregard their feelings."¹⁵⁹ The Alabama Code states "[w]itnesses and suitors should be treated with fairness and kindness."¹⁶⁰

The Code owes a larger debt, however, to Sharswood. A prominent contemporary ethics scholar describes the three "core values" of the legal profession as "loyalty, confidentiality, and candor to the court."¹⁶¹ Jones adopted the substance of the provisions in his Code taking two of these three subjects directly from Sharswood. When addressing what a lawyer owes his client, Jones quotes from Sharswood that the duty is "entire devotion to [his] interest" ¹⁶² However, Jones quickly adds the

156. CODE OF ETHICS, *supra* note 116, at 352.

157. CODE OF ETHICS, *supra* note 116, at 352.

158. Compare CODE OF ETHICS No. 33, *supra* note 116, at 359 with Resolution No. 36 ("Every letter or note that is addressed to me shall receive a suitable response, and in proper time."), RESOLUTIONS, *supra* note 128, at 347.

159. Resolution No. 42, RESOLUTIONS, *supra* note 128, at 349.

160. CODE OF ETHICS No. 53, *supra* note 116, at 362.

161. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1246 (1991).

162. Compare CODE OF ETHICS No. 10, *supra* note 116, at 355 with SHARSWOOD, *supra* note 138, at 24. As discussed in Part III of this paper, Hoffman had taken a different view of the attorney's loyalty, placing a higher premium on lawyers' duties

caveat: "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 the man's accountability to the Creator . . . and the obligation to his neighbor . . ." ¹⁶³ Jones also largely adopted Sharswood's view of the limits and implications of lawyer-client fidelity. While stating that it is wrong to prosecute someone a lawyer believes to be innocent, ¹⁶⁴ the Code also counsels that a lawyer cannot refuse to defend someone he knows or believes to be guilty. ¹⁶⁵

In terms of candor to the court, Sharswood stresses that the lawyer must be "particularly cautious" in ensuring that all statements made to the court are accurate; an attorney should "distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions." ¹⁶⁶ Jones adopts and extends Sharswood's position: "The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other." ¹⁶⁷

Jones made what has turned out to be a significant departure from Sharswood in the area of attorney-client confidences. While Sharswood does not explicitly mention the duty of confidentiality, the Alabama Code states: "Communications and confidence between client and attorney are the property and secrets of the client[;] . . . even the death of the client does not absolve the attorney from his obligation of secrecy." ¹⁶⁸ Jones' use of the word "secrecy," which was later adopted by the ABA, is the foundation of the contemporary lawyer's duty of confidentiality, which extends beyond the reach of the common-law based attorney-client privilege. ¹⁶⁹ Jones derived this provision from the Code of Alabama which articulated seven duties owed by law-

to society at large. See text accompanying notes 134-137, *supra*.

163. CODE OF ETHICS No. 10, *supra* note 116, at 355. This emphasis on societal morality recalls Hoffman's philosophy.

164. CODE OF ETHICS No. 12, *supra* note 116, at 356.

165. CODE OF ETHICS No. 13, *supra* note 116, at 356.

166. SHARSWOOD, *supra* note 138, at 18.

167. CODE OF ETHICS No. 5, *supra* note 116, at 354.

168. CODE OF ETHICS No. 21, *supra* note 116, at 357.

169. See L. Ray Patterson, *Legal Ethics and the Duty of Loyalty*, 29 EMORY L.J. 909, 914 (1980) (stating that duty of confidentiality "made its first appearance in the Alabama Code in 1887"); see also RHODE, *supra* note 6, at 242 (noting that a confidentiality requirement does not appear in Hoffman or Sharswood).

yers to the clients, including "[t]o maintain inviolate the confidence, and, at every peril to themselves, to preserve of their clients."¹⁷⁰ Alabama, in turn, patterned its statute on the 1849 Field Code of New York.¹⁷¹

Like Hoffman's and Sharswood's writings, the Alabama Code had no formal enforcement mechanisms. The Code relied on moral opprobrium and lawyers' solicitude for their reputation to induce practitioners to comply with its mandates. When advocating for adoption of the Code, Jones stated:

