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Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code and the Regulation of the Profession

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Thomas Goode Jones, circa 1887

University of Alabama School of Law

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A CALL FOR REGULATION OF THE PROFESSION

David I. Durham

During the December 1881 meeting of the Alabama State Bar Association at Mobile, Alabama, the idea of creating a code of legal ethics for the Association was first formally suggested. Chairman of the Committee on Judicial Administration and Remedial Procedure Thomas Goode Jones included within his report to the third annual meeting of the Bar, a call for the creation of a state code of ethics.[1] Jones perceived a strong need for a guide that would establish a standard of honor and integrity for the Alabama Bar. Of the necessity for a concise code of ethics, Jones borrowed in his report to the Association language from Daniel Defoe's well-circulated commentary on public good, writing "what is everybody's business is nobody's business."[2] Jones did not believe that there was widespread corruption within the state Bar, yet he understood that questionable or shameful practices by even a few lawyers reflected poorly on the profession as a whole.[3] In fact, Jones reported, most instances of questionable conduct by attorneys were merely thoughtless or occurred out of ignorance, rather than any willful or malicious breach of ethics.[4] Jones believed that most improprieties could have been avoided "if any short, concise Code of Legal Ethics,

[1] *Report of the Organization and of the First, Second and Third Annual Meetings of the Alabama State Bar Association* (Montgomery: Smith and Armstrong, Printers, 1882), 235-236. Reprinted herein at Appendix I.

[2] Daniel Defoe, *Every-Body's Bufinefs is No Body's Bufinefs; or Private Abufes, Publick Grievances* . . . (London: Printed for W. Meadows in Cornhill . . . , 1725).

[3] *Report of the Organization and of the First, Second and Third Annual Meetings*, 235.

[4] *Ibid.*

stamped with the approval of the Bar, had been in easy reach."[5]

Although Jones had a well-defined notion of what elements should be included in a code of ethics and of how it should appear structurally, he did not anticipate that he would be its author. In 1881, he offered the prescient observation that "the lawyer who shall frame such a code need ask no greater or more enduring fame. Nothing would more effectually promote the ends of justice, or tend more to advance judicial administration."[6] Jones believed that a code should "carry with it the whole moral power of the profession." It should, according to Jones, clearly reflect the Bar's position concerning practices that it condemned, thus leading toward the elimination of unethical practices.[7] Jones had a good knowledge of the standard works concerning ethics and had communicated his ideas of how a code of ethics for the Bar should appear. He was the natural choice to author the Association's code, and at the fourth annual meeting of the Bar in 1882 he was nominated as chairman of a three-member committee to draft a code.[8]

For a code of ethics to have the intended influence on the legal community, Jones believed that it had to be presented in a serviceable form. Jones acknowledged that a body of works on the topic already existed, writing in 1881 "while there are standard works of great eminence and authority upon legal ethics, these are not always accessible."[9] He perceived that the Code should be comprised of ideas collected from existing sources and made available to practicing lawyers in the form of a list that

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[5] *Ibid.*
[6] *Ibid.*, 236.
[7] *Ibid.*, 235.
[8] *Proceedings of the Fourth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1883), 20.
[9] *Report of the Organization and of the First, Second and Third Annual Meetings*, 235.

could provide a convenient reference for questions concerning legal ethics. For the structure of the Code, Jones undoubtedly consulted David Hoffman's work on the science of jurisprudence.[10] Hoffman's *A Course of Legal Study* (1836) included a series of fifty "Resolutions in Regard to Professional Deportment" that provided Jones with a good structural model for his code.[11]

Jones relied on numerous sources for the substance of his code. The "standard works" on legal ethics which he noted in his call for a code to the Bar Association would have included notable works by authors such as David Hoffman, David Dudley Field, and George Sharswood among others.[12] Jones also indicated that he relied on letters written to many of the state's most eminent judges and attorneys seeking guidance in composing a code of ethics for practitioners.[13] However, it is likely that Jones borrowed more heavily from the work of George Sharswood than any other single source. Jones' son,

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[10] David Hoffman, *A Course of Legal Study, Addressed to Students and the Profession Generally*, in two volumes (Baltimore: Joseph Neal, 1836). Hoffman's synthesis of Anglo-American law, originally published in 1817 under the title *A Course of Legal Study; Respectfully Addressed to the Students of Law in the United States*, was expanded considerably into two volumes in 1836.

[11] *Ibid.*, II: 752-775. Jones was familiar with the standard works on legal ethics of which Hoffman's publication was considered one. See *Report of the Organization and of the First, Second and Third Annual Meetings*, 235-236.

[12] Hoffman, *A Course of Legal Study*; David Dudley Field, *The Code of Civil Procedure of the State of New-York* (Union, N.J.: Lawbook Exchange, 1998 (1850) [hereinafter Field Code]); and George Sharswood, *An Essay on Professional Ethics* (Philadelphia: T. and J.W. Johnson Company, 1907), originally published in 1854 under the title *A Compend of Lectures on the Aims and Duties of the Profession of Law, Delivered Before the Law Class of the University of Pennsylvania* (Philadelphia: T. and J.W. Johnson, 1854).

[13] *Proceedings of the Sixth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1884), 21.

Walter B. Jones, reported that Thomas Goode Jones kept a copy of Sharswood's *An Essay on Professional Ethics* on his desk, frequently consulting it.[14] Jones included four substantive direct quotes in the prefatory material and in the text of his code—three of these were from Sharswood and one from David Dudley Field.[15] In addition to the quoted material, Jones borrowed generously from *An Essay on Professional Ethics* in language throughout the Code. Considering the influence of Sharswood, Hoffman, Field and others on Jones' Code, he distinctly perceived his role as that of integrating the existing body of ideas concerning legal ethics into a usable and coherent form for the good of the practicing attorney and the legal profession. His foresight was subsequently recognized by the American Bar Association, and much of Jones' material was adapted into that Association's *Canons of Professional Ethics* in

[14] Walter B. Jones, "Canons of Professional Ethics, Their Genesis and History," *The Alabama Lawyer*, 2 (July 1941), 248. This article was reprinted from the *Notre Dame Lawyer*, 7 (May 1932), 483.

[15] *Code of Ethics Adopted by the Alabama State Bar Association, Dec. 14, 1887* (Montgomery: Brown Printing Company, 1887), iii. This page contains a long quote from Sharswood, *An Essay on Professional Ethics*, 55. Jones used direct quotes for material from Sharswood again in rule number ten. See Sharswood, 78-79. Additional quoted material is found in rule number twenty-six. See Sharswood, 118-119. In addition to the Sharswood quoted material, a list of seven duties were taken indirectly almost verbatim from original language in the 1850 New York "Field Code." See *Field Code*, 204-209 (sec. 511). Jones appears to have quoted directly from the *Code of Alabama, Prepared by John J. Ormond, Arthur P. Bagby, George Goldthwaite, with Head Notes and Index by Henry C. Semple* (Montgomery: Brittan and De Wolf, 1852), 196 (sec. 738). The list of duties in the Alabama Code differs from the language in Field's code most noticeably in duty number one where the oath to "support the constitution and laws of this state, and the United States" are reversed from the New York code in which the oath is first to country, then state.

1908, creating a usable code of ethics for a national audience of practicing lawyers.[16]

The following work explores the significance of Jones' "Code of Legal Ethics" and its contribution to the discourse concerning the regulation of the legal profession. An opening essay entitled "The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association," is followed by a facsimile reproduction of the Code, and by an essay entitled "Thomas Goode Jones: Personal Code of a Public Man," which offers an analysis of Jones and the world in which he functioned. Three appendices follow which offer a text version of Jones' 1881 call for a code of ethics, the Alabama State Bar Association's debate concerning the adoption of the Code, and a comparison of the *Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887* to the subsequent *Canons of Professional Ethics, Adopted by the American Bar Association . . . on August 27, 1908.*

[16] *Canons of Professional Ethics, Adopted by the American Bar Association at its Thirty-First Annual Meeting at Seattle, Washington, on August 27, 1908* (Baltimore[?]: n.p., 1908).

THE LASTING LEGACY OF THE 1887 CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION

Carol Rice Andrews[1]

The 1887 Code of Ethics of the Alabama State Bar Association is an important document in the field of legal ethics. It was the first code of its kind. It was not the first statement of legal ethics, but it was the first one of such detail to be formulated by a state bar association for the guidance of its members. Alabama's 1887 Code of Legal Ethics was the primary model for other codes of ethics in the late 19th century and early 20th century. The most important of these was the American Bar Association's 1908 Canons of Legal Ethics, which was a close replica of the 1887 Alabama Code. Although the ABA during the past century has supplemented its canons and reformulated them into Model Rules of Professional Conduct, the core content has remained largely unchanged from the 1908 Canons. In turn, the ABA Model Rules, or some version of them, have become law in most states. Thus, Alabama's 1887 Code of Legal Ethics was a key source for what has become a national law of legal ethics. Indeed, it is difficult to find any modern discussion of legal ethics that does not credit the contribution of Alabama's 1887 Code of Legal Ethics.[2]

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[1] Professor of Law, University of Alabama School of Law. Professor Andrews teaches and writes in the area of legal ethics and civil procedure.

[2] *See* Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING, at 1-18 (2003) (stating that Alabama's 1887 Code of Legal Ethics was the first of the state bar association codes and that in

The significance of Alabama's 1887 Code of Legal Ethics is best seen by putting it in context, from both an historical and a modern perspective. Thomas Goode Jones,[3] who wrote Alabama's 1887 Code of Legal Ethics, did not write in a vacuum. Previous works had expounded on legal ethics—lawyer oaths, statutory statements of duties and academic discourses—but Jones collected and built upon these principles and stated them in the form of specific rules by and for lawyers. The prominence of the Alabama rules of conduct eventually led to several states adopting similar rules as a form of law. To be sure, the statement of the rules has changed over time, but the prin-

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1908 the ABA, "building on Alabama's 1887 Code of Legal Ethics, adopted the Canons of Professional Ethics"); Deborah L. Rhode and David Luban, LEGAL ETHICS, at 65 (3d Ed. 2001) (noting that Alabama's 1887 Code of Legal Ethics was the first state bar association's code of professional ethics); Thomas D. Morgan & Ronald D. Rotunda, PROFESSIONAL RESPONSIBILITY, at 11 (7th Ed. 2000) (noting that Alabama's 1887 Code of Legal Ethics "formed the basis for the American Bar Association's first statement of ethical principles, the Canons of Professional Ethics, published in 1908"); Robert F. Cochran, Jr. and Teresa Collett, THE RULES OF THE LEGAL PROFESSION, at 5 (1996) (noting that the "first state code for lawyers was adopted by the Alabama legislature in 1887" and that the 1908 ABA Canons "largely copied the Alabama Code"); Charles W. Wolfram, MODERN LEGAL ETHICS, at 54 n. 21 (1986) (noting that the 1908 ABA Canons "were not designed to break new ground" and were "largely copied from the 1887 Code of Ethics of the Alabama State Bar Association"); and Henry S. Drinker, LEGAL ETHICS, at 23 (1953) ("The first Code of Professional Ethics in the United States was that formulated and adopted by the Alabama State Bar Association in 1887, which between 1887 and 1906, was adopted, with minor changes [in ten states]").

[3] The accompanying essay, by Paul M. Pruitt, Jr., elaborates on the life, work and philosophy of Thomas Goode Jones. In addition, Jones' son, Walter Burgwyn Jones, chronicled his father's work in a 1931 law review article, with particular emphasis on his father's work on Alabama's 1887 Code of Legal Ethics. *See* Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME L. REV. 483, at 483-84 (1931).

ciples stated in Alabama's 1887 Code of Legal Ethics should be remarkably familiar to modern legal scholars. Indeed, the ABA's most recent effort to update the Model Rules, its Ethics 2000 project, reaffirms many of the concepts of Alabama's 1887 Code of Legal Ethics, in surprisingly similar language.

The Historical Backdrop to Alabama's 1887 Code of Legal Ethics

Ethical standards for lawyers were not a new concept when Thomas Goode Jones put pen to paper in the 1880s. Societies have regulated lawyer behavior since ancient times, and some of those regulations have resembled codes of ethics. The most pervasive early example was the detailed lawyer oath, which was in essence a "condensed code of legal ethics."[4] Lawyer oaths were particularly commonplace in medieval Europe, where advocates before ecclesiastical and lay courts swore to abide by a number of ethical precepts.[5] For example, in England during the 15th

[4] I take this term from Josiah Henry Benton, who lectured and published a book concerning lawyer's oaths, THE LAWYER'S OFFICIAL OATH AND OFFICE (1909).

[5] Josiah Benton, for example, reported that in 1231, the bishops of the Province of Tours, assembled a council at Chateau-Gontier, which adopted the following "oath of the advocates:"

> The advocates who in accordance with usage receive pay, shall by no manner of means be admitted, unless they have been sworn in. The formula for such an oath is thus: That they shall not favor (take) knowingly cases that are not just; nor shall they bring about, with malice aforethought, undue delay or haste in the conduct of cases by means of false oath, rather than stand by the truth. Nor shall they instruct their client toward malitious answer or statement; nor shall they after the published attestations, or at any stage of the trial, nor even before the oath suborn witnesses, or cause them to be suborned. Nor shall they permit their client to produce false witnesses; and if they should gain knowledge thereof, they

century (and likely earlier), lawyers swore to "do no falsehood," to report falsehoods by others, to "delay no man for lucre or malice," not to increase fees, and to represent their clients competently.[6] The practice of taking a detailed lawyer oath continued for hundreds of years in Europe and carried over to the American colonies.[7]

> shall reveal such to the court. If memorials (briefs) are to be made they shall do so in good faith, and not withdraw from court malitiously, until the memorial be completed and admitted in court. Clients they shall expedite to the best of their ability, and in good faith. Nor shall they bother (literally burden) the Judge with objections, believing that they will give in to them. They shall sustain the honor of the court, nor perpetrate in court a falsehood.

Id. at 21-22.

[6] According to Josiah Benton, the following oath likely was in use in England as early as 1246:

> You shall doe noe Falshood nor consent to anie to be done in the Office of Pleas of this courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lord Chief Baron or other his Brethren that it may be reformed you shall Delay noe Man for lucre Gaine or Malice you shall increase noe fee but you shall be contented with the old Fee accustomed. And further you shall use your selfe in the Office of Attorney in the said office of Pleas in this Courte according to your best learning and discrecion. So help you God.

Id. at 28.

[7] In 1701 Massachusetts, "An Act Relating to Attorneys," required lawyers to swear to an oath that was strikingly similar to the old English form of oath. *Id.* at 60 (quoting Province Laws, 1692-14, Vol. I, p 467). For a discussion of the regulation of lawyers in colonial Massachusetts and in its early statehood, see Hollis Bailey, ATTORNEYS AND THEIR ADMISSION TO THE BAR IN MASSACHUSETTS (1907).

Use of detailed lawyer oaths fell out of fashion for a time in the United States. By the early 19th century, most states required only a general oath of office that did not state individual ethical principles, and these states did not immediately replace the detailed oaths with any other form of ethical code for lawyers.[8] Courts retained their "inherent power" to discipline or disbar lawyers for misconduct, but they relied principally on broad standards of decorum and rarely exercised their power.[9] This meant that lawyers were largely unregulated during the first half of the 19th century, at least in terms of formal standards of professional conduct.

