Ethics & Aspirations:
The Changing Nature of Professional Regulation of Lawyers
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For most of the nineteenth century the American legal profession did not find it necessary to create a regulatory framework for lawyer behavior. The courts would, rarely, discipline lawyers for various forms of what we would today label as malpractice, but the organized profession depended upon self-imposed informal standards of behavior which, if violated, would cause violators to be shunned by other members of the profession. In effect, the punishment imposed upon those lawyers who did not adhere to conventional professional norms was loss of reputation and concomitant loss of business.

The Evolution of the ABA, and its Canons,

Code and Rules – A Brief History

The first adoption of a formal code of professional ethics by the legal profession was by the action of the Alabama Bar Association in 1887. This was followed by the adoption by the American Bar Association of its first formal code of legal ethics in 1908. Prior to the formation of the ABA in 1878, there were relatively few cases of lawyer misconduct that would have
required the use of codified rules and the cases that did arise were dealt with by judges under their general supervisory powers.\(^6\)

Lawyers in Colonial America were relatively few in number and, as noted, tended to use informal sanctions and peer pressure to regulate professional behavior. These factors taken together meant the profession was largely left alone.\(^7\) That is not to say there were no incidents of misconduct and punishment. While few statistics exist, in those recorded incidents where misconduct was alleged, a lawyer was required to respond to allegations that he engaged in elicit conduct before a judge or judges. If found guilty, the lawyer was liable be sanctioned or disbarred, which was consistent with the practice of English common law courts.\(^8\) But complaints against lawyers were usually simply that – complaints. For the most part, members of the organized Bar tended not to commit acts that were deemed to rise to the level of being reprehensible or adversely affecting the cases of their clients (most of the work lawyers engaged in during this time involved cleaning up the “trivial and untidy messes left by clients” with some transactional work).\(^9\) Therefore, during the Colonial Era and for almost two hundred years after the American Revolution, lawyers were relatively free from any sort of regulation.\(^10\)

Instead of regulation, for most of the nineteenth century legal ethics was deemed to be the preserve of academics. In 1836 David Hoffman, founder of the first law school in Maryland, published the second edition of his treatise, *A Course of Legal Studies*.\(^11\) To this was appended Hoffman’s *Fifty Rules on Professional Deportment*, a list of rules Hoffman believed that every

\(^{6}\) See id at 241-2.


\(^{8}\) See id. at 473-76.

\(^{9}\) Id. at 473.

\(^{10}\) See id. at 470.

\(^{11}\) See DAVID HOFFMAN, *A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS, AND THE PROFESSION GENERALLY* (1836).
lawyer should follow during his professional career. The subject of these rules ranged from client confidentiality to conflicts to admonitions not to be greedy. Hoffman’s work gained wide notoriety but his Rules did not become the basis for formal regulatory schemes until the Alabama Code of 1887 and the ABA Code of 1908 were adopted.

While Hoffman’s Rules were the earliest American attempt to rules of professional ethics for the legal profession in the nineteenth century, they were not the only such attempts. George Sharswood, a Philadelphia lawyer, law professor, and judge taught a course on legal ethics at the University of Pennsylvania for many years. His lectures there became a much reprinted book. But, again, it would be decades before they would influence a formal regulatory scheme.

Organized bar associations largely did not emerge until the late ninetieth and early twentieth centuries. Virtually all of these organizations were social in nature. Very few of them would be considered an activist or a prosecutorial group, unlike today’s modern bar. But, beginning in 1887 in Alabama, some of these organizations did adopt formal regulatory schemes. In fact, legal ethics pioneer Henry S. Drinker noted in his work Legal Ethics that just eleven states had adopted such codes prior to the implementation of the Canons, but these “codes” were nothing more than a “perfunctory and non-specific list of lawyer duties contained in the oath of admission prescribed by statute.” Thus, lawyers continued to practice in a relatively uninhibited manner, with individual clients or highly motivated volunteer lawyers or judges calling out any undesirable behavior.

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12 See id.
14 See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1860); see also Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO J. LEGAL ETHICS 241 (1992).
15 See Wolfram, supra note 7, at 476.
16 Id. at 485.
17 See id. at 477.
That would change in 1908. In response to an impassioned speech given by President Theodore Roosevelt at Harvard University that condemned the legal profession, and in an attempt to maintain pace with the more progressive bar associations throughout the country such as Alabama, the ABA released its first guidelines aimed at governing attorney ethical conduct. James M. Altman, in his study on the 1908 *Canons*, thoroughly sums up the young ABA’s motives for finally, after over one hundred years, taking the initiative to publish guidelines for the legal profession:

“The promulgation of *Canons* was intended to help the legal profession enhance its reputation and, thereby, better perform its important social and political role as America’s ‘governing class,’ by providing ethical standards: (i) to judge who should be permitted to become and remain lawyers; (ii) to educate young or inexperienced lawyers; and (iii) to elicit and strengthen lawyers’ resolve to conduct themselves in accordance with the highest ethical standards.”