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.¹⁷²

Like the ABA's Canons that followed the Alabama Code, the provisions of the Code functioned merely as evidence of enforceable legal standards.¹⁷³ Like Hoffman's and Sharswood's writings, it is premised on the assumption that the Code merely articulates community norms already shared by the legal profession.¹⁷⁴ However, the Association's concerns about disbarring unethical attorneys, reflected in the statements made at the Annual Meetings of the Association, found their way into the Code.¹⁷⁵ The assertion of a member of the Association is significant evidence of this vision of shared community norms:

The truth is that most of the recommendations of the committee

170. ALA. CODE § 872 (1867).

171. Patterson, *supra*, note 169, at 941-43.

172. ANNUAL MEETINGS I-III, *supra* note 54, at 235.

173. See Hazard, *supra* note 161, at 1250; see also Cooper & Humphreys, *supra* note 124, at 928 ("The Canons, like the Resolutions before them, and even the Code of Alabama, were clearly aspirational, not penal, as few mortals could completely qualify as 'ministers of the altar.'). There is evidence, however, that the Association hoped the Code could be enforced. After adopting the Code in 1887, the Association requested that Jones not disband his committee until they made a recommendation for the means of enforcing the Code. TENTH ANNUAL MEETING, *supra* note 79, at 9.

174. See *supra* text accompanying notes 134 and 156.

175. CODE OF ETHICS No. 11, *supra* note 116, at 355-56 ("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.").

[on legal ethics] would be suggested to any gentleman at the Bar. Any lawyer who is a real gentleman would be almost certain to carry out these rules in his intercourse both with the judges on the Bench and his professional brethren.¹⁷⁶

Despite its legal unenforceability, Jones authored the Code of Ethics for the benefit of practicing lawyers and did not limit himself to the guidance and inspiration of law students.¹⁷⁷ Unlike Sharswood's and Hoffman's tracts, the Code includes mundane advice, such as the benefits of reducing important agreements with clients to writing,¹⁷⁸ the dangers of negotiating a settlement without first informing the client,¹⁷⁹ and the problems of assuring the client of success in the litigation.¹⁸⁰

Similarly, the Code of Ethics delves with much greater detail into the economics of practicing law, including fixing fees and advertising. Sharswood's *Essay*, for example, delivers a long tribute to Greek and Roman lawyers who collected no fees at all.¹⁸¹ Sharswood limits his substantive remarks on the subject of fees to the recommendation that lawyers negotiate their fees before they begin working instead of asking a court to determine a fair fee at the termination of the litigation,¹⁸² the admonition that lawyers should sue for payment of their unpaid fees only in extraordinary situations,¹⁸³ and the condemnation of the moral effects of contingency fees.¹⁸⁴ Although recognizing the legality of a contingency system, Sharswood writes that the worst consequence of the arrangement is "its effect upon professional char-

176. TENTH ANNUAL MEETING, *supra* note 79, at 14.

177. However, one member of the Association declared that the code "is intended in a greater degree to call the attention of the younger men in the profession." TENTH ANNUAL MEETING, *supra* note 79, at 14.

178. CODE OF ETHICS No. 40, *supra* note 116, at 360.

179. CODE OF ETHICS No. 42, *supra* note 116, at 360.

180. CODE OF ETHICS No. 32, *supra* note 116, at 359.

181. SHARSWOOD, *supra* note 138, at 81-83. Sharswood also advocated the provision of pro bono services for the poor: "There are many cases, in which it will be [a lawyer's] duty, perhaps more properly his privilege, to work for nothing." *Id.* at 151. Similarly, the Alabama Code states "[a]n attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause, and should always be a friend to the defenseless and oppressed." CODE OF ETHICS No. 56, *supra* note 116, at 363.