Despite this void in the formal legal framework, or perhaps because of it, academics and prominent lawyers in the mid-19th century frequently expounded on the appropriate standards of conduct for lawyers.[10] Two of the most influential works of this period were academic

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[8] For example, in 1836, Massachusetts legislators mandated a simplified form of oath: "You shall solemnly swear, that you will conduct yourself, in the office of an attorney, according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as to your clients." Bailey at 57 (quoting Mass. Rev. Stat., ch 88 § 22). This was part of the Massachusetts legislature's resumption of control over lawyers. The 1836 statute also regulated admission and provided for a lawyer's removal by the courts "for deceit, malpractice or other gross misconduct." *Id.*

[9] *See* Charles Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 UNIV. CHICAGO ROUNDTABLE 469, 473-79 (2001) (discussing the courts' efforts to control misconduct of lawyers and noting that the "relative disuse" of judicial oversight continued from colonial times through the latter part of the 20th century "with little variation").

[10] *See, e.g.*, Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003) (surveying early 19th century American discussions concerning legal ethics); and M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other" Tradition*, 47 U. KAN. L. REV. 193 (1999) (surveying 19th century discussions of legal ethics, including academic works, eulogies, correspondence, and speeches).

discourses by David Hoffman and George Sharswood. In 1836, David Hoffman, an instructor of law at the University of Maryland, published a list of fifty "Resolutions In Regard to Professional Deportment."[11] Hoffman urged lawyers to resolve to abide by his fifty principles of good lawyering. His resolutions addressed matters of etiquette,[12] good business practice,[13] including proper fees,[14] and lawyer conduct in a variety of circumstances, primarily in the litigation setting.[15] In 1854,

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[11] David Hoffman, COURSE OF LEGAL STUDY (2d Ed. 1836). The ethical resolutions were added to the second edition of his popular *Course of Legal Study*, as an appendix. The original edition and the main text of the second edition were a plan of study and bibliographical guide to law students. *See generally* Maxwell Bloomfield, *David Hoffman and the Shaping of A Republican Legal Culture*, 38 MARYLAND L. REV. 673 (1979) (surveying the life and work of David Hoffman).

[12] Hoffman, note 11 *supra*, at 752-53 (Resolution No. 5 (resolving to "be always courteous" to other lawyers) and Resolution No. 17 (resolving to "ever be kind and encouraging" to junior lawyers)).

[13] *Id.* at 763, (Resolution No. 29 (resolving to refund client retainers), Resolution No. 25 (resolving to promptly turn over client funds), Resolution No. 26 (resolving to separately keep and account for client funds) and Resolution No. 30 (resolving to "carefully arrange" and return client papers)).

[14] *Id.* at 761-63, (Resolution No. 24 (noting that contingent fees sometimes are "perfectly proper" and "called for by public policy, no less than by humanity") and Resolution No. 27 (resolving to charge only reasonable fees)).

[15] In this regard, Hoffman's basic principle was that a lawyer should keep his conscience separate from the client and that the lawyer should aim to do justice. He, for example, instructed lawyers to resolve not to assert technical defenses such as the statute of limitation or infancy in cases where his client was actually in the wrong. *Id.* at 754-55 (Resolution No. 12 (resolving never to plead the statute of limitation when based merely on the passage of time) and Resolution No. 13 (resolving never to plead the defense of infancy "against an honest demand")). Hoffman urged lawyers to resolve that "in both cases, *I shall claim to be the sole judge* . . . of the occasions proper for their use." *Id.* (emphasis in original).

George Sharswood, a prominent lawyer, judge and professor at the University of Pennsylvania, publicly released a law school lecture, which he entitled *An Essay on Professional Ethics*.[16] Although different in form than Hoffman's listing—Sharswood wrote in essay form—Sharswood's discourse on ethics generally reflected the views of Hoffman.[17] Like Hoffman, Sharswood gave lawyers instruction on social discourse,[18] practice etiquette,[19] business relations with clients,[20] and proper litigation conduct.[21]

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[16] George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS (5th Ed. 1907). For a discussion of George Sharswood's work and life, see generally the "Memorial" dedicated to Sharswood in the Fifth Edition of his Essay on Professional Ethics.

[17] Sharswood, like Hoffman, was moralistic. *See id.* at 55 (starting discussion of ethics by noting that perhaps there is "no profession, after that of the sacred ministry, in which a high-toned morality is more imperative, necessary than that of law"). Sharswood was somewhat more liberal than Hoffman with regard a lawyer's potentially conflicting loyalties to society and client. Like Hoffman, Sharswood insisted that a lawyer was "duty bound" to refuse a plaintiff whose demand offends the lawyer's "sense of what is just and right." *Id.* at 96. Yet, Sharswood also stated that a lawyer "is not morally responsible for the act of the party in maintaining an unjust cause." *Id.* at 83. He equivocated as to whether lawyers could assert defenses such as the statute of limitation. According to Sharswood, a client had a right to "have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges," *id.* at 82, and although a defendant who knows he owes a debt "ought not to plead the statute [of limitation]," "if he does plead it, the judgment of the court must be in his favor." *Id.* at 83.

[18] Sharswood, for example, urged lawyers to be well-read in "polite literature" and to "cultivate a pleasing style, and an easy graceful address." *Id.* at 132-33. He also told lawyers to maintain an even temper. *Id.* at 64.

[19] *See id.* at 122-23 (urging "attention, accuracy and punctuality") and 124 (noting that the "importance of good handwriting cannot be overrated").

[20] *See id.* at 154-63 (warning of the dangers of contingent fee arrangements), 164-65 (advising that lawyers should avoid business

Also in the mid-19th century, an influential legal reformer, David Dudley Field, revived the old lawyer oaths by putting their ethical precepts in another form. Field was a key player in the codification movement of the mid-19th century, and his "Field Code" became a model for reform throughout the nation.[22] As part of this effort, Field proposed codification of the professional duties of lawyers. His proposed statute listed eight duties concerning advocacy before the courts and other matters, such as attorney-client confidentiality and loyalty.[23] Field's state-

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transactions with clients and not accept gifts from clients), and 166 (warning lawyers to avoid temptation and to not keep the client's money "one single instant longer than is absolutely necessary").

[21] *See id.* at 99 (noting that a lawyer "may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading") and *id.* at 118 ("no man ought to allow himself to be hired to abuse the opposite party"). *See also* note 17 *supra* (discussing Sharwood's views concerning the lawyer's duties with regard to a client's case or defenses that the lawyer may view as unjust).

[22] *See generally* THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK 1850, VOL. I, at i-x (introducing the Field Code and describing Field's codification efforts).

[23] Section 511 of the 1850 version of the Field Code listed eight duties of lawyers:

> 1. To support the constitution and laws of the United States and of this state;
> 2. To maintain the respect due to the courts of justice and judicial officers;
> 3. To counsel or maintain such actions, proceedings, or defenses, only, as appear to him legal and just, except the defense of a person charged with a public offence;
> 4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;
> 5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

ment of duties had essentially the same content as the old lawyer oaths,[24] but he stated the ethical precepts in the form of statutory duties, rather than an oath. The Field Code was a popular model in many states then adopting new codes and statutes, and as a result, Field's statement of a lawyer's duties found its way into the code books of many states and territories, including the 1852 Code of Alabama.[25]

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6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;
7. Not to encourage either the commencement or the continuance of an action or proceeding, from any motive of passion or interest;
8. Never to reject, for any considerations personal to myself, the cause of the defenseless or oppressed.

The Code of Civil Procedure of the State of New York, Section 511, pages 204-09 (1850).

[24] In fact, Field formally credited an oath of office for lawyers from 1816 Geneva as the source of his statement of duties. *Id.* at 204-09 (1850) (noting that the Swiss oath "so justly [expresses] the general duties of lawyers, that we cannot do better than take almost the very terms of it"). The Swiss oath was almost identical to Field's statement, with the exception that the Swiss oath did not address confidentiality. *See id.* at 205-06 (reprinting the Swiss oath).

[25] In addition to adopting Field's statutory duties, these states typically required lawyers to swear generally that they would abide by those duties. For example, the 1852 Alabama Code adopted, in Section 738, the Field Code statement of duties, and it also provided, in Section 735, that "[e]very attorney, before commencing practice, must take an oath to support the constitution of this state, and of the United States, and not to violate the duties enjoined on him by law." *See also* Idaho Gen. Law, Section 120 (1880-81); Indiana Rev. Stat. XLV Sections 768 (oath) & 771 (duties) (1852); Code of Iowa 1851, Section 1610 (oath) & Section 1614 (duties); Rev. Stat. Territory of Minn., Ch. 93, Section 7 (duties); Laws of the Territory of Nebraska, Ch V. Section 5 (1857); Statutes of Oklahoma, Ch. 7 Section 4 (1890); Laws of Oregon, 1843-1872, Title II, Section 1006 (Semple 1874). In addition, several other states—California, Georgia, Kentucky, Louisiana, Mississippi, Utah,

It was with this background that Thomas Goode Jones wrote Alabama's 1887 Code of Legal Ethics. In 1882, Jones, as chairman of the Alabama State Bar Association's Committee on Judicial Administration and Remedial Procedure, proposed, among other things, that the Association appoint a committee with instructions to create a code of ethics for consideration by the Association's membership.[26] Earlier, Jones had told the Association that "[w]hile there are standard works of great eminence and authority upon legal ethics, these are not always accessible."[27] Jones argued that many cases of improper conduct by lawyers were "thoughtless rather than willful" and could have been avoided if the lawyers had had "within easy reach" a "short, concise Code of Legal Ethics, stamped with the approval of the Bar."[28] This was a novel proposition. Although a few other bar associations previously had set some rules and guidelines for their members, these provisions were rare and addressed isolated issues, such as admissions standards.[29] Jones, by contrast, contemplated a

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Wisconsin, Washington—were reported to have adopted a similar form of statement of duties by at least 1908. *See* Memorandum For Use of ABA's Committee to Draft Canons of Professional Ethics, at 112 (1908); and American Bar Association, REPORTS OF THE ANNUAL MEETING vol. 30 at 676-736 (1907) (Report of the ABA Committee on Code of Professional Ethics). Interestingly, New York, Field's home state, did not adopt the statutory statement of a lawyer's duties.

[26] Proceedings of the Fourth Annual Meeting of the Alabama State Bar Association, at 20 (1883).

[27] Report of the Organization and of the First, Second and Third Annual Meetings of the Alabama State Bar Association, at 235 (1882).

[28] *Id.* For the full text of Jones' remarks on this occasion, see Appendix I below.

[29] *See* Bailey, *supra* note 7, at 20-24 (discussing 18th century Massachusetts county bar associations and their efforts regarding education and admission of lawyers). Bar associations themselves were rare and did not begin to flourish until the late 19th century. *See* Phillip J. Wickser, *Bar Associations*, 15 CORNELL L. Q. 39 (1930).

pervasive set of standards governing a broad range of lawyer activity.

The Alabama State Bar Association agreed to Jones' recommendation and appointed a committee, led by Jones, to create a comprehensive code of legal ethics.[30] Jones was the principal drafter, but as he reported in 1884, he solicited the input of "many eminent lawyers and judges, asking suggestions" for the code.[31] Jones also referred to existing works on legal ethics—his stated aim was to make existing ethical standards accessible to the practicing lawyer—and the "standard works of great eminence" to which Jones referred almost certainly included the works of Hoffman, Sharswood, and Field. Jones drew directly on Sharswood. Jones kept a copy of Sharswood's work on his desk,[32] and he quoted Sharswood in the preamble and elsewhere in Alabama's 1887 Code of Legal Ethics.[33] Jones also quoted from Field, albeit indirectly. In the preamble to his code, Jones reprinted Section 738 of the 1852 Alabama Code, which was a nearly verbatim restatement of the Field Code listing of duties and which Jones described as a "comprehensive summary of the duties specifically enjoined by

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[30] Due to a misunderstanding, the Committee was not formally appointed until 1883. On this issue, see Report of the Proceedings of the Fifth Annual Meeting of the Alabama State Bar Association, at 6-7 (1883).

[31] Report of the Proceedings of the Sixth Annual Meeting of the Alabama State Bar Association, at 21 (1884).

[32] This placement of Sharwood's essay was reported by Jones' son, Walter Bugwyn Jones. *See* Jones note 3 *supra* at 484.

[33] Alabama State Bar Association, Code of Ethics, Preamble (1887) ("There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law . . ."). *See* note 17 *supra* (quoting same provision of Sharswood). Jones' expression attributed the Preamble quotation to Sharwood, but he elsewhere quoted Sharswood without direct attribution. *See* Rule # 10 (stating that an attorney "owes entire devotion to the interest of a client, warm zeal in the maintenance and defense of his cause . . .") (*quoting* Sharswood, note 16 *supra* at 78-79).

law upon attorneys, which they are sworn 'not to violate.'"[34] Jones' reliance on Hoffman is almost as evident. Although Jones did not quote Hoffman, his code asserted many of the ideas contained in Hoffman's Resolutions. Moreover, the format and level of detail of the fifty-six rules in Alabama's 1887 Code of Legal Ethics more closely resembled Hoffman's fifty resolutions than Sharswood's lengthy essay or Field's eight basic duties.

Much has been written analyzing the differences and similarities between Alabama's 1887 Code of Legal Ethics and the earlier works, particularly those of Hoffman and Sharswood.[35] There are strong similarities, both in content and in tone. The 1887 Alabama Code, for example, started

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[34] Alabama State Bar Association, Code of Ethics, Preamble (1887). Jones cited to identical language in section 791 of the 1876 Alabama Code.

[35] *See*, e.g., Judith Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblese to Stated Expectations*, 77 TULANE L. REV. 91, 103-38 (2002) (comparing Hoffman, Sharswood and the 1887 Alabama Code to modern standards, with an emphasis on an attorney's pro bono duties); Susan D. Carle, *Lawyer's Duty to Do Justice: A New Look At The History of the 1908 Canons*, 24 LAW & SOCIAL INQUIRY 1 (discussing Hoffman, Sharswood, the 1887 Alabama Code and the 1908 ABA Canons and their respective views on the lawyer's duty to evaluate the justice of their clients' matter); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998) (comparing Hoffman, Sharswood and the 1887 Alabama Code); James E. Moliterno, *Lawyers Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 787-95 (1997) (comparing Hoffman and Sharswood to both the 1887 Alabama Code and the 1908 ABA Canons); and L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909 (1980) (comparing works of Hoffman, Sharswood, Field and Jones, with an emphasis on the duties of confidentiality and loyalty). *See also* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEORGETOWN J. LEGAL ETHICS, 241 (1980) (comparing Sharswood with the 1908 ABA Canons but noting the role of the 1887 Alabama Code and arguing that the 1887 Alabama Code is largely a compilation of Sharswood's ideas).

with Rule 1 urging respect for the court and judicial officers, as Hoffman, Sharswood and Field also had urged.[36] Jones' code likewise was filled with gentlemanly admonitions. Rule 6 told lawyers to be punctual and to apologize if they were late.[37] Rule 30 instructed the lawyer to be courteous and cooperative with opposing counsel and to not act in a way that "would be repugnant to his own sense of honor and propriety," even if the client asked otherwise.[38] The 1887 Alabama Code also advised lawyers of their high calling and community duties. Rule 57 exhorted lawyers to not ask to be excused from representing an indigent client "for any light cause" and to be "a friend to the defenceless or oppressed," which Hoffman, Sharswood and Field also had urged.[39]

Although similar comparisons can be made throughout much of the 1887 Code, Jones' new code was not identical to the previous works. Just as Hoffman, Sharswood, and Field varied among themselves in tone, detail and application, Alabama's 1887 Code of Legal Ethics also differed from these earlier writings. The lawyer's duty of confidentiality is a good example of this variation. Hoffman did not speak of this duty, except to the extent that confidentiality was part of his resolution to avoid conflicts

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[36] *See* Hoffman, note 11 *supra*, Resolution No. 3 (resolving to be respectful to "all judges") and Resolution No. 6 (resolving to be "studiously respectful" to officers of the court); Sharswood, note 16 *supra*, at 62-63 (stating that lawyers should treat judges and court officers with respect); Field, note 23 *supra*, Duty No. 2 (stating the duty of lawyers to "maintain the respect due to the courts of justice and judicial officers").