Thus, in 1908, the first national code of legal ethics in the United States was established. Thirty-two rules ranging in topic from the duty of lawyers to the courts, to fixing the fee amount, to treatment of witnesses, were promulgated. The ABA had finally provided some guiding principals to a profession that by this time had been heavily criticized by the public as being “hired cunning” and pettifoggers, or inferior legal practitioners who dealt with petty cases and employed dubious practices.

The early years of the organized bar were relatively uneventful. By 1919, however, committees began to form and the more active Bar that is present today began to take shape. The most significant of these committees, the Committee on Professional Ethics and Grievances (as it was called at the time), was established and by 1922 had the power “with its discretion…express its opinion concerning proper professional conduct, and particularly concerning the application

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18 Altman, *supra* note 5, at 239.
19 *Id.*
of the tenets of ethics thereto, when consulted by officers or committees of state or local bar associations.” 21 From that point forward, the ABA embarked on a mission that has continued until today, of tweaking the Canons (now Rules) and issuing powerfully influential formal opinions. By 1932, eighty-six formal opinions pertaining to subjects such as solicitation of business, firm names, attorney-client privileges, conflicts of interest, fee sharing, specializing, and trial publicity, had been issued. 22

But it was not until Henry S. Drinker took over the Committee on Professional Ethics and Grievances that “a New Era” in legal ethics was truly born, and lawyers across the country began to realize that the rules and opinions published by the bar could be spread far and wide and were, as a result, here to stay. 23 It was Drinker who first began to realize the limitations of the Canons and the ABA’s ability to enforce those Canons. During a heated debate about whether a particular formal opinion should be promulgated, Drinker famously expressed his views on the limited scope of the ABA, which would become a call for reform that has continued until today to make the ABA a less aspirational and a more practical organization:

“Our position is that we haven’t any power to enforce our decisions. All we can do is to recommend to the Board of Governors that an offending attorney be disciplined by censure, suspension, or expulsion from the Association. The Board of Governors can refuse to accept our recommendation, and has, in a number of cases. They are not constituted by the by-laws as an appeal court to decide whether our opinion is right or wrong. They are more like a board of pardons that says, irrespective of whether a man has committed an offense, ‘We won’t do anything about it.’” 24

Drinker knew, as many in the profession did at this time, that it was rare for the Canons to be invoked in state disciplinary proceedings against lawyers. Furthermore, the ABA had been established and functioned effectively primarily as an “exclusive social fraternal organization”

21 Id. at 1065.
22 See id.
23 Id. at 1067.
24 Id. quoting Drinker and his appeal to the Association’s Board of Governors shortly after he had taken over the Chairman’s position on the Committee on Legal Ethics.
rather than a regulatory body.\textsuperscript{25} As a result, it was not about to risk angering its “high-status” members over these matters.\textsuperscript{26} Despite Drinker’s views and the reality of the situation, he continued to try to improve the legal profession through the strengthening and enhancement of legal ethics laws. During the first three years of his chairmanship, he wrote 186 informal opinions – an insignificant amount compared to the number of both informal and formal opinions he would eventually write throughout his tenure.\textsuperscript{27}

But by far his most significant contribution to not only the Committee and the ABA, but to the legal profession in general, was his 1953 publication of \textit{Legal Ethics}.\textsuperscript{28} In Drinker’s own words, the primary purpose of \textit{Legal Ethics} was to “make readily available to the chairman and members of the various ethics committees throughout the country, as well as to lawyers confronted with ethical problems, a summary of the [formal and informal] decisions by such committees.”\textsuperscript{29} One of the more valuable aspects of Drinker’s book was the inclusion of an appendix containing summaries of all of the Committee’s decisions. This practice became so useful for attorneys across the county that the ABA made it an annual publication available to its members.

In addition to the formal and informal opinions being published, the \textit{Canons} themselves changed. Overall, several major and minor changes, additions, and subtractions, were made to the \textit{Canons}.\textsuperscript{30} These modifications, coupled with the significant number of interpretative decisions, began to highlight the deficiencies of the \textit{Canons}. A strong call from the legal

\textsuperscript{25} Wolfram, \textit{supra} note 7, at 485.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{See} Armstrong, \textit{supra} note 20, at 1067.
\textsuperscript{28} \textit{See} HENRY S. DRINKER, \textit{LEGAL ETHICS} (1953).
\textsuperscript{29} Armstrong, \textit{supra} note 20, at 1068, \textit{quoting} DRINKER, \textit{LEGAL ETHICS}.
\textsuperscript{30} \textit{See} Armstrong, \textit{supra} note 20, at 1066.
community for the ABA to bring marketable change to the Canons began. Soon, the governing body would take notice.