182. SHARSWOOD, *supra* note 138, at 148.

183. SHARSWOOD, *supra* note 138, at 151.

184. SHARSWOOD, *supra* note 138, at 153-54, 160-62.

acter. It turns lawyers into higglers with their clients."¹⁸⁵

By contrast, the Alabama Code of Ethics takes a more realistic view of compensation. Jones agreed with Sharswood that it is better practice to agree on the fee in advance¹⁸⁶ and not to sue for a fee "except as a last resort to prevent imposition or fraud."¹⁸⁷ In one provision slightly reminiscent of Sharswood's altruistic view of compensation but probably more derivative of southern notions of family and society, the Code states that lawyers should not generally charge for services to the family of a deceased attorney.¹⁸⁸ Jones also includes practical advice, such as opining that a regular client may be charged less,¹⁸⁹ and provides a general guide to the kinds of factors that should be used to determine the appropriate fee. These considerations include the time and labor required, the possible conflicts that may arise from the case, the size of the case, and whether payment is fixed or on a contingency basis.¹⁹⁰ Instead of reproducing Sharswood's long harangue against contingency fees, the Alabama Code tersely states: "Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred."¹⁹¹

Neither Sharswood nor Hoffman mentions the delicate issue of lawyer advertising. The Alabama Code approves of "[n]ewspaper advertisements, circulars and business cards, tending professional services to the general public,"¹⁹² but labels lawyers' attempts to stimulate newspaper coverage of their cases "of evil tendency and wholly unprofessional."¹⁹³ The Code takes a more equivocal stance on newspaper publications written by a

185. SHARSWOOD, *supra* note 138, at 161. Scholars have remarked on the organized bar's hostility to contingency fees. Although some believe that disapproval of the practice was an effort by the elite bar to shut out poorer members of the profession and their clients, others believe that hostility to the practice derived from a desire to maintain professional independence from the client. See Michael Mariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1026 (1994) (adopting the latter theory).

186. CODE OF ETHICS No. 46, *supra* note 116, at 361.

187. CODE OF ETHICS No. 47, *supra* note 116, at 361.

188. CODE OF ETHICS No. 52, *supra* note 116, at 362.

189. CODE OF ETHICS No. 49, *supra* note 116, at 361.

190. CODE OF ETHICS No. 50, *supra* note 116, at 362.

191. CODE OF ETHICS No. 51, *supra* note 116, at 362.

192. CODE OF ETHICS No. 16, *supra* note 116, at 356.

193. CODE OF ETHICS No. 16, *supra* note 116, at 356.

lawyer on the merits of pending litigation. "It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously."¹⁹⁴ The Code emphatically decries ambulance chasing, employing runners, or generally stirring up litigation.¹⁹⁵ With these gentlemanly views on the initiation and funding of lawsuits, the Alabama Code of Ethics was not well suited to a competitive urban practice.¹⁹⁶

Thus, the Alabama Code of Ethics adopts the lofty sentiments and assumptions about shared norms reflected in the writings of Sharswood and Hoffman. The Code, however, goes beyond the academic limitations of Sharswood and Hoffman by attempting to tackle the practical problems faced by an ordinary practitioner. Although Jones' solutions often tended to benefit elite lawyers with well-established practices, he did attempt to grapple with the quotidian problems faced by the practicing Bar, such as the necessity of the contingency fee arrangements. As will be discussed in the next section, many other jurisdictions endorsed Jones' solutions to these problems by adopting the Alabama Code in its entirety or with modest modifications.

VI. THE INFLUENCE OF THE ALABAMA CODE ON THE CODES OF OTHER STATES AND ON THE ABA'S CANONS OF PROFESSIONAL ETHICS

In 1905, the American Bar Association decided to research the advisability of adopting a national legal code of ethics.¹⁹⁷ In

194. CODE OF ETHICS No. 17, *supra* note 116, at 356.

195. CODE OF ETHICS No. 20, *supra* note 116, at 357. ("It is indecent to hunt up defects in titles and the like and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust, make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit.").

196. See AUERBACH, *supra* note 11, at 42 (stating rules about non-solicitation "could hardly reassure . . . the new-immigrant neophyte in a large city where restricted firms monopolized the most lucrative business and thousands of attorneys scrambled for a share of the remainder").