[37] Alabama State Bar Association, Code of Ethics, Rule # 6 (1887).

[38] Alabama State Bar Association, Code of Ethics, Rule # 30 (1887).

[39] *See* Hoffman, note 11 *supra*, Resolution No. 18 (resolving that lawyers should "cheerfully" give their services to clients who have low or no financial means); Sharswood, note 16 *supra*, at 151 (noting that there "are many cases, in which it will be his duty . . . to work for nothing"); Field Code, note 23 *supra*, Duty No. 8 (stating that the lawyer must "never reject the cause of the defenceless or oppressed").

of interest.[40] Sharswood spoke about confidentiality principally in terms of privilege.[41] Field's duties instructed that the lawyer must "maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients."[42] Alabama's 1887 Code of Legal Ethics stated the duty of confidentiality in more detail. Its Rule 21 required client consent to divulge both communications and confidences and provided that the lawyer's "obligation of secrecy" extended beyond the death of the client.[43] Rule 22 explained that the duty "extends further than mere silence" and required the lawyer to decline subsequent related matters in which he might use the secrets against his client.[44]

In addition, Alabama's 1887 Code of Legal Ethics set out rules on matters not addressed by Hoffman, Sharswood or Field. Rule 11 instructed Alabama lawyers that they should report the wrongdoing of other lawyers: "Attorneys must fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession."[45] Rule 17 added a duty to refrain from trial publicity because such discussions "tend to prevent a fair trial in the courts, and otherwise

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[40] Hoffman, note 11 *supra*, Resolution No. 8 (resolving that "if I have ever had any connection with a cause, I will never permit myself . . . to be engaged on the side of my former antagonist").

[41] Sharswood, note 16 *supra*, at 107 (noting that a lawyer who learns of his client's guilt "cannot disclose" the truth, for "the law seals his lips as to what has thus been communicated to him in confidence by his client").

[42] *See* Field Code, note 23 *supra*, Duty 5.

[43] Alabama State Bar Association, Code of Ethics, Rule # 21 (1887).

[44] Alabama State Bar Association, Code of Ethics, Rule # 22 (1887).

[45] Alabama State Bar Association, Code of Ethics, Rule # 11 (1887). The duty of a lawyer to report the wrongdoing of another was not Jones' innovation. The old English oath, for example, required lawyers to report at least falsehoods that others perpetrated on the courts. *See* note 6 *supra* (providing that lawyers who gain knowledge of any falsehood in the pleas of the court "shall give knowledge thereof to the Lord Chief Baron or other of his Brethren so that it may be reformed").

prejudice the due administration of justice."[46] Rules 16 and 20 permitted general advertisements and business cards but condemned "self-laudation" as "wholly unprofessional" and solicitation as "indecent" (at least where the individual was not tied to the lawyer by family or other relationship).[47] Rule 35 added a duty to settle without litigation, "if practicable."[48]

Even with these additions, the most significant contribution that Alabama's 1887 Code of Legal Ethics made over the previous works was not its content but rather the role that the code played in first guiding and then regulating lawyers. Unlike the works of Hoffman and Sharswood, which were academic discourses by individuals, Alabama's 1887 Code of Legal Ethics was commissioned by and bore the "stamp of approval" of the entire bar.[49] To be sure, Thomas Goode Jones was the principal author, but he actively sought input and suggestions from other sources, including his contemporaries in the bar. Furthermore, the Alabama State Bar Association did not merely rubber stamp his proposed code. The Association distributed Jones' proposed code for review and comment by its entire membership (which consisted of roughly half of the nearly 800 lawyers in the state at that time).[50] The membership questioned and made some changes to Jones' proposed rules,[51] and, the group as

[46] Alabama State Bar Association, Code of Ethics, Rule # 17 (1887).

[47] Alabama State Bar Association, Code of Ethics, Rules # 16, 20 (1887).

[48] Alabama State Bar Association, Code of Ethics, Rule # 35 (1887).

[49] Jones' stated aim was to create a code that bore this stamp of approval. *See* Report of the Organization and of the First, Second and Third Annual Meetings of the Alabama State Bar Association, at 235 (1882).

[50] Report of the Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association, at 9 (1888).

[51] *See id.* (reporting the debate of the Association on individual provisions of the Code of Ethics). Among other things, the members

a whole acted formally to adopt and endorse the standards of conduct in the code.[52] The Alabama State Bar Association both publicly published the new code and distributed copies to all lawyers in the state, not just members of the association.[53] Thus, unlike Hoffman's and Sharswood's scholarly works, Alabama's 1887 Code of Legal Ethics was a set of guidelines made by and for all practicing lawyers in the state.

And, unlike the Field Code, Alabama's 1887 Code of Legal Ethics provided crucial detail. Indeed, it primarily was an elaboration of the Field Code duties. The preamble of the 1887 Code of Ethics began by stating the statutory duties, and many of its rules concerned the same subject matter as the Field Code duties. For example, the 1887 Code of Ethics significantly elaborated upon the third statutory duty to "not mislead judges." Rule 5 condemned

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debated whether the rules should include generally accepted and followed practices or whether such rules trivialized the code. For example, one member argued that it should be understood that a lawyer should not call a judge "an ass" and that no rule was needed for this proposition. *Id.* at 12-15. Ultimately, the membership voted to include such general standards, primarily for the guidance of young lawyers who may not yet understand basic concepts of etiquette and ethics. *Id.* at 14-15. In addition, the membership voted to amend Jones' proposed Rule # 14, which required an attorney to decline civil cases where the client's purpose is merely to harass the opponent. The membership voted to delete one clause of this rule and seemingly agreed to amend the rule so that it was discretionary rather than mandatory, *id.* at 19, but this latter change evidently did not make it to the final published version. (See 1887 and 1904 versions of Rule # 14, retaining the "must" language).

[52] For this point, see Report of the Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association, at 21 (1888) (adopting the Code).

[53] *Id.* (noting that there were approximately 400 lawyers in Alabama who did not belong to the Association and asking that the code be sent to them, as well as the Association members, for a total of 795 lawyers, because the non-members "are our brethren" and "feel as deep an interest as we do in the Code").

several itemized "deceits," including "[k]nowingly citing as authority an overruled case, or treating a repealed statute as in existence," "knowingly misstating the contents of a paper, the testimony of a witness, of the language or argument of opposite counsel," and "offering evidence which it is known the court must reject as illegal, to get it before the jury."[54] Even this list of deceits was not necessarily exhaustive. As the preamble to the 1887 Code of Ethics recognized, no single set of rules can govern every circumstance—"[n]o rule will determine an attorney's duty in the varying phases of every case"[55]—but Alabama's new code of legal ethics gave lawyers better guidance than the Field Code.

To the extent that Alabama's 1887 Code of Legal Ethics elaborated on the meaning of the statutory duties to which lawyers swore to abide, the rules were enforceable. In other words, if a lawyer perpetrated one of the itemized "deceits" in violation of Rule 5 of Alabama's 1887 Code of Legal Ethics, a court could find the lawyer in violation of both Section 791 of the 1876 Code of Alabama and his oath of office. Indeed, a principal aim of the Alabama State Bar Association was to police lawyer misconduct and the new code was an essential step toward this goal.[56] In his initial

[54] Alabama State Bar Association, Code of Ethics, Rule # 5 (1887).

[55] Alabama State Bar Association, Code of Ethics, Preamble (1887).

[56] Members of the Alabama State Bar Association argued that the Association would heighten its legitimacy, and thus its membership, by policing lawyers. In an August 1883 report, for example, Jones' committee noted that the Association has thus far "not accomplished much practical good," that the Association "will gain popular support and rapid accessions from lawyers not members, when it gives some token that it is in earnest, and will act as well as advise in matters looking to the advancement and elevation of the profession," and that if the Association acts to "put down . . . evil practices" lawyers who have not previously joined the Association "will become warm and ardent members." Report of the Proceedings of the Fifth Annual Meeting of the Alabama State Bar Association, at 6-7 (1883). They also recommended that the Association appoint a committee of three members

1881 report, Jones argued that a code of ethics was needed because "[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."[57] Jones noted that if any attorney were to engage in improper practices, that "the Code would be ready witness for his condemnation, and carry with it the whole moral power of the profession."[58]

Nevertheless, enforcement remained a lingering question as to both Alabama's 1887 Code of Legal Ethics and its successor codes. This was especially true with respect to rules regarding conduct, such as lawyer advertising, not addressed by the Field Code statutory duties. The issue of enforcement was raised often during the proceedings in which the Alabama State Bar Association adopted the new code of ethics. The members seemed to assume that the new code would be enforced, for they raised vagueness and other "enforceability" issues as concerns about particular rules in the proposed code.[59] Yet,

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in each judicial circuit to monitor misconduct by lawyers and "to take proper proceedings for the disbarment of the offending member, at the expense of the Association." *Id.* at 7.

[57] Report of the Organization and of the First, Second and Third Annual Meeting of the Alabama State Bar Association at 235 (1882).

[58] *Id.*

[59] For example, in the debate concerning whether the rules should address matters that most lawyers knew and understood—that a lawyer should not call a judge "an ass" for example, *see* note 51 *supra*—one member noted that "it is important to call these rules to the attention of the younger members, and enforce them, because there may be instances where they ought to be enforced." Found in, Report of the Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association, at 14-15 (1888). In another example, one lawyer questioned the merit of a rule that required lawyers to refrain from offering evidence that he knows to be inadmissible, in large part because such would be unenforceable, in that it would leave to each lawyer to determine whether he knows a judge will reject the evidence. *Id.* at 16-17.

the members questioned how such a code would be enforced. At the same meeting, one member of the bar asked that the Association not discharge Jones' committee but instead ask the committee to reconvene and consider the question of enforcing the code.[60] The Alabama State Bar Association agreed and charged Jones' committee with this new assignment,[61] but no action seemingly was taken and no formal means of enforcement resulted. Despite this lapse, both Thomas Goode Jones and Alabama's 1887 Code of Legal Ethics ultimately would play an important role in transforming the rules of conduct into binding rules of law. They did this indirectly, by influencing the ABA in its formation of model standards, which eventually became legally enforceable rules of conduct in most states.

The Modern Legacy of Alabama's 1887 Code of Legal Ethics

Alabama's 1887 Code of Legal Ethics was quickly imitated. Within twenty years of its adoption in Alabama, ten other states adopted a code of ethics based on Alabama's code, and many other states were considering adopting such a code.[62] More importantly, Alabama's 1887

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[60] *Id.* at 9 (stating that "if the Association adopt the Code of Ethics, the most natural consequence would be the means of enforcing it," that the committee that drafted the code would be the most "competent" to suggest such means, and asking that Jones' committee therefore not be discharged).

[61] *Id.* at 9.

[62] In 1907, an ABA committee reported on the widespread adoption of the 1887 Alabama Code of Legal Ethics. *See* 32 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 685-713 (1907) (reporting the variations of the codes of Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, Wisconsin, and West Virginia, and using Alabama's 1887 Code of Legal Ethics as the basis for comparison because it was the "foundation of all the other codes"). Later, in 1908, the ABA Committee reported that during the course of its work, another state—Mississippi—had adopted a code identical to that of Alabama, and that at least nine other

Code of Legal Ethics played a key role in the American Bar Association's adoption of a national model for future codes of legal ethics. In 1905, the ABA appointed a committee to explore such a code.[63] In 1907, the ABA's Committee on Code of Professional Ethics reported that it had reviewed then-existing standards and codes of legal ethics and that Alabama's 1887 Code of Legal Ethics was the prevailing model.[64] The ABA Committee therefore asked that Thomas Goode Jones be invited to join in its efforts to draft new national standards of legal ethics.[65]

Jones joined the ABA Committee, and over the next year, the ABA Committee met, wrote model standards, distributed drafts and solicited comments from state bar associations and members of the bar nationwide.[66] The ABA Committee received over 1000 letters of comment.[67] Yet, with all of this input, the final draft of the new ABA

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states and "doubtless a number of others" had formed committees to consider such a code. Memorandum For Use of ABA's Committee To Draft Canons of Professional Ethics, at 5 (1908).

[63] 28 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 132 (1905).

[64] 30 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 61-64 (1907). *See also id.* at 676-736 (Report of the Committee on Code of Professional Ethics).

[65] *Id.* at 61-64, 679.

[66] *See* generally 33 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 567-73 (1908) (Final Report of the Committee on Code of Professional Ethics) (summarizing the work of the Committee).

[67] 30 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 570-71 (1907) (Final report of the Committee on Code of Professional Ethics) (reporting that "more than one thousand replies were received by letter and postcard from every section of the United States, many of them evidencing that deep and earnest thought which the importance of the subject demands"). The ABA Committee on the Code of Professional Ethics collected, in rough form, all of the comments and suggestions in a "Memorandum For Use of ABA's Committee To Draft Canons of Professional Ethics," dated March 23, 1908 and informally known as the "Redbook."

code, called "Canons of Ethics," closely resembled Alabama's 1887 Code of Legal Ethics. In its final report, the ABA committee singled out Thomas Goode Jones for praise and acknowledged that Alabama's 1887 Code of Legal Ethics was the "foundation of the draft for canons of ethics."[68] At its 1908 annual meeting, the ABA, with only limited debate and one change, approved the proposed canons—a modified version of Alabama's 1887 Code of Legal Ethics.[69]

The ABA's 1908 Canons took the same basic format as Alabama's 1887 Code of Legal Ethics.[70] The ABA version had only 32 Canons, as opposed to 57 rules in Alabama's 1887 Code of Legal Ethics, but this numerical comparison is misleading. The two had substantially identical content. The ABA version combined and condensed many rules of Alabama's 1887 Code of Legal Ethics into a single canon. For example, ABA Canon 12 ("Fixing the Amount of the Fee"), was a verbatim restatement of Rules 48, 50 and 52 of Alabama's 1887 Code of Legal Ethics.[71] This pattern repeated itself throughout much of the 1908 Canons.[72]

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[68] *See generally* 33 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 570 (1908).

[69] 33 AMERICAN BAR ASSOCIATION REPORTS OF THE ANNUAL MEETING, at 55-86 (1908).

[70] *See generally* "A Comparison of the 1887 Alabama State Bar Association's Code of Ethics and the 1908 Canons of the American Bar Association," Appendix III, below.

[71] ABA Canon 12 stated:

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

> In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.
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> In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 12 (1908). *Compare* Alabama State Bar Association, Code of Ethics, Rules (1887). *See also* Appendix III, below.

[72] For instance, the ABA combined Rule # 3 of Alabama's 1887 Code of Legal Ethics, concerning "marked attention and unusual hospitality to a judge," and Rule # 15, concerning ex parte contacts with judges, into a single Canon, Number 3:

> Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

The ABA's 1908 Canons added a few new ideas, such as the Canon 2 provision for merit selection of judges.[73] Yet, to the extent that there are differences in content between the ABA Canons and Alabama's 1887 Code of Legal Ethics, the 1908 Canons' omissions are perhaps more interesting, because the ABA later corrected most of these "oversights." The 1908 Canons, for instance, did not address a lawyer's duty of confidentiality other than to mention confidentiality generally with regard to conflicts of interest.[74] In addition, the 1908 Canons did not require prompt communications with clients as did Rule 33 of Alabama's 1887 Code of Legal Ethics. The Canons did not tell lawyers to discuss and resolve fee arrangements with clients in advance, as did Alabama Rule 46. And the Canons did not particularize the general prohibition on attorney conflicts of interests in the manner of Alabama's 1887 Code of Legal Ethics. Alabama Rule 23, for example, barred an attorney from later attacking an instrument that he had drafted, and Rule 31 advised lawyers to give preference to older and existing clients over new clients.[75] These omitted provisions, however, were not

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AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 3 (1908). *See also* Appendix III, below.