In 1965, the ABA and specialized committees determined that the “existing [C]anons were] in need of substantial revision.”31 Specifically, it was noted that these new rules must “be capable of enforcement. They must lay down clear, peremptory rules in the critical areas relating most directly to the duty of lawyers to their clients and to the courts. This sharpening and clarification of the [C]anons will facilitate more effective disciplinary action and also increase significantly the level of voluntary compliance.”32 The solution, in brief, was to divide the new Model Code, as it was to be dubbed, into three parts: Canons, Ethical Considerations, and Disciplinary Rules. The nine canons were general restatements taken from the original Canons, and the Ethical Considerations were intended to be aspirational goals for the legal profession. The mandatory provisions of the Code were to be contained in the Disciplinary Rules.33

Suffice it to say there were many problems with the new Model Code from the start. Chiefly, lawyers had significant difficulty in determining the best possible way to interpret the three distinct provisions.34 Specifically, there were several internal inconsistencies between the different provisions.35 Larger issues that attracted the attention of many legal scholars included the suppression of lawyer advertising and the prohibition of lawyer solicitation, both of which were struck down by the U.S. Supreme Court as being unconstitutional.36 These issues, and the

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31 Id. at 1069 quoting the committee’s report.
32 Id. quoting Lewis F. Powell, Jr. who made the remarks in his annual address to the A.B.A. Powell would serve as the body’s president from 1964-1965 and who would eventually become an Associate Justice on the Supreme Court of the United States.
34 See id at 2-3.
35 See id at 3.
36 See id. See also Bates v. Arizona, 433 U.S. 350, reh’g denied, 434 U.S. 881 (1977) (upholding the right for lawyers to advertise their services); Oralik v. Ohio State Bar Assn., 436 U.S. 447, reh’g denied,439 U.S. 883 (1978) (lawyer's in-person solicitation of employment could be prohibited); In re Primus, 436 U.S. 412 (1978)
countless other criticisms directed towards the Code, led to its demise and eventual replacement with the Model Rules of Professional conduct just over a decade later.

In 1983, the Kutak Commission, headed by Robert J. Kutak, a prominent Nebraska lawyer and Bar leader, addressed not only the Code’s structural issues but also issues such as lawyer-client confidentiality, advertising and solicitation, and conflicts of interest by proposing that the ABA replace the Model Code with new Model Rules of Professional Conduct. The new Rules marked a sharp departure from the old Code: black-letter law that told lawyers what to do in explicit language was finally available to the legal profession, particularly judges, for application in disciplinary proceedings. The new Rules were far more specific in content than the old Code and were far more regulatory in nature. The new Model Rules set the floor for what would be consider acceptable and ethical conduct and what would not, the former more vague, less regulatory aspirational statements of the old Code were incorporated into comments that follow each rule. Today, the new Rules are in place in most U.S. states and territories.

The 1908 Canons and the Model Code as a whole were actually closely inter-related. The Code, as noted above, restated the Canons in its first provision, and contained many aspirational principals found in the Canons in its second. The Code, argued one historian, “could aptly be described as clothing the prior principals in new language and expanding their substance.”37 Another author noted that the Code “preserved a role for both regulation and conscience, but divided them from one another, with legally binding regulation expressed as ‘disciplinary rules’ and merely aspirational appeals to conscience expressed as ‘ethical

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considerations.” Historian Forest J. Bowman noted, “[T]he *Code of Professional Responsibility* was, as to matters of substance, a re-draft of the old 1908 ABA *Canons of Professional Ethics*, a document that was itself a virtual recodification of the *Alabama Code of Ethics* of 1887. As a body of a ‘law of ethics’ the *Code of Professional Responsibility* was essentially unchanged from its 1908 predecessor – while the profession to which it applied had undergone vast changes in the intervening sixty-one years.” There is no doubt that the *Model Code* was an admixture of aspiration and regulation. However, by the 1970s that model, too, was destined to change and the focus shifted from one of aspirational ideals to pure regulatory rules.

### The Rise of the Aspirational Idea

In discussing the aspirational ideals that were lost from the transition from the *Canons* and *Code* to the *Rules*, it is important to note that the term ‘aspirational’ refers to a hope of achieving something not yet in existence. Thus, we now turn to the question of how the Bar and its leaders went from drafting policies that expected lawyers to be moralistic and self-regulating, to creating regulations that “set forth a positive statement defining minimum acceptable behavior that can be enforced through [a] disciplinary process.” Why did the ABA move to a policy of having its primary standard for the profession be one based on regulatory law, rather than on morality.

One of the driving forces behind legal ethics reform has always been the Bar’s concern with criticisms the morality of the profession by the general public. Attacks such as these led to

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40 Ingold, *supra* note 33 at 7.
the initial passage of the Canons in 1908 and the birth of aspirational guidelines for the profession to follow.