197. RUTHERFORD, *supra* note 2, at 87. The ABA was apparently prompted by a speech given by Teddy Roosevelt blasting the role of corporate lawyers in assisting their clients in evading regulatory legislation. See Mariens, *supra* note 185, at 1024 (quoting Roosevelt as saying "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

1907, the ABA Committee on Professional Ethics published a report advocating the adoption of a code of ethics.¹⁹⁸ Appendix B to that report analyzed all the codes of ethics that had been adopted by state Bars; the list included Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, Wisconsin, and West Virginia.¹⁹⁹ The Committee noted that the Alabama Code "is the foundation of all the other codes" and used it as its model, merely noting when the other jurisdictions had deviated from its wording.²⁰⁰

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.²⁰¹ 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."²⁰² 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"²⁰³ Six

their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth.").

198. See 31 REPORT OF THE THIRTIETH MEETING OF THE AMERICAN BAR ASSOCIATION at 676 (1907) [hereinafter ABA REPORT]. The American Bar Association, like Hoffman, Sharswood, and Jones before it, indulged in a hyperbolic panegyric on the importance of an ethical code: "Our profession is necessarily the keystone of the republican arch of government. Weaken this keystone by allowing it to be increasingly subject to the corroding and demoralizing influence of those who are controlled by graft, greed and gain . . . and sooner or later the arch must fall. It follows that the future of the republic depends upon our maintenance of the shrine of justice pure and unsullied." *Id.* at 681.

199. See *id.* at 685 (Appendix B).

200. Louisiana had also adopted a code but had not used Alabama as the model. *Id.* at 678. It was not included in the ABA's analysis.

201. Several of the states also objected to the Alabama Code's advice on how to treat conflicts among clients or conflicts among several lawyers of the same client. Only Michigan adopted the Code's provision that clients of longest standing take precedence in conflicts between clients. CODE OF ETHICS No. 31, *supra* note 116, at 359; ABA REPORT, *supra* note 198, at 702. Similarly the Alabama Code provision advising attorneys how to proceed if there were already an attorney representing a client in a case, CODE OF ETHICS No. 44, *supra* note 116, at 361, was adopted by five states, modified by one, and rejected by four. ABA REPORT, *supra* note 198, at 707.

202. ABA REPORT, *supra* note 198, at 696.

203. CODE OF ETHICS No. 48, *supra* note 116, at 361; ABA REPORT, *supra* note

states rejected the Code's provision that a regular client may be charged less for services than a "casual" client.²⁰⁴ All states but one, however, adopted Jones's description of the general factors to evaluate when fixing a fee.²⁰⁵ In sum, although other jurisdictions expressed greater disapproval of solicitation while seeming to erase suggestions that lawyers should charge their clients less in specific instances, it is clear that the economics of the profession continued to generate the most controversy around the adoption of codes of ethics.

In 1907, the ABA appointed Thomas Goode Jones to its Committee on Professional Ethics, even though he was not a member of the organization.²⁰⁶ With his membership on the committee, it is not surprising that the code of ethics the ABA adopted in 1908, the Canons of Professional Ethics, should have drawn heavily from the Alabama Code.

Although a detailed comparison between the ABA Canons and the Alabama Code of Ethics is beyond the scope of this article, a few remarks on the subject highlights the influence of Jones' vision. Virtually all of the thirty-two original Canons derive from one of the fifty-six provisions of the Alabama Code of Ethics. The clearest exception to this pattern is Canon 2, which states that lawyers have a duty to prevent political considerations from trumping evaluation of judicial fitness in the selection of judges.²⁰⁷ The Alabama Code makes no mention of the proper criteria for the selection of judges.

A few provisions appear to be new to the Canons but are arguably based on one of the statements in the Alabama Code. For example, Canon 10 states that "[t]he lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."²⁰⁸ The Alabama Code had stated that an attorney should not commingle his private property with a client's property, should avoid becoming a borrower or creditor of their

198, at 708.