[73] AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 2 (1908) (stating the duty of the bar "to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges" and urging lawyers to "protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench").

[74] AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 6 (1908) ("Adverse Influences and Conflicting Interests") (providing that "the obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed").

[75] Alabama State Bar Association, Code of Ethics, Rules # 23, 31 (1887).

permanent oversights. All eventually made their way into the national law of ethics.

The ABA soon supplemented the original 1908 Canons with both additional canons and "opinions" (informal and formal) as to the proper application of the canons to particular circumstances. In 1928, for example, the ABA recognized the need for a more detailed explanation of the duty of confidentiality, and it added Canon 37, which resembled the confidentiality doctrines of Rules 21 and 22 of Alabama's 1887 Code of Legal Ethics.[76] Since then, the duty of confidentiality has been the center of some of the most heated debate concerning modern notions of ethics.[77] This reaffirms the insight of Jones, who at least made an initial attempt at laying out this complicated duty in some detail.

In the late 1960s, the ABA reconfigured the Canons into a "Model Code of Professional Responsibility."[78] This was a dramatic change in format. The 1970 Model Code had three levels of detail: canons, ethical considerations and disciplinary rules. The canons were very broad basic statements of ethics, such as Model Code Canon 4, which stated that a "lawyer should preserve the confidences and secrets

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[76] Drinker note 2 *supra*, at 131, n. 25 (reporting addition of Canon 37 in 1928 and its amendment in 1937). *Compare* AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 37 (providing, among other things, that the lawyer has the duty "to preserve his client's confidences" and that this duty "outlasts the lawyer's employment," but does not apply to the client's "announced intention to commit a crime"), *with* Alabama State Bar Association, Code of Ethics, Rules # 21 & 22 (1887).

[77] *See generally* Hazard & Hodes, note 2 *supra*, at § 9.2 (2001) (discussing the duty of confidentiality and the "enormous controversy" surrounding it). Both the breadth of the basic duty and its exceptions are the source of uncertainty and debate. *See id.* §§ 9.15-9.34.

[78] *See id.*, § 1.11 (discussing formation of Model Code); Wolfram, note *supra*, § 2.6.3 (same).

of a client."[79] The ethical considerations were extended commentary on the meaning of each canon,[80] and the disciplinary rules imposed certain absolute standards of conduct with regard to each canon.[81] The disciplinary rules

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[79] AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4 (1970).

[80] Some of these ethical discussions are quite lengthy. Canon 7 (zealous representation), for example, eventually had 39 paragraphs of Ethical Considerations. AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, Ethical Considerations 7-1 through 7-39 (1970). The Model Code set out only six paragraphs of Ethical Consideration for Canon 4 and its duty of confidentiality. *See* note 79 *supra*. Ethical Consideration 4-1, for example, stated:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets on one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek legal assistance.

AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, Ethical Consideration 4-1 (1970).

[81] For example, the lone disciplinary rule under Canon 4 (confidentiality), note 79 *supra*, provided:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the

became binding rules of law in the states that adopted them, and, as the name implied, a violation of the disciplinary rules subjected the lawyer to discipline.

The 1970 Model Code was more than a change in format. The Model Code had considerably more detail than the 1908 Canons. Yet, many of the Model Code's added provisions were not truly new concepts. First, the Model Code formally incorporated many of the concepts that the ABA had developed over the prior fifty years, in formal and informal opinions that supplemented and interpreted

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> disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
>
> (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101 (1970).

the Canons. Second, the Model Code included provisions taken from other (non-ABA) statements of ethics, such as Alabama's 1887 Code of Legal Ethics. For example, Ethical Consideration 2-19, instructed lawyers to reach a "clear agreement" with the client as to fees "[a]s soon as feasible after the lawyer has been employed,"[82] just as Rule 46 of Alabama's 1887 Code of Legal Ethics had done.[83]

In 1983, the ABA again reformatted its national standard, in the form of "Model Rules of Professional Conduct."[84] An important aim of this revision was to emphasize the rules of conduct as enforceable rules of law. To help achieve this new focus, the Model Rules format eliminated the broad canons, replaced the lengthy narrative discussion of the "Ethical Considerations" with "commentary" and reversed the order, so that the commentary followed the black letter rules. The Model Rules were enormously successful. As of 2002, a significant majority of the states had adopted their own versions of the Model Rules as binding rules of law for lawyers.[85]

Interestingly, the ABA's new emphasis on rules brought its model closer to the rules format of Alabama's 1887 Code of Legal Ethics. The Alabama Code had 56 rules, and the original ABA Model Rules consisted of 52 rules. More importantly, the content of one echoed the other. Indeed, a quick review of the table of contents of the Model Rules immediately brings to mind many of the rules in

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[82] *Id.*, E-C 2-19.

[83] Alabama State Bar Association, Code of Ethics, Rule # 46 (1887).

[84] *See generally*, AMERICAN BAR ASSOCIATION, CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES.

[85] Stephen Gillers & Roy D. Simon, Jr., REGULATION OF LAWYERS: STATUTES AND STANDARDS, at xxvi (2002) (reporting that "[a]s of fall 2001 more than 40 states and the District of Columbia had adopted all or significant portions of the Model Rules").

Alabama's 1887 Code. The Model Rules had (and continue to have) rules addressing diligence, fees, confidentiality, conflicts of interests, safekeeping of a client's property, candor toward the tribunal, fairness to the opposing party, trial publicity, prosecutor's duty, lawyer as witness, advertising, pro bono obligations and the duty to report wrongdoing of other lawyers. A few of the Model Rules resurrected substantive elements of Alabama's 1887 Code of Legal Ethics that had been omitted from the Model Code. Model Rule 1.4, for example, affirmatively required prompt communications with a client,[86] and thus echoed Rule 33 of Alabama's 1887 Code of Legal Ethics.

In addition, a significant contribution of the Model Rules was its sophisticated set of rules governing conflicts of interests. Some of the new detail in the Model Rules was reminiscent of Alabama's 1887 Code of Legal Ethics. For example, the official commentary to Model Rule 1.9, relating to conflicts of interests with former clients, brought back the spirit of Rules 22 and 23 of Alabama's 1887 Code of Legal Ethics,[87] by explaining that a lawyer "could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client."[88] Likewise, the loyalty concept of Rule 31 of Alabama's 1887 Code of

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[86] Model Rule # 1.4 provided:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule # 1.4 (1983).

[87] *See* note 75 *supra*.

[88] AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule # 1.9 (1983) (Comment ¶ 1).

Legal Ethics was revived during the Model Rule era, albeit indirectly. Rule 31 of Alabama's 1887 Code had required lawyers to give preference to existing clients, over new ones, when faced with a potential conflict between the two. Although this concept was not a part of the formal ABA Model Rules or its comments, many states modified their rules to incorporate a "hot potato" rule, under which a lawyer may not drop an existing client like a "hot potato" in order to represent a new client.[89] This "hot potato" rule is not stated in terms as elegant as those of Thomas Goode Jones, but it reflects his gentlemanly concept of loyalty.

In 2002, in a project known as "Ethics 2000," the ABA adopted new revisions to the Model Rules.[90] The ABA did not change the format of the Model Rules, but instead amended the content of the individual rules and their commentary. The amendments were wide-sweeping, with changes made to almost every rule or the commentary. The changes corrected some problems in the rules, addressed new issues and suggested a subtle change in tone. Interestingly, some of the "new" Ethics 2000 provisions are reminiscent of the "gentleman's code" provisions of Alabama's 1887 Code of Legal Ethics. For example, the new preamble to the rules continues to remind lawyers of their duty to represent their clients vigorously (as the ABA had long instructed lawyers),[91] but the Ethics 2000 pre-

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[89] *See* AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, at 144-45 (4th Ed. 1999); Hazard & Hodes, note 2 *supra*, § 20.10 (discussing hot potato rule).

[90] The ABA House of Delegates formally adopted the new set of Model Rules in February 2002. *See* ABA, Model Rules of Professional Conduct (2002). *See generally*, Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEORGETOWN J. LEGAL ETHICS 441 (2002).

[91] *See* AMERICAN BAR ASSOCIATION, CANONS OF LEGAL ETHICS, Canon 15 (1908) ("The lawyer owes entire devotion to the interest of

amble also reminds lawyers of their equal duties to be courteous and civil: a lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."[92] Similarly, new comments to Model Rule 1.3 remind lawyers that the lawyer's duty to diligently represent his client "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect" and "does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client."[93] Thus, the seemingly quaint "courtesy" elements of the Alabama's 1887 Code of Legal Ethics are now back in fashion.

In sum, Alabama's 1887 Code of Legal Ethics has played an important role in the development of modern standards of ethics for lawyers. Although Alabama's 1887 Code of Legal Ethics itself built upon prior works, the code was instrumental in the formation of national standards of legal ethics, by and for lawyers. The influence of Alabama's 1887 Code of Legal Ethics carries on. The simple concepts of courtesy that threaded throughout Alabama's 1887 Code of Legal Ethics have resurfaced and helped to set the tone for the ABA's newest set of ethical standards. And, in all likelihood, future generations of legal thinkers will continue to see "new" wisdom in Alabama's 1887 Code of Legal Ethics.

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the client, warm zeal in the maintenance and defense of his rights") (quoting Sharswood and 1887 Alabama Code); *see* note 33 *supra*.

[92] AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (2002). The reporter stated that this change was meant "to give lawyers further guidance in how the basic principles underlying the Rules may help resolve" conflict between a lawyer's competing responsibilities and interests.

[93] *Id.*, Rule # 1.3 (Comment ¶¶ 1 & 3).

AN IMPROBABLE JOURNEY

David I. Durham

Thomas Goode Jones' recommendation at the 1881 Alabama State Bar Association meeting for a code of ethics to be presented "for consideration at the next annual meeting" proved to be an unrealistic exhortation.[1] A completed draft of the Code would not be available for consideration by the Bar Association until their annual gathering six years later on December 14, 1887. Jones' recommendation in 1881 that the Association appoint a committee with instructions to draft a code of legal ethics was not acted on that year, and it was not until the following year that Montgomery lawyer Henry C. Semple offered the motion that a committee of three should be appointed to report a code of ethics at the next meeting.[2] This early confusion surrounding its creation was followed by several years of delays and unusual activity that preceded the adoption of a final version of the Code.

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[1] *Report of the Organization and of the First, Second and Third Annual Meetings of the Alabama State Bar Association* (Montgomery: Smith and Armstrong, Printers, 1882), 236. Jones' "Report of the Committee on Judicial Administration and Remedial Procedure" is found at 224-241. The call for a code of ethics is at 235-236. For a text of the ethics section, see Appendix I, below.

[2] For Semple's motion, see *Proceedings of the Fourth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1883), 20. It is likely that a simple oversight was responsible for the failure to appoint a committee to draft a code following the approval of the idea in 1882. For lawyer and Civil War veteran Henry Churchill Semple, see Thomas McAdory Owen, *History of Alabama and Dictionary of Alabama Biography* (Spartanburg: Reprint Company, 1978 (1921)) IV: 1527-1528.

By the end of the 1882 meeting of the Association, Jones had been appointed chairman of a three-person committee to draft a code; however, the other two positions were not filled.[3] The vacant positions on the committee did not matter in a practical sense, because it seemed to be understood that Jones would compose the Code. Nevertheless, Jones was uncomfortable proceeding without the full committee in place. At the fifth annual meeting the following August (1883), the error was addressed and the mandate of the committee was reported:

> At the last meeting a Committee of three, of which the Chairman of the Executive Committee was named as Chairman, was ordered to be appointed to prepare and report a Code of Ethics for the consideration of this meeting. Owing to some misunderstanding the Committee was not appointed, and the member named as Chairman in the resolution, felt it improper to proceed alone, in view of the delicate and important duty imposed upon the Committee.
>
> Your Committee believe that a Code of Ethics would go very far, using the language of our Constitution, "to advance the science of jurisprudence, to promote the administration of justice throughout the State, uphold the honor of the profession of the law, and establish cordial intercourse among the members of the Bar of Alabama." We recommend that a Special Committee of three be raised with instructions to report at our next Annual Meeting a Code of Ethics

[3] Concerning the two vacant positions, President Emmet A. O'Neal announced "I will not appoint the committee now, but will take a little time." *Proceedings of the Fourth Annual Meeting*, 3, 20.

for the Bar of this State.[4]

After considering the matter, President Martin Luther Stansel announced that the incoming president should make the appointment of the two vacant committee positions.[5] At some point prior to the closing of the session, notwithstanding Stansel's announcement, Richard Orrick Pickett of Florence, and Daniel Shipman Troy of Montgomery, were appointed to the special committee "To Prepare a Code of Legal Ethics."[6]

At the Association's annual meeting in 1884, Jones asked for additional time on behalf of the ethics committee. He reported that the matter was of such importance that it could not be hurried. His further comments at that meeting provide some insight into the approach that Jones used to draft the Code. In addition to printed sources, Jones wrote that he relied on responses from written inquiries to "many eminent lawyers and judges, asking suggestions." Jones had hoped to have a draft of the Code submitted by the August 1884 meeting, however, he commented that "the week set apart for this work was unavoidably taken up with

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[4] *Proceedings of the Fifth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1883), 6. For the Alabama State Bar Association Constitution, see *Report of the Organization and of the First, Second and Third Annual Meetings*, 8-12.

[5] *Proceedings of the Fifth Annual Meeting*, 12. For Martin L. Stansel, see Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1613.

[6] *Proceedings of the Fifth Annual Meeting*, 126. Both Troy and Pickett served as colonels in the Confederate Army, were members of the state legislature, and were active Redeemers (restorers of Democratic power after Reconstruction). Troy was the son-in-law of Alabama Governor Thomas H. Watts, was a charter member of the Bar Association, and was serving as its president at the time of his death in 1895. For Richard O. Pickett and Daniel S. Troy, see Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1363-1364 (Pickett), and 1685-1686 (Troy).

other duties, and the Committee is reluctantly compelled to ask the indulgence of the Association until its next meeting."[7]

At the Alabama State Bar Association's next meeting in December 1884, the Committee on Legal Ethics still had not reported a code. On behalf of Jones, association member Edmund W. Pettus communicated to the president that the report had been written, however, "it is not in such condition as to be read—that is to say, it has not been reviewed—and Col. Jones has been so occupied by his duties in the legislature, that he has not had time to review it."[8] Pettus recommended that the Code should be published in the proceedings of the Association at whatever time it was submitted to the Executive Committee. However, Executive Committee Chairman Henry C. Tompkins suggested that the report of the ethics committee should be published in pamphlet form and distributed to the members of the Association prior to any discussion of adoption of the Code.[9] During the Eighth Annual Meeting in 1885, long-

[7] *Proceedings of the Sixth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1884), 21.

[8] *Proceedings of the Seventh Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1885), 8-9. For brigadier-general, circuit judge, and United States Senator Edmund Winston Pettus, see Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1351-1352. Jones was commissioned lieutenant colonel during the Civil War and later served as colonel of the second infantry regiment of the Alabama State Troops (1880-1890). He was a member of the Alabama legislature from 1884-1888, serving as speaker of the house of the sessions from 1886-1888. See Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 942-943; and Paul M. Pruitt, Jr., "Thomas Goode Jones, 1844-1914: Personal Code of a Public Man," below.