Although not the first attack on the legal profession, perhaps the most well publicized and documented assault came from President Theodore Roosevelt mentioned above. In a now famous commencement address given at Harvard University in 1905, Roosevelt appealed to the University’s new graduates to adopt and help create:

“A public sentiment which shall demand of all men of means, and especially of the men of vast fortune, that they set up an example to their less fortunate brethren, by paying scrupulous heed not only to the letter but to the spirits of the laws, and by acknowledging in their heartiest fashion the moral obligations which cannot be expressed in law, but which stand back of and above all laws.”41

Roosevelt was calling for moral leadership from the graduates.42 He was pushing for a profession that would be less corrupted by lawyers who were assisting big business and wealthy individuals in “over-rid[ing] and circumvent[ing] the law” into one that was more aspirational and moralistic; one where lawyers would truly advocate for their clients no matter what the fee may be and where they would constantly elicit their “better nature”.43

Louis Brandeis also shared Roosevelt’s progressive call for giving the profession more direction. He too believed the wealthy and powerful corporate interests had become too influential. In his 1905 address to the Harvard Ethical Society, the future Supreme Court Justice stated, “The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by

42 See id. at 243.
43 Id. at 244.
which legislators sought to regulate the power or curtail the excesses of corporations.”

“We hear much of the ‘corporation lawyer,’ and far too little of the ‘people’s lawyer.’”

The aspirational ideals called for by Roosevelt, Brandeis, and others became something of a subtle rallying cry for members of the ‘gentleman’s Bar.’ For the better part of the nineteenth century, “elite lawyers” were forced to see their once noble profession destroyed by “lawyers occupying the lower ranks of the profession” who possessed seemingly no moral or ethical compass. Historian James M. Altman described this desire by the elite to distinguish themselves from the pettifoggers by noting “Elite lawyers occup[y] the moral high ground. They practice (or at least aspired to practice) ethically. [A]s…gentlemen, they practice a learned profession.” The Canons could help make this distinction by showing the nation a gentleman lawyer was different than the “‘shyster, the barratrously inclined, [and the] ambulance chaser.’” “Those lawyers violated the Canons’ vision of conscientious lawyering and acted unethically by practicing in accordance with the morals of the marketplace.” The promulgation of the Canons, therefore, was intended to help the legal profession “enhance its reputation and, thereby, better perform its important social and political role as ‘America’s governing class.’”

In the latter part of the nineteenth century a second major problem arose for the profession, including its elite members. After the Civil War, American industry began to shift rapidly from consisting of many small businesses serving local communities to national

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44 Id. at 245.
45 Louis D. Brandeis, The Opportunity in the Law, 39 AM. L. REV. 555, quoted in Altman, supra note 5,
at 245.
46 See generally Altman, supra note 5.
47 These were often called “pettifoggers.” Id. at 338; See M. Bloomfield, American Lawyers in a Changing Society (1979) and M.H. Hoeflich, Lawyers, Fees, and Anti-Lawyer Sentiment in Popular Art, GREEN BAG 2D, V. 4, 141.
48 Altman, supra note 5, at 338.
49 Report of the Comm. on Code of Professional Ethics, 29 A.B.A. REP. 600, 600 (1906), quoted in Id. at 338.
50 Altman, supra note 5, at 338.
51 Id. at 239.
corporations. This shift began with the railroads and soon spread to the steel and to petroleum industries. These new, large industrial conglomerates needed a new type of lawyer. Hence, the ‘corporate lawyer’ and the ‘corporate law firm’ came into being. These new lawyers serving large corporations had a very different practice from their predecessors. Rather than have a general practice with many individual and small business clients, these new corporate lawyers found themselves very much the servants of one or two large corporations. This was seen by many of the Bar’s elite as a serious threat to lawyers’ independence and, thereby, a threat to ethical behavior.52

As a result, the organized Bar set out to create what would become the Canons of Professional Ethics. These Canons would be based upon aspirational, moralistic ideals, rather than rigid rules. The ‘gentlemen’s club’ culture was firmly embedded into many bar associations throughout the country. “Gentlemen’s ethics” had “set the legal ethics agenda” up to the early 1900s.53 A gentleman lawyer of high society, it could be argued, would never need stringent laws to govern his behavior. Rather, he should know better and should aspire for more. Like the Alabama Code of Legal Ethics before it, which did not “adopt rules” but rather adopted “a sound code of morals for the practice of law,” the Committee on Professional Ethics concluded “it might be more desirable to have the Canons consist of a statement of fundamental principals that should govern a lawyer’s conduct rather than of definite rules as to specific items of ‘conduct.””54

Committee reports published during this period of change exhibited aspirational and moralistic metaphors, such as: “‘the lawyer is and must ever be the high priest at the shrine of

53 Shaffer, supra note 38, at 370.
54 Walter Burgwyn Jones, Canons of Professional Ethics, Their Genesis and History, 7 NOTRE DAME LAW 483, 489 (1931); 49 A.B.A. REP. 467-468 (1924), quoted in Wright, supra note 29, at 3.
justice;'” “'like God, ‘justice reigns;'” “courts are ‘shrines of justice;'” “lawyers are the
‘ministers of her courts of justice robed in the priestly garments of truth, honor and integrity;'”
and “the practice of law is a lawyer’s ‘high calling.’” 55  The fact that the codes of ethics were
called and composed of “Canons” exemplified just how far the committees wanted to stay away
from hardline rules. 56  Specific examples showing the Canons’ “preoccupation with
professionalism and reputable, decent and gentlemanly conduct” included:

Canon 1. "Judges, not being wholly free to defend themselves, are peculiarly entitled to
receive the support of the Bar against unjust criticism and clamor."