204. CODE OF ETHICS No. 49, *supra* note 116, at 361; ABA REPORT, *supra* note 198, at 709.

205. CODE OF ETHICS No. 50, *supra* note 116, at 362; ABA REPORT, *supra* note 198, at 709-10.

206. ABA REPORT, *supra* note 198, at 679.

207. CANONS OF PROFESSIONAL ETHICS Canon 2 (1908).

208. CANONS OF PROFESSIONAL ETHICS Canon 10 (1908).

client, and should not "bargain[] about the subject matter of the litigation" ²⁰⁹ Other Canons reveal an obvious shift in professional norms. The Alabama Code had stated that "[c]ontingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred." ²¹⁰ Canon 13 considerably softened official disapproval of the practice: "contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges." ²¹¹

The Canons also omit some provisions of the Alabama Code. For example, the ABA apparently did not feel the need to state "[o]ne 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." ²¹² The Canons also left out the most mundane aspects of the Alabama Code, such as advising lawyers to reduce important agreements to writing. ²¹³ In an important omission that has already been mentioned, the Canons did not impose a duty of secrecy on attorneys towards their clients. ²¹⁴

The most striking feature of the Canons, however, is their similarity to the Alabama Code. The Canons governing fixing the amount of the fee, ²¹⁵ attempts to privately influence the court, ²¹⁶ candor and fairness to the court, ²¹⁷ advertising, ²¹⁸ the duty of a lawyer to his client, ²¹⁹ and "[u]pholding the honor of the profession" ²²⁰ are some of the more important provisions clearly patterned on the Alabama Code. ²²¹

Generally, the importance of both codes of ethics and legal education to the professionalization of the practice continued into the twentieth century. In 1908, the ABA recommended that

209. CODE OF ETHICS Nos. 37, 38, *supra* note 116, at 360.

210. CODE OF ETHICS No. 51, *supra* note 116, at 362.

211. CANONS OF PROFESSIONAL ETHICS Canon 13, at n.5 (1908).

212. CODE OF ETHICS No. 7, *supra* note 116, at 355.

213. CODE OF ETHICS No. 40, *supra* note 116, at 360.

214. *See supra* text accompanying notes 168-171.

215. CANONS OF PROFESSIONAL ETHICS Canon 12 (1908).

216. CANONS OF PROFESSIONAL ETHICS Canon 3 (1908).

217. CANONS OF PROFESSIONAL ETHICS Canon 22 (1908).

218. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

219. CANONS OF PROFESSIONAL ETHICS Canon 15 (1908).

220. CANONS OF PROFESSIONAL ETHICS Canon 29 (1908).

221. In order, they are based on the CODE OF ETHICS Nos. 50, 3, 5, 16, 10, 8, 11, *supra* note 116.

professional ethics be taught in all law schools and candidates for admission to the Bar be examined on the subject.²²² By 1910, two years after the ABA had promulgated its Canons of Professional Ethics, they had been adopted in twenty-two states.²²³

VII. CONCLUSION

The contributions of the Alabama State Bar Association and Thomas Goode Jones to the history of legal ethics in the United States are often given only passing mention. In 1958, however, the United States Congress delivered "A Tribute to the Late Thomas Goode Jones."²²⁴ The Senate published in the *Congressional Record* the Alabama Code of Ethics and an address that Charles S. Rhyne, the President of the American Bar Association, had given in memory of Jones. The *Congressional Record* reads:

The Honorable Thomas Goode Jones needs no commendation from any man, for his name and his brilliant record and achievements are the finest possible tribute to the man himself. Truly he was among the small body of history-making figures who seem to arise in each era of crisis, destined to mold the minds of men, to chart the course of history and to provide the rock-like example of leadership that enables men to find a better way of life.²²⁵

Certainly, Jones and the Alabama State Bar Association hoped that their Code of Ethics would assist lawyers in leading a better professional life. Although their solutions in many ways seem inadequate for the complex practice of a highly industrialized age, they provide a compelling example of a thoughtful and concerted commitment to the furtherance of the law as a noble profession.

222. RUTHERFORD, *supra* note 2, at 89.

223. RUTHERFORD, *supra* note 2, at 89.

224. CONG. REC. 15,514 (July 30, 1958).

225. *Id.*