[9] Henry Clay Tompkins (law partner of ethics committee member Daniel S. Troy) offered the suggestion to publish the code in pamphlet form and to make it available for the next annual meeting of the Bar. *Proceedings of the Seventh Annual Meeting*, 8-9. For Henry Clay Tomkins, see Owen, *History of Alabama and Dictionary of Alabama*

time Bar secretary Alexander Troy reported that although a code had been prepared by Jones, he was engaged in the United States Court and "if he could get it to the meeting in time he would present it."[10]

Perhaps the most bizarre exchange surrounding the much-delayed Code occurred at Montgomery during the Ninth Annual Meeting in 1886. Following a postponement granted to the committee on the previous day, ethics committee member Daniel Troy reported on Wednesday, December 2, 1886 that Jones had a draft of the Code ready for presentation, but that he was obligated to his duties as speaker of the house and requested that the report be delayed until the afternoon session.[11] The afternoon meeting was called to order at four o'clock and Chairman Jones reported,

> Mr. President,[12] I regret very much that accidentally I am prevented from presenting that report. A portion of it was written off by my shorthand writer, and he sent it this morning up to the House. It was on my desk at dinner time, but can not be found now. It contains some other matter written by myself. It is impossible at this time to have it re-written, or to take it from the notes, so as to present it to the Association, but it can be re-copied in two or three days and furnished to the Secretary to be

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Biography, IV: 1674-1675; and *Proceedings of the Sixth Annual Meeting*, 147.

[10] *Proceedings of the Eighth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1886), 33. Alexander Troy was a nephew of ethics committee member Daniel S. Troy. See Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1685.

[11] *Proceedings of the Ninth Annual Meeting of the Alabama State Bar Association* (Montgomery: Barrett and Company, 1887), 14, 43.

[12] William McLin Brooks from Selma. See Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 223-224.

> printed with the proceedings. I have made [a] diligent search for it and some other papers I had on my desk, but they have disappeared. Under the circumstances the committee is unable to report. We worked diligently on it, and I regret it can not now be presented.[13]

It seems that the most plausible explanation for the loss of the material is that it literally blew out of the window of Jones's office. The last time that the draft of the Code was seen it was located on the speaker of the house's desk which was situated next to an open window in the Capitol.[14] On a motion by Alexander Troy, the completed Code was to be printed in pamphlet form and distributed to the members of the Association prior to the next meeting on December 14 and 15, 1887.

The "Committee to Prepare a Code of Legal Ethics" indeed produced a report before the next meeting. The Code was printed in pamphlet form and distributed to all members of the Association before the Tenth Annual Meeting of the Alabama State Bar Association on December 14, 1887. The report was debated at that meeting and a final version was adopted. Although the discussion was at times vigorous and reveals much concerning the contemporary political climate, Jones' draft survived the scrutiny of the debate with only two minor changes.[15] The numerous small errors that are found in the printed version (such as erroneous numbering and mis-

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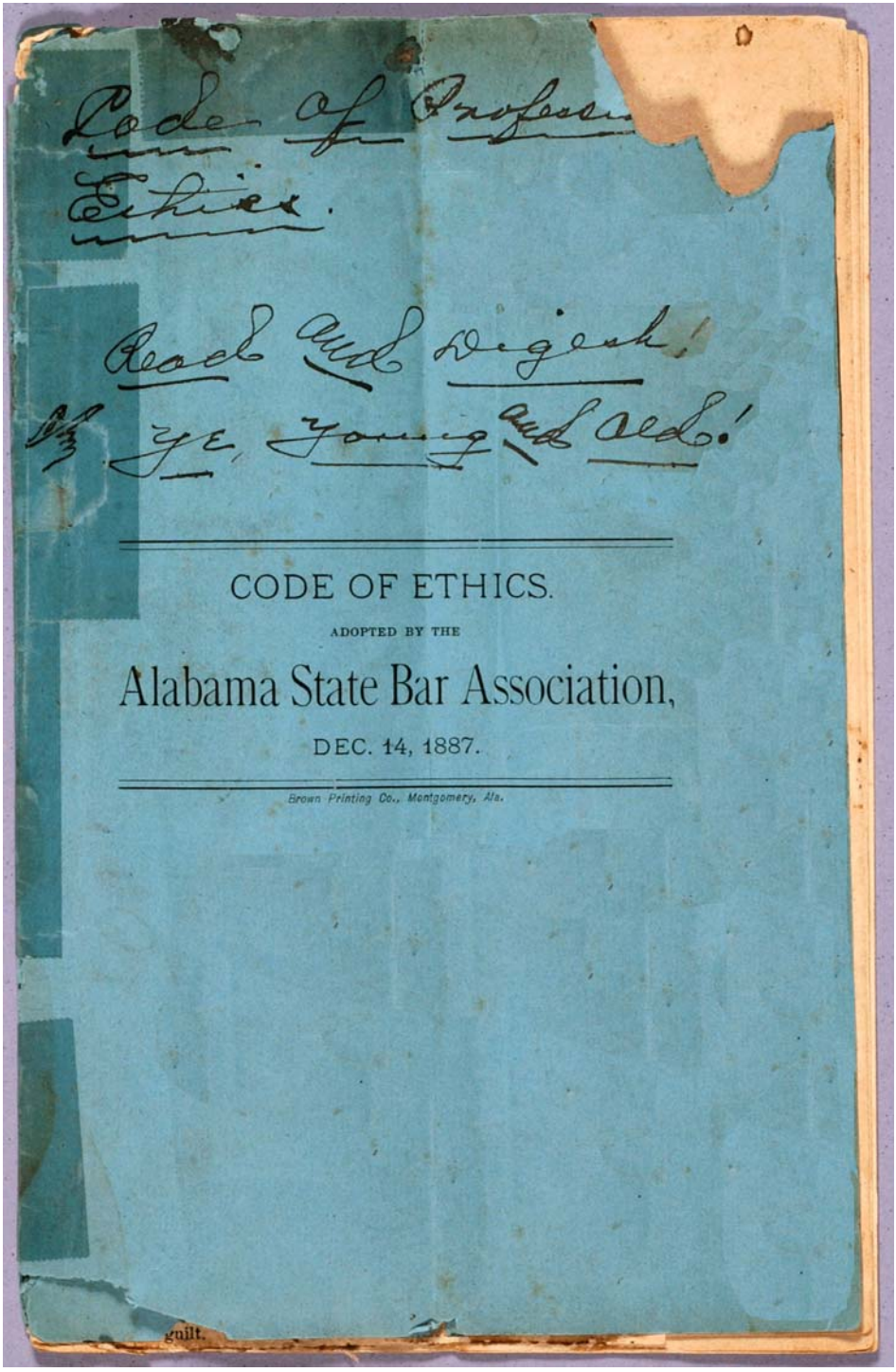
[13] *Proceedings of the Ninth Annual Meeting*, 51.

[14] See Walter B. Jones, "Canons of Professional Ethics, Their Genesis and History." *The Alabama Lawyer*, 2 (July 1941), 250. (Reprinted from the *Notre Dame Lawyer*, 7 (May 1932), 483.

[15] *Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association* (Montgomery: Brown Printing Company, 1888), 8-22. Changes in the Code occurred at section 14, and at section 20; see the debates concerning the Code at *ibid.*, 19-20 (reprinted herein at Appendix II).

quoted material) likely indicate that Jones and his committee hurriedly re-copied the frequently-delayed Code for publication. It was not until the Code was reprinted in the 1904 *Proceedings of the Alabama State Bar Association* that some of the errors were corrected.[16] A facsimile reproduction of the 1887 "Code of Legal Ethics" follows, succeeded (Appendix II) by a reproduction of the Bar Association debates concerning the adoption of the Code.

[16] *Proceedings of the Twenty-Seventh Annual Meeting of the Alabama State Bar Association* (Montgomery: Woodruff Company, 1904), 233-246.


Code of Professional Ethics.

Read and Digest!

Ye, Young and Old!

CODE OF ETHICS.

ADOPTED BY THE

Alabama State Bar Association,

DEC. 14, 1887.

Brown Printing Co., Montgomery, Ala.

guilt.

CODE OF ETHICS.

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 their great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries.

"There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and man-traps at every step, and the mere youth at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."—Sharswood.

A comprehensive summary of the duties specifically enjoined by law upon attorneys, which they are sworn "not to violate," is found in section 791 of the Code of Alabama.

These duties are:

"1st. To support the constitution and laws of this State and the United States.

2d. To maintain the respect due to courts of justice and judicial officers.

3d. To employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth; and never to seek to mislead the judges by any artifice or false statement of the law.

4th. To maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients.

5th. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which they are charged.

6th. To encourage neither the commencement nor continuance of an action or proceeding, from any motive of passion or interest.

7th. Never to reject, for any consideration personal to themselves, the cause of the defenceless or oppressed."

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by analogy to the duties enjoined by statute, and the rules of good neighborhood.

The following general rules are adopted by the Alabama State Bar Association for the guidance of its members:

Duty of Atttorneys to Courts and Judicial Officers.

1. The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, can not excuse the withholding of the respect due the office, while administering its functions.

2. The proprieties of the judicial station, in a great measure, disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to

causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of the judge is necessarily involved in determining his removal from or continuance in office.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial personal and official relations between bench and bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence—knowingly misquoting the language of a decision or text-book—knowingly misstating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel—offering evidence which it is known the court must reject as illegal, to get it before the jury, under guise of arguing its admissibility—and all kindred practices—are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening argument, positions intended finally to be relied on, in order that opposite counsel may not discuss them, is unprofessional.

Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side-bar" remarks and sparring discourse, to influence the jury or bystanders. Personal colloquies between counsel tend to delay, and promote unseemly wrangling, and ought to be discouraged.

6. Attorneys owe it to the courts and the public whose business the courts transact, as well as to their own clients, to be punctual in attendance on their causes; and whenever an attorney is late he should apologize or explain his absence.

7. One side must always lose the cause; and it is not wise, or respectful to the court, for attorneys to display temper because of an adverse ruling.

Duty of Attorneys to each other, to Clients and to the Public.

8. An attorney should strive, at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow-man.

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

10. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in

withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability," to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within, and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

11. 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.

12. An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, for-swears himself. The State's attorney is criminal, if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle pros.*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

13. An attorney can not reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and lawful means to pre-

sent such defenses as the law of the land permits; to the end that no one may be deprived of life or liberty, but by due process of law.

14. An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

16. Newspaper advertisements, circulars and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency and wholly unprofessional.

17. Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.

18. When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client, as to any matter.

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

20. 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. Stirring up strife and litigation is forbidden by law, and disreputable in morals.

21. Communications and confidence between client and attorney are the property and secrets of the client, and can not be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

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

23. An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for

any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere conveyancer, and was not consulted as to the facts, and, unknown to him, the transaction amounted to a violation of the criminal laws, he may assail it on that ground, in suits between third persons, or between parties to the instrument and strangers.

24. An attorney openly, and in his true character, may render purely professional services before committees, regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

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

26. "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and villified."

27. An attorney is under no obligation to minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client can not be made the keeper of the attorney's conscience in professional matters. He can not demand as of right that his attorney shall abuse the opposite party, or indulge in offensive personalities. The attorney, under the

solemnity of his oath, must determine for himself, whether such a course is essential to the ends of justice, and therefore justifiable.

28. Clients and not their attorneys are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

29. In the conduct of litigation and the trial of causes the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history, or mental or physical peculiarities or idiosyncrasies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.

31. Where an attorney has more than one regular client, the oldest client, in the absence of some agreement, should have the preference of retaining the attorney, as against his other clients in litigation between them.

32. The miscarriages to which justice is subject, and the uncertainty of predicting results, admonish attorneys to be-

ware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

33. Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

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

35. An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it he ought to seek to adjust it without litigation, if practicable.

36. Where an attorney, during the existence of the relation, has lawfully made an agreement which binds his client, he can not honorably refuse to give the opposite party evidence of the agreement, because of his subsequent discharge or instructions to that effect by his former client.

37. Money or other trust property coming into the possession of the attorney, should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

38. Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their client; and they ought scrupulously to refrain from bargaining about the subject-

matter of the litigation, so long as the relation of attorney and client continue.

39. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but after advising frankly with the client, it should be left to his determination.

40. Important agreements affecting the rights of clients should, as far as possible, be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing as required by rules of court.

41. An attorney should not ignore known customs or practice of the bar of a particular court, even when the law permits, without giving opposing counsel timely notice.

42. An attorney should not attempt to compromise with the opposite party, without notifying his attorney, if practicable.

43. When attorneys jointly associated in a cause can not agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively; in which event, it is his duty to ask to be discharged.

44. An attorney coming into a cause in which others are employed, should give notice as soon as practicable and ask for a conference, and if the association is objectionable to the attorney already in the cause, the other attorney should decline to take part, unless the first attorney is relieved.

45. An attorney ought not to engage in discussion or argu-

ments about the merits of the case with the opposite party, without notice to his attorney.

46. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset, as to the amount of the attorney's compensation; and, where it is possible, this should always be agreed on in advance.

47. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.

48. Men, as a rule, over-estimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances, and sometimes none at all.

49. An attorney may charge a regular client, who entrusts him with all his business, less for a particular service than he would charge a casual client for like services. The element of uncertainty of compensation where a contingent fee is agreed on, justifies higher charges than where compensation is assured.

50. In fixing fees the following elements should be considered: 1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2d. Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be

employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d. The customary charges of the Bar for similar services. 4th. The real amount involved and the benefit resulting from the service. 5th. Whether the compensation was contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

51. Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred.

52. Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney, should be rendered without charge in most instances; and where the circumstances make it proper to charge, the fees should generally be less than in case of other clients.

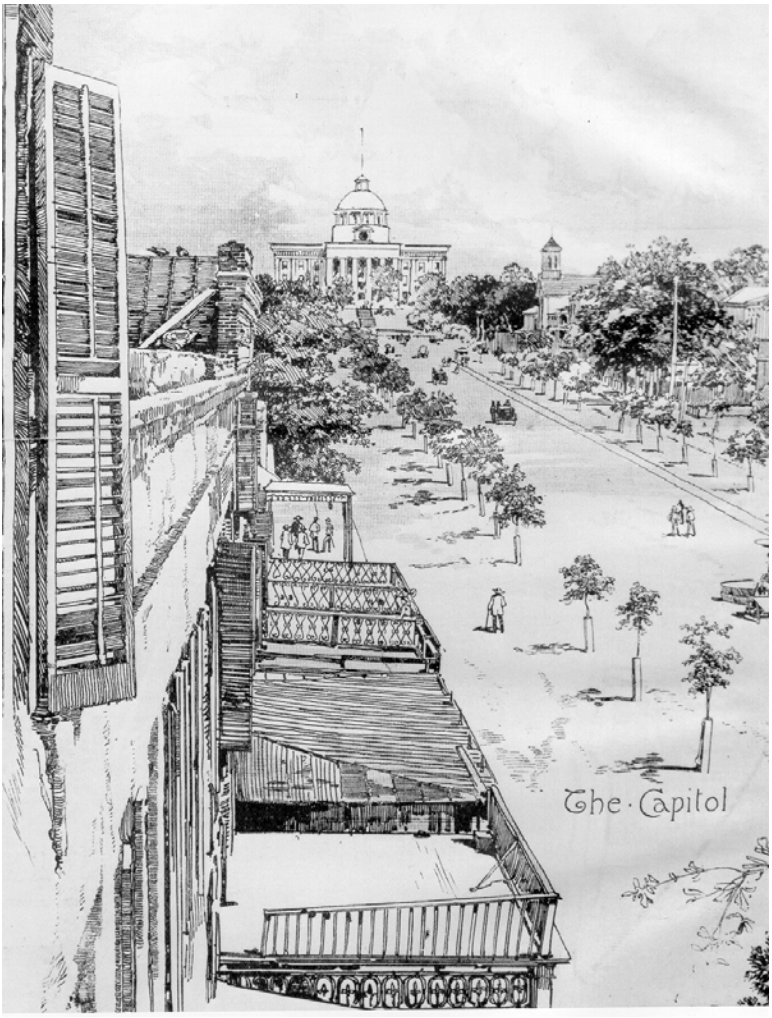
53. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without villification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness' testimony, and often rob deserved strictures of proper weight.