Canon 3. "Marked attention and unusual hospitality on the part of a lawyer to a
Judge…should be avoided."

Canon 17. "Clients, not lawyers, are the litigants…decent to allude to the…particular
peculiarities and idiosyncrasies of counsel on the other side."

Canon 23. "All attempts to curry favor with juries by fawning, flattery or pretended
solicitude for their personal comfort are unprofessional."

Canon 24. "[N]o client has a right to demand that his counsel shall be illiberal" in such
matters as forcing trial on a particular day to the injury of the opposing lawyer.

Canon 28. "It is disreputable to hunt up defects in titles…or to breed litigation by seeking
out those with claims for personal injuries or those having any other grounds of action in
order to secure them as clients…” 57

Thus, the 1908 Code and its aspirational and loose rules became the basis for legal
professionalism in the first half of the twentieth century.  The practice of the ABA and local bar
associations functioning like a gentlemen’s clubs filled with members who had social prestige
also continued.  As a result, it was rare for the Canons to be invoked against lawyers. 58

Furthermore, the rules were “too vague for adequate enforcement” and were “not suited to

55 Minutes of Section on Legal Education, 28 A.B.A. REP. 549, 550 (1905); see also Lucien Hugh
Alexander, Some Admissions Requirements Considered Apart from Educational Standards, 28 A.B.A. REP. 619
(1905), quoted in Altman, supra note 5, at 251.
56 See Altman, supra note 5, at 251.
57 Roderick B. Mathews, The Virginia Code of Professional Responsibility, 19 U. RICH. LAW. REV. 467,
58 See Wolfram, supra note 7, at 485.
disciplinary proceedings.” 59 Nevertheless, the Canons of Professional Ethics stood for six decades and set a precedent of modeling the rules off a moralistic and aspirational standard. Professionalism and legal ethics, summarized Altman, were now “inextricably intertwined: the lawyer who acted as a member of the profession was a lawyer who acted ethically and the lawyer who acted ethically was a true ‘professional.’” 60

The Demise of the Aspirational Standard

The problems with enforcement of the Canons, coupled with them being “duplicative” and “devoid of clear organization” prompted a movement to reform the rules beginning in the early to mid 1960s. 61 This reformation was the first step in moving away from the aspirational and idealistic foundation on which the Canons were built, to one composed of more stringent and practical rules that were built for real-world problems that occurred in the profession.

While the drafters of the Code still believed ABA rules should provide “some outline of a higher and better role to which a lawyer should aspire” they also believed the Code should “prescribe basic and fundamental duties – towards lawyers, toward clients, and toward society – the violation of which can result in sanctions.” 62 The Committee on Professional Ethics summarized the problems with the old Canons by noting they were deficient in four principal respects:

1. The Canons do not concentrate sufficiently on the professional activities of lawyers

2. The Canons are not arranged in such a way as to make their importance easily understood, and to make clear their relation to the statements of principles which they contain.


60 Altman, supra note 5, at 341.

61 Walter, quoted in Ingold, supra note 33, at 2

62 Bowman, supra note 39, at 285.
3. The Canons do not present in sufficient detail and variety the guides useful to the individual lawyer in the determination of solutions to ethical problems arising in specific situations encountered in actual practice…

4. The form and content of the Canons are not suited to disciplinary proceedings.\textsuperscript{63}

All of these reasons reflect a singular major reason for abandoning the aspirational \textit{Canons} for the new \textit{Code}: the Canons simply were not built for the “changed and changing conditions” in the modern legal profession.\textsuperscript{64} Thus, we see a general shift away from an aspirational code towards a more pragmatic one by the drafters in an effort to improve upon these points.

One way in which the \textit{Code} shifted to being a more practical and useful guide was by the committee determining the \textit{Code} would be based off the fundamental concept that “the legal profession is the integral part of the legal system which exists to represent those in need of legal assistance.”\textsuperscript{65} No longer, it seems, was the ABA committed to keeping the legal profession as a gentlemen’s club for strictly ‘learned’ men who were not willing to represent a client with an unpopular cause. Rather, it appears the ABA was trying to make the legal profession more accessible for all clients. An increase in the number of attorneys during this era – specifically those who felt a “clear moral obligation” to help those with a more morally reprehensible case – did not mean pettifoggers would dilute the profession again.\textsuperscript{66} Rather, it was important to the Committee that the “layman be able to secure the services of a lawyer and that the services rendered by the lawyer [were] of high quality.”\textsuperscript{67}

\textsuperscript{63} See Wright, \textit{supra} note 37, at 4, remarking on the A.B.A. committee’s findings at the end of 1958 on the deficiencies of the Canons.

\textsuperscript{64} Id. at 5, quoting the preface to the Code.