54. It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for

their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue, or hunger, the uncomfortableness of their seats, or the court-room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court; whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury towards court or opposite counsel, if such requests are denied. For like reasons, one attorney should never ask another in the presence of the jury, to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard, after the jury withdraws.

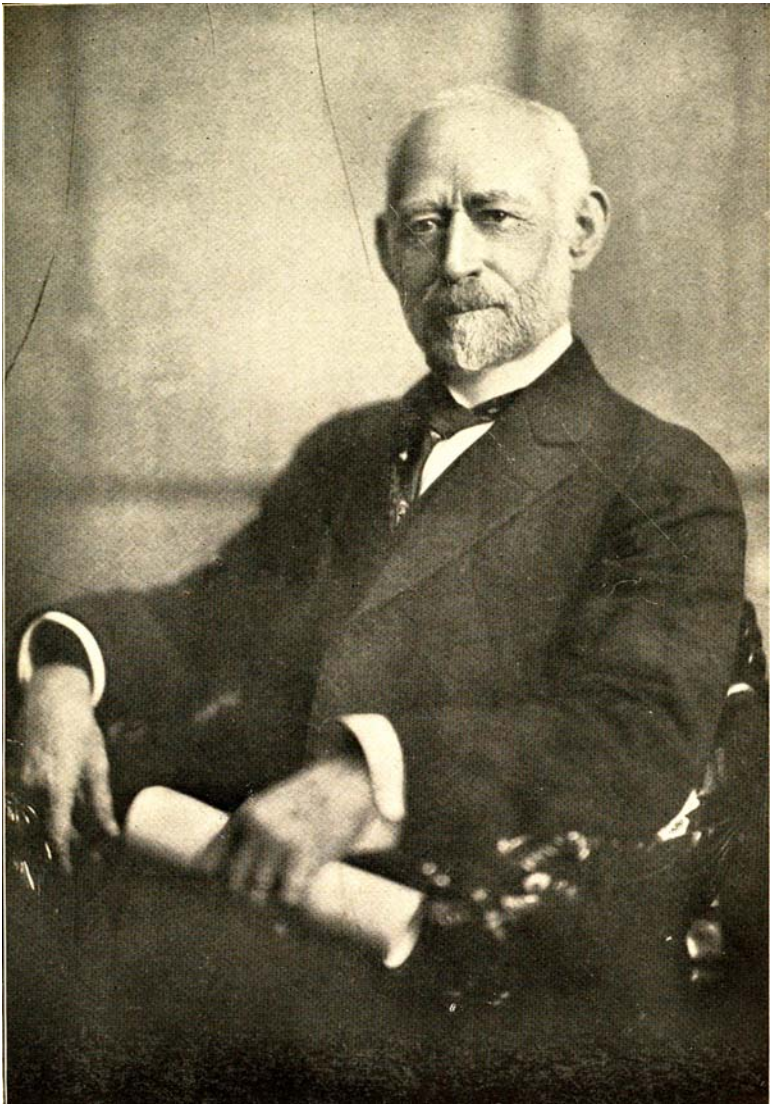
55. An attorney ought never to converse privately with jurors about the case; and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color for imputing evil designs, and often leads to scandal in the administration of justice.

57. An attorney assigned as counsel for an indigent prisoner ought not ask to be excused for any light cause, and should always be a friend to the defenceless and oppressed.



An 1887 View of the Alabama State Capitol from Dexter Avenue

Harper's Weekly, July 16, 1887



Alabama State Bar Association
Secretary, Alexander Troy

Thomas Goode Jones and Fellow Officers, circa 1887

Alabama Department of Archives and History, Montgomery, Alabama

Abram Joseph Walker

Samuel F. Rice

THOMAS GOODE JONES: PERSONAL CODE OF A PUBLIC MAN

Paul M. Pruitt, Jr.

As the drafter of Alabama's 1887 Code of Ethics, Thomas Goode Jones was well aware of the importance of his work. As early as 1881 he had told colleagues that the author of such a code "need ask no greater or more enduring fame."[1] Students of legal ethics know that Jones' code was adopted by several states, and was an important influence upon the 1908 American Bar Association canons of ethics and upon subsequent efforts to regulate the ethics of the profession.[2]

Students of history are more likely to know Jones as a Confederate veteran and New South lawyer who achieved high office as Alabama's governor (1890-1894)[3] and as a federal judge (1901-1914).[4] Viewed in this light, Jones

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[1] *Report of the Organization and of the First, Second, and Third Annual Meetings of the Alabama State Bar Association* (Montgomery: Smith and Armstrong, Printers, 1882), 236.

[2] Walter B. Jones, "History of the Alabama Lawyer's Code of Ethics," *The Alabama Lawyer*, 17 (January 1956), 23-24.

[3] Paul M. Pruitt, Jr., "Thomas Goode Jones," in Samuel L. Webb and Margaret E. Armbrester, editors, *Alabama Governors: A Political History of the State* (Tuscaloosa: University of Alabama Press, 2001), 116-121; and Carolyn Ruth Huggins, "Bourbonism and Radicalism in Alabama: The Gubernatorial Administration of Thomas Goode Jones, 1890-1894" (M.A. thesis, Auburn University, 1968).

[4] Tony Freyer and Timothy Dixon, *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820-1994* (Brooklyn: Carlson Publishing, 1995), 63, 66, 68, 90, 93, 104, 111-116, 118-120, 274; Pete Daniel, *The Shadow of Slavery: Peonage in the South, 1901-1969* (Urbana: University of Illinois Press, 1990), 43-81; and Brent Jude Aucoin, "'A Rift in the Clouds': Southern Federal

seems in many respects the perfect "Bourbon": an advocate of limited government, a loyal servant of railroads and industry, and the beneficiary of a racist political system.[5] Yet this friend of robber barons and disfranchisers was also an opponent of Alabama's convict lease system and the peonage that flourished under the state's contract labor laws. A confidante of Booker T. Washington and a determined foe of lynching, Jones may (to modern eyes) seem as much the reformer as the reactionary.[6] Certainly Jones' career was an exemplar of what a recent scholar has called the "dazzling incongruity of southern politics."[7]

Jones, in all probability, would have admitted no such contradictions. His papers and writings are focused and confident, conveying a secure sense of self. His early biographer, the historian John Witherspoon DuBose, noted that Jones was considered by some to be "self-conscious to the point of vanity of mind."[8] It is no great leap to argue that a man like Jones, in order to achieve such a measure of self-absorption, must have possessed an ethical framework capable of resolving the contradictions of a convoluted life. In order to understand his ethics, it will first be useful to

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Judges and African-American Civil Rights, 1885-1915" (Ph.D. dissertation, University of Arkansas, 1999), 126-178.

[5] William Warren Rogers, *The One-Gallused Rebellion: Agrarianism in Alabama, 1865-1896* (Baton Rouge: Louisiana State University Press, 1970), 118-120, 182-184, 198, 213-227, 274-275; and Sheldon Hackney, *Populism to Progressivism in Alabama* (Princeton: Princeton University Press, 1969), 59, 61-62, 202, 290-292, 296-298.

[6] The fullest exploration of this interpretation is Brent Jude Aucoin's "Thomas Goode Jones, Redeemer and Reformer: The Racial Policies of a Conservative Democrat in Search of a 'New' South" (M.A. thesis, Miami University, 1993).

[7] Burton D. Wechsler, "Black and White Disenfranchisement: Populism, Race, and Class," *American University Law Review*, 52 (October 2002), 51.

[8] John Witherspoon DuBose, "A Historian's Tribute to Thomas Goode Jones," *The Alabama Lawyer*, 14 (January 1953), 47; this article was originally published in the Birmingham *Age-Herald*, May 31, 1914.

discuss his formative years, and next to identify unifying patterns of thought.

Biographical Outline to 1887

Thomas Goode Jones was born November 26, 1844, near Macon, Georgia. He was the eldest son of Samuel Goode Jones and Martha Goode Jones, both descendants of old Virginia families. Samuel Goode Jones was a civil engineer, a graduate of Williams College who came south in 1839 and made a notable career as a railroad builder. He brought his family to Montgomery, Alabama, in the spring of 1850. A well-to-do planter and slaveholder,[9] a prominent citizen and successful lobbyist for his industry, he served during the Civil War as a Confederate railroad official and as captain of the Montgomery home guards.[10]

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[9] In 1860, Samuel Goode Jones claimed $50,000 in real estate and $119,500 in personal property; the latter included thirty-two slaves. See *Population Schedules of the Eighth Census of the United States, 1860: Alabama, Volume 10* [Montgomery and Morgan Counties] (Washington, D.C.: National Archives and Records Administration, 1967), Reel 19, 306; and *Population Schedules of the Eighth Census of the United States, 1860: Alabama Slave Schedules, Volume 4* [Mobile, Monroe, and Montgomery Counties], Reel 33, 235. For Thomas Goode Jones' memories of slaves, see Thomas Goode Jones to Booker T. Washington, September 20, 1901, in Louis R. Harlan, *et al*., editors, *The Booker T. Washington Papers* (Urbana: University of Illinois Press, 1972-1989), 6: 214.

[10] For Samuel G. Jones' career, see "Thomas Goode Jones" in *Northern Alabama: Historical and Biographical* (Spartanburg: Reprint Company, 1976 (1888)), 600; Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography* (Spartanburg: Reprint Company, 1978 (1921)), III: 941, 942; DuBose, "Historian's Tribute," 51; Malcolm Cook McMillan, "Thomas Goode Jones, 1844-1914: Warrior, Statesman, and Jurist," *The Alabama Lawyer*, 17 (October 1956), 376; and Ethel Armes, *The Story of Coal and Iron in Alabama* (Leeds, Alabama: Beechwood Books, 1987 (1910)), 104, 109, 112.

Politically, Samuel Goode Jones has been described as an "old line Whig,"[11] and he passed on to his son both a Whiggish faith in industrial development and a paternalistic sense of duty. Samuel Jones prepared his son for a gentleman's career, providing him with private tutors and sending him to schoolmasters in Montgomery and Virginia. By the fall of 1860, at age sixteen, Thomas Goode Jones was a cadet at Virginia Military Institute. Soon the Civil War would cut short his adolescence.

Jones' military career began soon after the outbreak of hostilities in Virginia, where he served under the command of Stonewall Jackson, his former VMI professor. By November 1862, Jones had enlisted in the 53rd Alabama and with this regiment saw action in Mississippi and Tennessee. In the spring of 1863, upon the recommendation of Confederate Attorney General Thomas H. Watts, an old Montgomery connection, he was assigned as aide to General John B. Gordon of the Army of Northern Virginia.[12] For the remainder of the war he carried messages for Gordon, a dangerous occupation that often brought him under fire. Wounded several times and promoted to the rank of major, he was commended by Robert E. Lee for braving a storm of Federal fire at Hare's Hill, near Petersburg. A few days later, Jones was sent through the lines with a flag of truce prior to the surrender at Appomattox.[13]

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[11] Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 941.

[12] DuBose, "Historian's Tribute," 51-52; and McMillan, "Thomas Goode Jones, 1844-1914," 376-377.

[13] Walter B. Jones, "Anecdotes About Governor Thomas Goode Jones," *The Alabama Lawyer*, 17 (July 1956), 289, 290-293; this article is partly based upon John Brown Gordon, *Reminiscences of the Civil War* (New York: Charles Scribner's Sons, 1903). For a personal account, see Thomas Goode Jones, *Last Days of the Army of Northern Virginia: An Address Delivered by Gov. Thos. G. Jones, Before the Virginia Division of the Association of the Army of Northern Virginia*

Jones was marked for life by the experience of war, yet was not embittered by it, in part because of the lessons he learned from General Gordon. Only twelve years older than Jones, Gordon had molded an "immature boy" into an officer.[14] An industrial promoter and lawyer before and after the war, Gordon was both an affirmation of Samuel Goode Jones' values and a pattern of determination in the face of defeat. The general and his aide remained on close terms, and their later careers as Democratic politicians, railroad men, and Confederates devoted to a restored Union ran on parallel lines.[15]

Jones returned to Alabama and was soon engaged on several fronts, though his main ambition was to practice law. Proposing to live in pre-war style, he began to grow cotton in 1866 on a farm provided by his father, that same year marrying Georgena Caroline Bird of Montgomery. The marriage was a great success,[16] but the plantation venture was doomed by the instability of cotton markets and by Jones' inability, in those early post-emancipation days, to secure a sufficient labor force. By the end of the

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at the Annual Meeting, Richmond, Va., October 12, 1893 (Richmond [?]: n.p., *circa* 1893).

[14] Jones, "Anecdotes," 292.

[15] See Thomas Goode Jones to General John B. Gordon, December 28, 1886, in Letterbook, 1886-1889 [leaf 3], Thomas Goode Jones Collection, Alabama State Department of Archives and History. This is one of several such letters, personal and official, exchanged by the two men in the mid-1880s. See also Thomas Goode Jones, *Resolutions and Address of Judge Thomas G. Jones: In Memory of Gen'l John B. Gordon, at Nashville, Tennessee, June 15, 1904* (Nashville [?]: n.p., *circa* 1904), 13-16, *passim*. For an overview of Brown's career see Robert Preston Brooks, "Gordon, John Brown," in Allen Johnson and Dumas Malone, editors, *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1960), IV-1: 424-425.

[16] DuBose, "Historian's Tribute," 54-55; and see *In Memoriam: Thomas Goode Jones, 1844-1914, Georgena Bird Jones, 1846-1921* (Montgomery: Thomas Goode Jones Camp, Sons of Confederate Veterans, 1956), *passim*.

decade he had lost his land and was encumbered with debts.[17]

Fortunately, his legal career was more promising. After studying under John A. Elmore (William Lowndes Yancey's former law partner) and Chief Justice A.J. Walker, he was admitted in 1868 to practice before the Alabama Supreme Court and the federal district court.[18] Within two years, Jones was appointed reporter of the Supreme Court, a move that indicated both the high esteem in which he was held and his ability to cross political lines.[19] At that time, Republicans controlled the high court. Its chief justice, the "Scalawag" Elijah Wolsey Peck, had served as president of the Republican-dominated constitutional convention of 1867.[20] Walker had refused to administer the oath of office to Peck,[21] but Jones saw no reason to confuse law and partisanship. To the scandal of some Democrats, he even rode in a Fourth of July parade with the Republican justices.[22]

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[17] Dubose, "Historian's Tribute," 55; and McMillan, "Thomas Goode Jones, 1844-1914," 377. In 1868 Jones supplemented his income by editorial work for the Montgomery *Daily Picayune*, a short-lived newspaper remarkable (in McMillan's words) "for its sane approach to the problems of the period." Several issues are extant; see Montgomery *Daily Picayune*, June 18, 23, 24, 1868.

[18] DuBose, "Historian's Tribute," 54; McMillan, "Thomas Goode Jones, 1844-1914," 377; for John A. Elmore, William Lowndes Yancey, and Abram J. Walker, see William Garrett, *Reminiscences of Public Men in Alabama for Thirty Years* (Spartanburg: Reprint Company, 1975 (1872)), 61-62, 454-455, 681-695.

[19] DuBose, "Historian's Tribute," 57; DuBose states that Jones was unanimously recommended by the Montgomery bar.

[20] For E.W. Peck, see *Northern Alabama*, 522-523; and Joel Kitchens, "E.W. Peck: Alabama's First Scalawag Chief Justice," *Alabama Review*, 54 (January 2001), 3-32. A Scalawag was a native white southerner who supported the Reconstruction-era Republican Party.

[21] William H. Brantley, *Chief Justice Stone of Alabama* (Birmingham: Birmingham Publishing Company, 1943), 215.

[22] DuBose, "Historian's Tribute," 57.

Jones served as reporter for about ten years,[23] during which time he established himself as a promising lawyer, working in partnership with former chief justice Samuel F. Rice, himself a Scalawag Republican and railroad lawyer.[24] By the early 1880s, Jones was a lawyer for the powerful Louisville and Nashville Railroad,[25] one of the most important professional affiliations of his life. By the same time he was an active member of the Alabama State Bar Association (founded in 1878), an organization that tended to reflect the views of the profession's thoroughly interconnected urban and corporate elite.[26] Like their counterparts in the American Bar Association, the leaders of the Alabama association were reformist in their approach to law and the legal profession, favoring uniform rules and

[23] "Thomas Goode Jones," *Northern Alabama*, 602. Jones' accomplishments as writer and digester (and his occasional vacations from this work) can be followed in the *Alabama Reports*, volumes 42 to 62.

[24] Jones practiced with the firm of Rice, Jones, and Wiley for much of the mid-1870s; for its other members, Samuel F. Rice and Ariosto A. Wiley, see *Northern Alabama*, 595-596, 607-608. For an example of his railroad work, see *The South & North Alabama Railroad Co. v. Henlein & Burr*, 52 *Alabama Reports*, 606-624 (1875). See *Thomas v. The State, ex rel. Stepney*, 58 *Alabama Reports*, 365-370 (1877) for the firm's defense of a black attorney who had been suspended from practice in the courts of Dallas County.

[25] *Hubbell's Legal Directory for Lawyers and Business Men* [1882-1883] (New York: J.H. Hubbell and Company, 1883), 733. See also Jones to Russell Houston, May 23, 1887, Letterbook, 1886-1889 [leaves 98-99], Jones Collection.

[26] Freyer and Dixon, *Democracy and Judicial Independence*, 70-74; and Paul M. Pruitt, Jr., "The Life and Times of Legal Education in Alabama, 1819-1897: Bar Admissions, Law Schools, and the Profession," *Alabama Law Review*, 49 (Fall 1997), 301-302, 304-305, 309-318. For a demonstration of how much the attorneys of one city (Montgomery) and one family (that of Daniel S. Troy and his connections), could influence Association policy, see Appendix II, below.

procedures.[27] Jones' 1881 report as chairman of the Committee on Judicial Administration and Remedial Procedure—in which he called for adoption of a state ethics code—falls within this pattern.[28]

Politically, despite professional dealings and personal friendships with Republicans, Jones was firmly identified with the Democratic (or Conservative) Party, and therefore with its racial politics.[29] He was a Democratic campaigner during the turbulent contests of 1874, when the election of gubernatorial candidate George S. Houston effectively broke the power of the Republicans.[30] Soon thereafter Jones began to move up the political ladder. From 1875 to 1884 he served as a Montgomery alderman, mastering the intricacies of local politics and making himself an expert on such technical matters as the law of quarantine—useful knowledge since the community was threatened in 1878 by a yellow fever epidemic.[31] In 1884, the forty-year-old Jones was elected to the legislature. Reelected in 1886, he was chosen Speaker of the House.[32] Comfortable with the

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[27] Lawrence M. Friedman, *A History of American Law*, 2nd edition (New York: Simon and Schuster, 1985), 407-408.

[28] *Report of the Organization and of the First, Second, and Third Annual Meetings*, 224-241; for other members of the committee, see *ibid*., 164.

[29] See Walter L. Fleming, *Civil War and Reconstruction in Alabama, with New Introduction by Sarah Woolfolk Wiggins* (Spartanburg, South Carolina: The Reprint Company, 1978 (1905)), 782-798, *passim*. See also Malcolm Cook McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism, with New Introduction* (Spartanburg, South Carolina: The Reprint Company, 1978 (1955)), 175.

[30] McMillan, "Thomas Goode Jones, 1844-1914," 378; DuBose, "Historian's Tribute," 56.

[31] See Thomas G. Jones, "Some Observations on the Law of Quarantine," *Southern Law Journal and Reporter*, 1 (February 1880), 161-175; and Robert Partin, "Alabama's Yellow Fever Epidemic of 1878," *Alabama Review*, 10 (January 1957), 31-51.

[32] "Thomas Goode Jones," *Northern Alabama*, 602.

planters and businessmen whose representatives dominated the Democratic Party, he began to think about running for governor in his own right.[33]

Thus Jones established himself as a rising lawyer and politician; but he had never ceased to be a soldier. Indeed he had been an organizer of state troops as early as 1866, and he was one of Governor Houston's military advisors in 1874. Thereafter he served as captain of an elite company, the Montgomery Greys, before accepting command, in 1880, of the Second Regiment of state troops. As such he was often in the public eye, and sometimes in personal danger, since the Second Regiment was used on several occasions to keep public order.[34] One of its most notable achievements was recorded on December 4, 1883, when Jones and his men prevented a Birmingham mob from killing a black prisoner. Jones' leadership—his combination of determination and tact—helped end the riot without bloodshed, and contributed to his reputation as an expert on the lawful use of force.[35]

Jones' Values and Ideals

Approaching middle age, Jones clung to the ideals of Old South paternalism: hierarchy, loyalty, duty and

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[33] Jones to My Dear Captain, March 14, 1888, Letterbook, 1886-1889 [leaf 249], Jones Collection.

[34] McMillan, "Thomas Goode Jones, 1844-1914," 378; and "Thomas Goode Jones," *Northern Alabama*, 601 (quoted passage).

[35] "Thomas Goode Jones," *Northern Alabama*, 601-602. For information on this riot, see *Posey v. The State*, 73 *Alabama Reports*, 490-495 (1883). For a later case in which Jones and his regiment stopped a lynching, see *Hawes v. The State*, 88 *Alabama Reports*, 37-73, especially 53 (1889); see also Birmingham *Evening News*, December 10, 1888, containing Jones' warning to rioters. McMillan, "Thomas Goode Jones, 1844-1914," 379, notes that Jones sponsored a "Riot Act" in the legislature. For one such act sponsored by Jones, see 1884-1885 *Acts of Alabama*, 143-144; for the decade's main anti-riot legislation, passed after Jones left the legislature, see 1888-1889 *Acts of Alabama*, 99-102.

honor.[36] Jones' exposure to antebellum society had convinced him that social hierarchies were a natural part of life.[37] His military experiences only reinforced the notion of hierarchy as an organizing principle. Professionally, he associated with elite lawyers at a time when the Bar was increasingly specialized and stratified.[38] Certainly the legal business of the great regional railroads, notably that of the L&N, was conducted through what one historian has called a "hierarchical, federalized chain of firms and attorneys."[39]

Loyalty is both a military and a paternalistic virtue, and Jones displayed intense loyalty—not only to his former commanders, but also to persons who had been under his command. Who could forget, he asked at a meeting of Confederate veterans, the private soldier's "bright face, his tattered jacket and crownless hat," his "jests which tickled the very ribs of death," his "hope and faith and patience to the end"?[40] Like his mentor Gordon, Jones spoke often before veterans' encampments, urging his comrades to remember the glorious past but to put aside hatred.[41] Rejecting hate was not the same thing as abandoning shared beliefs. "Force," Jones would quote Gordon, "could not kill principle and truth, but altered conditions may

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[36] For a deconstruction of these themes, see Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982).

[37] See Eugene Genovese, *The World the Slaveholders Made: Two Essays in Interpretation* (New York: Vintage Books, 1971), 99-102, *passim*.

[38] Friedman, *A History of American Law*, 632-654; and Samuel Haber, *The Quest for Authority and Honor in the American Professions, 1750-1900* (Chicago: University of Chicago Press, 1991), 206-239.

[39] William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge: Louisiana State University Press, 1999), 39-44, quoted passage on 43.

[40] Jones, "Last Days of the Army of Northern Virginia," 45.

[41] DuBose, "Historian's Tribute," 61-62.

require different applications of them."[42] Most notably in politics, the solidarity of Confederate veterans had helped achieve the Democratic victory of 1874—a quasi-military campaign—and Jones was one of many who embraced the soldiers of the Democratic Party as brothers-in-arms.[43]

In tandem with his affection for the band of Confederate brothers, Jones felt a patriarchal sense of obligation to Alabama's freedmen, who, in his opinion, had recently been thrust into civic responsibilities for which they were not ready. Indeed, he viewed it as the duty, as well as the self-interest, of former slaveholders to provide black people with education and to recognize their new status as citizens.[44] In one of his most-quoted speeches Jones spelled out a vision of white men as the "custodians" of the African American, adding: "Let us make him feel that . . . we intend to be just to him, to be his friend, and that he ought to rely on us."[45] Old South racial doctrine was never more blandly set forth.[46]

For a man of such mingled authoritarian and benevolent impulses, the law was more than a respectable profession, more than a way to ally himself with a powerful corporation. In fact, law provided a system of belief in which Jones found roles consistent with his principles of honor.

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[42] Jones, *Resolutions and Address of Judge Thomas G. Jones, in Memory of Gen'l John B. Gordon*, 12.

[43] William Warren Rogers, *et al*., *Alabama: The History of a Deep South State* (Tuscaloosa: University of Alabama Press, 1994), 259-264.

[44] Jones made these points in his first gubernatorial address. See 1890-1891 *Journal of the Senate of the State of Alabama*, 177-178.

[45] These are passages from a speech Jones delivered to the Alabama Constitutional Convention of 1901; see *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901, to September 3rd, 1901* (Wetumpka, Alabama: Wetumpka Printing Company, 1940), IV: 4303-4304.

[46] See George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* (Middletown, Connecticut: Wesleyan University Press, 1987 (1971)), 198-227, for a discussion of New South paternalism.

Mid-nineteenth-century legal thinkers viewed the courtroom as a place apart, ideally a realm of fair combat in which independent professionals fought fiercely to protect their clients' interests, but within the bounds of recognized procedures and traditions, and without personal rancor.[47]

Jones was inclined to describe chivalrous rivalry as a component of civilized behavior. At the Montgomery Confederate Memorial Day exercises of 1874, for example, he affirmed that "Honor to noble foes is the warrior's highest courage."[48] It seems certain that Jones polished his adversarial manners while working with Samuel F. Rice, a very successful attorney who had survived a lifetime of legal and political controversy with reputation and independence intact. "First," Rice was quoted by his partner Ariosto A. Wiley, "We can differ and be honest. Second—We can differ and be friends. Third—We can differ and be patriots. Fourth—We can differ and be sincere worshippers of the same true and living God."[49] Jones' role models,

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[47] Haber, *Quest for Authority and Honor*, 206-209, *et seq*. On the writings of legal ethicists David Hoffman and George Sharswood, see Carol Rice Andrews, "The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association," above. For a contemporary Alabama view, see Wade Keyes, "Introductory Lecture, Delivered March 1860, Before the Class of the Montgomery Law School," in David I. Durham and Paul M. Pruitt, Jr., editors, *Wade Keyes' Introductory Lecture to the Montgomery Law School: Legal Education in Mid-Nineteenth Century Alabama* (Tuscaloosa: University of Alabama School of Law, 2001), 29-32.

[48] DuBose, "Historian's Tribute," 61. Jones, like his mentor General Gordon, participated in the "ring tournament" revival of the late 1860s and 1870s. These contests, inspired by Sir Walter Scott's *Ivanhoe* and similar works of romantic medievalism, were intended to promote chivalry; after the war, they sometimes promoted sectional reconciliation. Jones delivered the "charge to the knights" at an 1870 tournament in Winchester, Virginia. See Esther J. Crooks and Ruth W. Crooks, *The Ring Tournament in the United States* (Richmond: Garrett and Massie, 1936), 3, 42-48, 87, 100-105, *passim*.

[49] A. A. Wiley, "Samuel F. Rice," 88 *Alabama Reports*, ix-xii (1890), quoted passage on xi.

from General Brown to Judge Rice, showed him how to fight hard without holding grudges. He determined for himself methods of preserving such ideals in the face of a rough and tumble practice.

Jones and the Ethical Problems of Legal Practice

In court—whether in the nineteenth century or the twenty-first—the validity of the adversarial system depends upon the rulings of an impartial judge and the presence of a jury representing the people.[50] It also depends upon the integrity of lawyers, and Jones was well aware that many lawyers of his day had no intention of engaging in fair combat if they could help it. Complaints about lawyers' subterfuges, of course, were nothing new.[51] But in Alabama the situation was aggravated by an unusually cumbersome system of pleading.[52] In addition it was a well-established custom for Alabama lawyers to disrupt trials with long "side-bar" remarks aimed at opposing counsel. Such speeches distracted juries and violated the unwritten rule that "attorneys should try the case and not one another." Such abuses, Jones knew, were rooted within the profession itself.[53] Other ethical problems had more to do with the impact of the outside world upon practitioners.

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[50] *Report of the Organization and of the First, Second, and Third Annual Meetings*, 227-235.

[51] See William Shakespeare, *Hamlet*, III: 1: 72.

[52] For brief discussions of pleading under Alabama's 1852 Code, see Pruitt, "Life and Times of Legal Education," 289-290, and Tony A. Freyer and Paul M. Pruitt, Jr., "Reaction and Reform: Transforming the Judiciary Under Alabama's Constitution, 1901-1975," *Alabama Law Review*, 53 (Fall 2001), 96-97.

[53] *Report of the Organization and of the First, Second, and Third Annual Meetings*, 226-227, 236-241, quoted passage on 227. Courtroom criticism of opposing lawyers was so common that Mark Twain could write (of a mock trial held in 1867) that "The opposing counsel were eloquent, argumentative, and vindictively abusive of each other, as was characteristic and proper." See Mark Twain, *The*

The explosive growth of railroads and heavy industry in the late nineteenth century touched off a revolution in law and practice. Railroad cases in particular influenced the development of new patterns in tort, negligence, labor relations, and other fields of law.[54] The sheer volume of claims against railroads promoted the creation of plaintiff and corporate defense factions within the bar.[55] Jones and most of his bar association colleagues were among the latter, and as such were willing to criticize ambulance chasers and those who, in Jones' moderate language, "volunteer[ed] advice to bring a law suit."[56] Yet the real issue for Jones and like-minded lawyers was not merely the well-being of their corporate clients, but the health of the profession. His overriding goal as a bar leader was to promote professional responsibility—certainly not to encourage money-grubbing, either in the wake of ambulances or in the offices of the robber barons.[57]

Powerful clients threatened the self-image of lawyers schooled in the old-fashioned ethic of independent judgment.[58] Railroads in particular were jealous mistresses, as

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Innocents Abroad, Or The New Pilgrim's Progress (New York: Signet Classics, 1966 (1869)), 35.

[54] Friedman, *History of American Law*, 467-487; and James W. Ely, *Railroads and American Law* (Lawrence: University Press of Kansas, 2002), *passim*.

[55] For a discussion of the early "plaintiffs' personal injury bar," see Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (New York: Oxford University Press, 1992), 150-154.

[56] Thomas, *Lawyering for the Railroad*, 35-36; *Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887* (Montgomery: Brown Printing Company, 1887), ix (number 20).