\textsuperscript{65} Id. at 7.


\textsuperscript{67} Wright, \textit{supra} note 37, at 7.
Yet another reason for the move away from the aspirational Canons was because it was impractical and confusing to teach to young lawyers. As a result, a movement towards more legal ethics education was made – a pragmatic move by the ABA to provide its members with more tools to do their job effectively in an ever-changing world.

For many years before the Code was adopted, men such as Henry St. George Tucker, the ABA’s President from 1904 to 1905 and former dean of what is now the George Washington University Law School, had been proposing “an enlarged and comprehensive course in the subject of ‘legal ethics’ to be taught…by ‘men of lofty ideals, which they try to live up to and not merely talk of.’”68 He also proposed an “honor system” which would help create within each student “‘a manly sentiment of honor and integrity and a corresponding scorn of chicanery and deception.’”69 These proposals by Tucker harken back to an aspirational era.

Soon, however, it appeared that teaching aspirational ideals simply would not do. The Committee knew they must have more concrete rules in order to better provide young lawyers with guidance. As early back as 1935, the Committee released reports that noted, “the younger men…in the profession feel that they do not have proper guidance in these matters.”70 The Canons, it seemed, provided too few illustrative solutions. A “more comprehensive but concise statement of the general principles of proper professional conduct” was needed in order for new lawyers to be able to understand what they could and could not do as practitioners.71 Lawyers at the time the Code had been adopted had been living in an increasingly modern post-war era. The profession was no longer relatively “uncomplicated” and lawyers were no longer operating in a rural society where they were “in any locality…generally well known to one another” and where,

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68 Henry S. George Tucker, Address of the President, 28 A.B.A. REP. 299, 388-89, quoted in Altman, supra note 5, at 248.
69 Id.
70 60 A.B.A. REP 437-38 (1933), quoted in Wright, supra note 37, at 4.
71 58 A.B.A. REP 437-38 (1933), quoted in Wright, supra note 37, at 4.
if necessary, “the collective opinion of the local bar could be called upon to bring pressure on an individual…who overstepped the bounds of ethical behavior.”\textsuperscript{72} Given the increasingly important and visible role lawyers played in society, a lawyer must understand not just the “established standards of professional conduct, but the reasons underlying these standards.”\textsuperscript{73} Comprehensive legal education was needed if the profession was going to continue increasing its reputation. Furthermore, in order to make the profession better suited for an ever complicated and changing legal profession, ABA leaders needed to create rules bright-line rules that had tenants that were sufficiently understandable.

This new foundation for the rules did not completely nullify the old aspirational ideals of the Canons. In fact, the Committee noted that because lawyers were the face of the legal profession, they must also adhere to the highest standards of moral and ethical conduct, harkening back to why the ABA first passed the Canons – to increase the reputation of the profession.\textsuperscript{74} In fact, the simultaneous implementation of the Canons, Ethical Considerations, and Disciplinary Rules was seemingly the Committee’s attempt to keep the aspirational ideals of the Canons while still making improvements to the Code. As Edward L. Wright, Chairman of the Committee on Professional Ethics (which came to be known as the “Wright Committee”) explained:

“One reason for including both Ethical Considerations and Disciplinary Rules [in addition to the Canons] in the Code is to forestall or answer an attack against the Disciplinary Rules on the ground that they are arbitrary, and therefore unconstitutional, by providing in close proximity a set of explanatory provisions upon which the Rules are based. A lawyer who complies with these minimum standards may be an ethical lawyer only in a marginal sense, for he may have failed to conform to the higher ideals and traditions of the profession.”\textsuperscript{75}

\textsuperscript{72} Bowman, supra note 39, at 274.
\textsuperscript{74} See Wright, supra note 37, at 7-8.
\textsuperscript{75} Id. at 11.
To omit either the Ethical Considerations or the Disciplinary Rules would be undesirable, according to the Committee, for "[a] code, to be complete, [it] should tell lawyers how to practice law in an aspiring, grand manner, and it should also tell courts and grievance committees the manner in which law shall never be practiced."\textsuperscript{76} One of the more rational realizations by the Committee during the implementation of the new Code was their realization that there is some conduct that can be required and some conduct which can only be encouraged.\textsuperscript{77}

While the Code may have made a seemingly sharp departure from the aspirational ideals of the Canons with its bright-line rules and more user-friendly format that allowed for better access to the legal system and a better tool to use to teach legal ethics education, a single event in American history would prompt ABA officials to take yet another look at the rules and consider eliminating all aspirational clauses that could be a source of misinterpretation.

That event, of course, was the Watergate scandal. The event rocked the nation and the legal profession. As Bowman would write, “highly placed and very visible lawyers who were trapped in the ethical morass” of Watergate led the profession as a whole to engage in “a great deal of…soul searching.”\textsuperscript{78} Specifically, the event led to a “resurgence of interest in legal ethics in general” and as a result, the Code of Professional Responsibility “was subjected to an intense scrutiny.”\textsuperscript{79} The failure of the profession’s rules to “prevent” lawyer’s involvement in Watergate reflected poorly on the Code.\textsuperscript{80} Following the infamous 1972 break-in that occurred at the Watergate Hotel in Washington, D.C., the ABA mandated the teaching of professional

\textsuperscript{77} See Wright, supra note 37, at 11.
\textsuperscript{78} Bowman, supra note 39, at 288. See generally Kettleson, Revising the Code of Professional Responsibility, 35 NATIONAL LEGAL AID & DEFENDER ASSOCIATION BRIEFCASE 40 (1978).
\textsuperscript{79} Bowman, supra note 39, at 288.
\textsuperscript{80} Id.
responsibility in law schools. Watergate, and the period from 1968 until 1974, was what one legal historian would call “terrible years” and a “coming apart” of legitimate authority in American institutions, including law and the legal profession.\(^{81}\) The scrutiny that the profession experienced during these years would further intensify the need to eliminate any ambiguity that aspirational clauses may have caused in legal ethics rules.

These events led to the development of the *Model Rules of Professional Conduct*, and with it a further departure from the aspirational ideals once embodied in the *Canons* and the *Code*. One of the primary ways in which the Kutak Commission was able move further away from those previous ideals was by changing the overall structure of the Code. In its discussion draft that was published in the beginning of 1980, the Commission noted that it was determined to abandon the traditional canon format and the cumbersome three-section Code and replace it with a “black-letter” criminal law style followed by committee comments.\(^{82}\) Once again, it is evident that the ABA wanted to make the rules more understandable by creating laws that were easy to locate and relatively unambiguous. As Bowman noted:

> Where, for example, the Ethical Considerations merely restate the Disciplinary Rules [the Model Rules of Professional conduct] obviously are not merely aspirational but have become mandatory like the Disciplinary Rule they restate. Moreover, when an Ethical Consideration states, as does EC 5-15, "A lawyer should never...", it obviously is couched in more than merely aspirational language.\(^{83}\)

No longer would there be rules with words such as ‘may’ that would create confusion for the self-regulating profession. The Committee made sure that the “ethical code binding lawyers should not consist of merely polite suggestions about behavior.” Rather, they would set a


\(^{83}\) Bowman, *supra* note 39, at 291.
“ground floor” which a lawyer could not cross without facing sanctions.84 Bright-line rules would come to dominate legal ethics, ending an era of apparent uncertainty in the profession. One scholar summarized the changes by stating, “Unlike the ethical considerations under the ABA Code, the new Rules are, for the most part, specific and mandatory. The failure to comply with a rule is ground for invoking the disciplinary process…”85

The ABA also justified moving away from a code steeped in aspirational language by again attempting to create rules that were even more practical and conducive to adjusting to the modern law practice. As one author noted, the new Rules are less “preachy” and more practical. They address the lawyer in a manner that tells him or her how to “function in the modern world to a degree that was never attempted by the Code.”86 For example, Rule 1.4 clearly states, “A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”87 This fairly simplistic rule, and others like it, is nevertheless very straightforward and easy to understand, which is necessary in the complex and fast-paced modern legal practice.

The straightforward ground floor rules and its more flexible comment counterpart were also designed to be conducive to the modern legal practice by being applicable to the many different types of law practices that are now prevalent throughout the profession. Lawyers practicing in different areas of the law, such as tax or real estate, often have different types of ethical demands. Because of the Rules, these lawyers know the lines they must not cross, regardless of their respective fields. Lawyers are not “a monolithic body of professionals, all doing the same thing in the same way and for the same purpose” and the ABA recognized this

84 Id at 312.
85 Ingold, supra note 33, at 10.
86 Bowman, supra note 39, at 290.
87 MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 1983) (emphasis added).
In an effort to continue to accommodate and save face for the profession, it has attempted to move away from fluctuating aspirational rules towards hardline ones that can apply to various types of lawyers, are straightforward, and are easy to comprehend.

However, aspirational rules were not totally forgotten. The comments following the rules set, to some extent, what was to be considered optimal ethical behavior whereas the rule itself was to be considered the ground floor. Comment 1 to Rule 1.4 states, in part “The client should have sufficient information to participate intelligently in decisions” and “[o]rdinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.” The comments have allowed the ABA to preserve some aspirational aspects, while at the same time getting rid of the confusing Ethical Considerations, albeit in a much less influential and pronounced manner. The comments have also allowed the ABA to accommodate lawyers in different practice areas by telling them ideal way to handle different situations that occur in whatever area they are engaged in.

In addition to the reasons mentioned above, legal ethics scholar Charles M. Wolfram did an extensive review on why the aspirational ideals of the Canons were lost with the adoption of the Code and the Rules. In his work, Wolfram argues that the rise of the regulatory state in the U.S. beginning in 1970 was the catalyst behind the ABA’s massive shift from the more passive Canons and Code to the strict Rules. Wolfram cites four relevant factors as to why lawyers became more regulated, and thus why the profession based its code of conduct on less aspirational ideals:

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88 Bowman, supra note 39, at 298.
89 MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt. (AM. BAR ASS’N 1983) (emphasis added).
91 See id. at 206.
1. The emergence of courts as the regulators of lawyers and their continuation in that unchallenged role.

2. The adaptability of the American legal profession form to the regulatory state.

3. The broadened scope of regulation of almost every other profession makes it politically and intellectually impossible for lawyers to claim exemption from regulation.

4. The stresses within society that affected American law and the American legal profession.92

First, Wolfram argues that the rise of judges as regulators of the legal profession led to a significant increase in the number of malpractice claims. This in turn prompted the ABA to enact less aspirational, more stringent rules to govern the profession. Throughout the nineteenth century, it was natural and accepted that “courts, as the convenient expression of relevant official power [for the judicial system], should assert some degree of control over lawyers, and…lawyers should accede to that power and even welcome it, as long as the leash was kept appropriately slack.”93 However, as courts became more “activist” in the later party of the twentieth century, their regulation and, in many cases, protection of the legal profession from outside interference by virtue of their widely accepted role as overseers of the profession shifted.94 Soon, judges became judicial wardens. This shift in how judges saw themselves led to a “spectacular increase” of malpractice decisions beginning in the 1960s that has continued.95 Wolfram’s argument aligns with what has already been discussed in this memorandum: legal malpractice claims and events such as Watergate led to the eventual downfall of aspirational laws and the rise of codified, strict, black and white laws.

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92 See id. at 209-210.
93 Id. at 212.
94 Id.
95 Id. at 214.
Wolfram also argues that despite its history of independence from regulation, the legal profession in reality is not immune from the “wheels of political and social fortune.” As a result, the bar was transformed from the ‘gentlemen’s club’ discussed above not only by expanding legal services to the general populous, but also by becoming an organization that committed itself to becoming serious about addressing the profession’s regulatory issues. One of the primary ways it answered this call, of course, was by totally revamping its code of conduct and moving it away from aspirational rules open to interpretation which imposed liability on the profession as a whole. If the bar did not answer this call to turn around the “woeful state of lawyer discipline” that spiked in the 1960s, the profession well may be subject to the same high level of government regulation that “has been inflicted on so many other occupational groups” such as organizations on Wall Street.

Despite the actions of the ABA in the 1960s, Wolfram correctly points out that the legal profession, like most other professions in the twentieth century, fell to the “machinery” of the regulatory state. Wolfram argues that lawyers “could not have expected to have it both ways – both designing and implementing a regulatory state that would enmesh every other significant element of the American economy, yet remain immune from the juggernaut’s rash.” The government, continues Wolfram, aggressively set up and enforced “regulatory regimes” and administrative procedures to deal specifically with lawyers. This has forced the ABA to minimize damage to its members by adopting black-letter rules and regulations that reduce the number of legal actions taken against lawyers by governmental entitles, such as the Securities

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96 Id. at 216.
97 Id. at 217.
98 Id. at 218.
99 Id. at 219.
100 Id.
and Exchange Commission and its crusade to force lawyers to act in accordance with regulatory expectations when servicing clients with issues before the agency.  

Finally, Wolfram argues that the “fundamental restructuring” of the overall legal profession that began in the 1970s led to more structure and less aspirational notions. Many “stresses within…society” affected American law and the American legal profession. Wolfram points out that the size and complexity of the American law firm exploded during the later part of the twentieth century. Mega firms now have upwards of a thousand lawyers and income levels for attorneys employed at such firms have soared. As a result, “increased legal regulation of business in general and increased commercialization of [the] law practice occurred.” Specifically, the record number of billing transactions and the continual movement of lawyers from firm to firm prompted the ABA to be much more forward about what was exactly required of lawyers in terms of financial responsibility with client funds and conflicts of interest. As a result, aspirational rules were thrown to the wayside, and the rise of rules that could not be disputed took place.

**Conclusion**

The field of legal ethics has undergone a dramatic transformation in the last one hundred years. Its aspirational and moral standards have been staples of the profession for many years prior to the *Canons*, but really become solidified when the profession needed protection from public attacks on its character from both the general public, and highly visible figures such as Roosevelt and Brandeis. Quickly, however, scholars, leaders, and mere members of the

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101 See *id.*
102 *Id.* at 222; *Id.* at 210.
103 *Id.* at 224.
104 *Id.*
105 See *id.* at 225.
profession began to see the issue with allowing a self-regulating profession to base its entire rules scheme off of aspirational statements. Its inability to be enforced, its lack of organization, and its lack of applicability to the dramatically evolving legal profession are just a few reasons for why aspirational standards do not play a larger role in today’s version of the rules. Although it appears those legal ethics provisions based on regulation and those based on conscience have been separated at least for the foreseeable future, the debate rages on. It will be interesting to see whether the profession can return to an era when honor is a cornerstone and thus aspirational and moralistic standards can be incorporated into the self-enforcing rules once again.