[57] *Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887*, ix (number 20).

[58] See Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910," in Gerald W. Gawalt, editor, *The New High Priests: Lawyers in Post-Civil*

Jones found in the late 1870s, when he paid a price for separating his professional and political personae. The North and South Alabama Railroad, a puppet of the L&N, was one of the chief clients of Jones' firm (Rice, Jones, and Wiley). Yet Alderman Jones, according to one account, took the lead in forcing the North and South to honor its contract to build a new downtown depot. When the railway threatened Judge Rice with the loss of its business, Jones resigned from the firm.[59]

As noted above, Jones was soon retained by the L&N itself. He may have viewed his new status as a reward for principled behavior, though apparently he was taken back after a change in the road's management.[60] In the future he would be sensitive to any implication that he was merely a hired spokesman. Early in 1887, for instance, Jones sent Alabama congressman Hilary A. Herbert a letter concerning possible difficulties in enforcing the Interstate Commerce Act. He wished to be discreet, since he believed that "many demagogues" would oppose any suggestion made by a railroad lawyer. In a follow-up letter he clarified this statement, insisting that he had written only as a public

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War America (Westport: Greenwood Press, 1984), 51-74; and Thomas, *Lawyering for the Railroad*, 33-39.

[59] [W.T. Sheehan], *Judge Jones and the Railroad Question: From the Montgomery Advertiser* (Montgomery: n.p., c. 1907), 3-4. The L&N was also upset with the Montgomery city government over its quarantine policy during the Yellow Fever epidemic of 1878—specifically over its refusal to allow refugee-bearing trains to unload in town. See Wayne Cline, *Alabama Railroads* (Tuscaloosa: University of Alabama Press, 1997), 115; and Maury Klein, *History of the Louisville and Nashville Railroad* (New York: Macmillan Company, 1972), 232-233. Jones, "Some Observations on the Law of Quarantine," 161-175, supports the absolute power of governments to impose such bans on commerce. See above, note 31.

[60] [Sheehan], *Judge Jones and the Railroad Question*, 4.

official (he was then Speaker of the House) concerned only with "the regulation of the people's business."[61]

In his own mind, Jones had achieved an ethical division of labor. When he was on duty as an office-holder, he was the people's lawyer. As such, he was bound to oppose any measure intended to limit basic rights—including the economic rights of black Alabamians, which, as Jones knew, were frequently under attack. Thus in the mid-1880s Jones successfully opposed the "Wiley Contract Bill," which would have made it a misdemeanor for share-croppers to break labor contracts. To Jones the bill proposed nothing less than a system of imprisonment for debt, which would have placed an unconstitutional lever of control in the hands of landlords.[62] Criticized by white constituents, he declared that he would "not represent my people if I had to do so with a padlock on my lips, or at the sacrifice of any honest conviction."[63] As the people's lawyer it was Jones' duty to be independent-minded and forthright.

By the mid-1880s, Jones was at home in a complex ethical world, one drawn from elements of Old South chivalry and paternalism, military discipline, and industrial optimism—all tempered by an almost religious devotion to the traditions of the bar. Yoking together these principles and interests was not always easy, but Jones' personal code helped him resist the crassest impulses of racism, capitalism, and political partisanship. To that extent he was an inner-directed man. On the other hand, nothing in his

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[61] Jones to Hilary A. Herbert, January 27, February 6, 1887, Letterbook, 1886-1889 [leaves 31-32, 46-48], Jones Collection.

[62] Aucoin, "Thomas Goode Jones, Redeemer and Reformer," 65-66; see also *Constitution of the State of Alabama*, 1875, Article I, section 21. The bill's sponsor was Ariosto A. Wiley, Jones' former law partner. See 1884-1885 *Journal of the House of Representatives of the State of Alabama*, 5, 862.

[63] Aucoin, "Thomas Goode Jones, Redeemer and Reformer," 66-67, quoting the Montgomery *Daily Advertiser*, March 24, 1892.

ethics prevented him from thinking well of the state's ruling clique—the industrialists, Black Belt landowners, and supply merchants who controlled the Democratic Party. In this respect, like many successful lawyers of his or any other time, Jones was something of a pragmatist, ethically in tune with his culture.[64]

New South thought was simultaneously hopeful and nostalgic, tied to the cause of profits and to the Lost Cause,[65] and it should not be surprising that Jones' 1887 ethics code reflects both the man and the era. A self-consciously reformist document, intended to promote courtroom decorum, personal integrity, observance of due process, and professional concern for the "defenceless and oppressed," it proposed chiefly a return to well-established principles.[66] In public, moreover, Jones expressed a simplistic confidence in the integrity of his brethren at the bar. Once a proper code was in place, he predicted, "evil practices" would begin to disappear; such was the "moral power of the profession" when it spoke with one voice.[67]

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[64] On this point see Oliver Wendell Holmes, Jr., *The Common Law* (New York: Dover Publications, 1991 (1881)), 1, noting famously that "The Life of the Law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, . . . even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." In this connection see also Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus, and Giroux, 2001), 339-347.

[65] Paul M. Gaston, *The New South Creed: A Study in Southern Myth-Making* (New York: Alfred A. Knopf, 1970), *passim*., especially 119-150.

[66] *Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887*, xvi (number 57).

[67] *Report of the Organization and of the First, Second, and Third Annual Meetings*, 235-236.

Jones and the Ethos of Disfranchisement

Following his authorship of the ethics code, Jones was often in the public eye. As an officeholder, his objectivity as the people's lawyer was often strained by the pull of other forces. Serving as governor from 1890 to 1894, he faced explosive situations—notably a deteriorating economy and political insurgency by farmers and their spokesmen.[68] In his 1892 reelection campaign he faced a formidable agrarian, Reuben F. Kolb, who was supported by a large number of rebellious Democrats, as well as Populists and Republicans. In this extremity Jones resorted to racist appeals, asking voters to preserve "the walls of our civilization, which can be guarded only by a united white race."[69] His supporters revived the worst excesses of Reconstruction politics, and Jones, narrowly victorious and disillusioned, considered resigning and returning to work for the L&N.[70] Yet the following year he signed the Sayre Act, designed to make voting more difficult for illiterates

[68] For overviews of Jones' gubernatorial years see Pruitt, "Thomas Goode Jones," and Huggins, "Bourbonism and Radicalism," cited above, note 3.

[69] Rogers, *One-Gallused Rebellion*, 165-216, quoted passage on 208. Kolb was a hero of Alabama's small farmers, most of whom were members of the officially non-partisan "Farmer's Alliance." Convinced that he was unjustly denied the Democratic gubernatorial nomination in 1892, Kolb bolted the party and founded a short-lived, Alliance-based "Jeffersonian Democratic" party. He soon secured the endorsement of other opposition groups, including radical agrarians (Populists) and opportunistic Republicans.

[70] *Ibid*., 221-226, 255; and see Chappel Cory to Jones, August 14, 1892, Tennent Lomax to Jones, October 18, 1892, and Milton H. Smith to Jones, February 16, 1893, Jones Collection. The consensus of historians is that Jones' supporters, especially in Black Belt counties, stuffed ballot boxes to insure his reelection over Kolb. Officially, Jones won by a vote of 126,959 to 115,524.

and to increase the power of appointed Democratic polling officials.[71]

By endorsing the Sayre Act, Jones came down firmly on the side of Democratic loyalists who feared the disruption of white solidarity[72] and were determined to keep power by disfranchising the groups—blacks especially, but poor whites as well—most likely to vote against them. The trend was regional; from 1890 to 1910, one southern state after another restricted its suffrage by means of devices including literacy, property, and residence requirements, and the enactment of white primaries.[73] A chain of United States Supreme Court decisions (including the 1898 opinion in *Williams v. Mississippi*) had convinced some observers that constitution-makers, so long as they avoided overtly racial language, could purge the voting rolls without provoking the intervention of the Federal government.[74]

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[71] Rogers, *One-Gallused Rebellion*, 236-240. The Sayre Act eliminated party symbols from ballots, and specified an alphabetical listing of candidates. Under this law, voters were required to enter a booth; only polling officials could assist them. The Sayre Act assured that Kolb, who ran as a Jeffersonian Democrat in 1894, would lose again. See *ibid*., 271-292.

[72] For Jones' concern over white solidarity, see his 1890 inaugural address, at 1890-1891 *Journal of the Senate of the State of Alabama*, 179-180. In 1892, Jones would endorse constitutional change, at least to the extent of an educational qualification; see McMillan, *Constitutional Development in Alabama*, 249, citing 1892-1893 *Journal of the Senate of the State of Alabama*, 45.

[73] C. Vann Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press, 1951), 321-349; and Edward L. Ayers, *The Promise of the New South: Life After Reconstruction, 1877-1906* (New York: Oxford University Press, 1992), 304-309. See also Wechsler, "Black and White Disenfranchisement," 25-29.

[74] See the works cited in note 73, above. For case law, see *Williams v. Mississippi*, 170 *United States Reports*, 213 (1898); for earlier, related precedents, see *United States v. Cruikshank*, 92 *United States Reports*, 542 (1876); the *Civil Rights Cases*, 109 *United States Reports*, 3 (1883); and *Plessy v. Ferguson*, 163 *United States Reports*, 537 (1896).

Some disfranchisers were concerned mostly with the elimination of political enemies; others cherished hopes that suffrage limitation would purify politics; a number were bitter racists.[75] Jones shared something of the first two motives, but he would not have supported a movement that, to his knowledge, intended to employ the law as an engine of oppression. Indeed, he continued to view himself as a friend and mentor of black people. He had worked, as governor, to prevent lynching and to end the state's practice of leasing prisoners to corporations, each a practice that punished blacks and the poor.[76] In addition he had opposed constitutional maneuvers aimed at reducing appropriations

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For a detailed interpretation of the politics and case law of disfranchisement, see R. Volney Riser, "Of Pigs and Sows and Judicial Cognizance: Alabama's Constitutional Convention, the U.S. Constitution, and the Supreme Court" (unpublished manuscript), 6-10, 30-36, 38-44 (on file, John C. Payne Special Collections facility, Bounds Law Library).

[75] McMillan, *Constitutional Development in Alabama*, 229-262, 305. See also Wechsler, "Black and White Disenfranchisement," 39-41.

[76] For Jones' persistent efforts to prevent lynching by means of both legislation and investigation, see Aucoin, "Thomas Goode Jones, Redeemer and Reformer," 48-54. Jones was one of several Alabama leaders opposed to the convict lease system, which had been rooted in the industrial life of the state since the 1860s. Jones and his allies nearly abolished the system in 1893, via an act that allowed the state to improve its own prison facilities and acquire farmland with a view to making prisons self-supporting. The plan was to transfer all prisoners from private confinement (typically in coal mines) by January 1895, but the Panic of 1894 caused such a decline in state revenue that William C. Oates, Jones' successor, persuaded the legislature to repeal the reform legislation. See *ibid*., 11-23. Generally, see Allen Johnson Going, *Bourbon Democracy in Alabama, 1874-1890, with a New Foreword by the Author* (Tuscaloosa: University of Alabama Press, 1992 (1951)), 170-190; and Mary Ellen Curtin, *Black Prisoners and Their World: Alabama, 1865-1900* (Charlottesville: University Press of Virginia, 2000), *passim*.

for black education,[77] evidently persuading himself that the state's segregated school system offered blacks a reasonable chance to meet any literacy test imposed upon them.[78]

With a clear conscience Jones served as a delegate to Alabama's 1901 constitutional convention, and endorsed its work.[79] The new document's suffrage provisions were formally color-blind, a fact that constituted in Jones' mind a promise of fair treatment. By thinking along those lines, at least, he could reconcile the contradictions among his roles as party leader,[80] paternalist, and people's lawyer. It is true that he had acted as a leader, on the convention floor, of the opposition to a temporary "grandfather clause" for the benefit of Confederate veterans and their descendants.[81]

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[77] 1890-1891 *Journal of the Senate of the State of Alabama*, 175-179; Aucoin, "Thomas Goode Jones, Redeemer and Reformer," 24-33; and see also Going, *Bourbon Democracy*, 158-161.

[78] Jones' optimism (see below, at note 83) was in spite of the fact that an 1891 law allowed superintendents of education in Black Belt counties discretion in spending funds; former laws had required equal apportionment per capita, regardless of race. Thereafter black schools were starved for funds. For this law, and for Jones' role in persuading black leaders that it would work no harm, see Horace Mann Bond, *Negro Education in Alabama: A Study in Cotton and Steel* (Tuscaloosa: University of Alabama Press, 1994 (1939)), 155-163.

[79] Thomas Goode Jones to Booker T. Washington, September 20, 1901, in Harlan, *et al*., *Booker T. Washington Papers*, 6: 213. See also McMillan, *Constitutional Development in Alabama*, 341.

[80] Jones' role as party leader was somewhat constricted by the late 1890s, as the state Democratic Party had fallen under the influence of the inflationist William Jennings Bryan. In Alabama, Bryan's supporter Joseph Forney Johnston (elected governor in 1896) had garnered much of the Populist vote. In the presidential election of 1896, Jones supported a bolting ticket of "Gold Democrats." See Rogers, *One-Gallused Rebellion*, 320, 325-326.

[81] McMillan, *Constitutional Development in Alabama*, 283-309; McMillan, 306, notes that the new constitution's suffrage article was the "most intricate" yet adopted, with a "temporary plan" featuring "the newly invented soldier and fighting grandfather clauses," and a

With former governor William C. Oates and other Bourbons, he pointed out the obvious racial favoritism behind the measure and predicted that it would be deemed a violation of the Fifteenth Amendment.[82] Even so, he would soon reassure Booker T. Washington that the "permanent plan of suffrage will not in the end operate harshly on the [N]egro race; for coming up to its requirements will help to lift them up, and all deserving people can come up to the requirements."[83]

Bourbon Reform in Action: Jones on the Bench

In the fall of 1901, former governor Jones was appointed (with Booker T. Washington's backing) federal judge of Alabama's Middle and Northern districts.[84] On the bench for the remainder of his career, he sought to be true to his legal values, especially those of fairness and due process. Though Jones remained complacent with the legal regime of suffrage limitation,[85] he was increasingly de-

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"permanent plan" that included "educational, property, and employment qualifications as well as the disfranchising crimes section and the poll tax." See also Wechsler, "Black and White Disenfranchisement," 35-39, 43-52.

[82] For Jones' speech on suffrage, see *Official Proceedings of the Constitutional Convention*, III: 2886-2896. See also McMillan, *Constitutional Development*, 292-294; and Riser, "Of Pigs and Sows and Judicial Cognizance," 31-35 (discussing Oates), 38-43 (discussing Jones).

[83] Jones to Booker T. Washington, September 20, 1901, in Harlan, *et al*., *Booker T. Washington Papers*, 6: 213. Washington wrote back in a tactful vein. His chief worry, he said, was whether the new constitution would be enforced fairly; see Booker T. Washington to Jones, September 23, 1901, *ibid*., 215-216. In public, Washington did not fight fiercely against suffrage restriction. See McMillan, *Constitutional Development in Alabama*, 302-304.

[84] See Freyer and Dixon, *Democracy and Judicial Independence*, 68; and Aucoin, "Rift in the Clouds," 129-130, 147.

[85] Jones sat as the trial judge in *Giles v. Harris*, a challenge to the 1901 constitution; see 189 *United States Reports*, 475-504 (1903). He dismissed the petitioner's case on the grounds that his court lacked

termined to defend the economic rights of poor people. Most famously, he presided (1903-1904) over a series of peonage prosecutions, in the course of which he condemned the complicity of public officials and employers, and tried earnestly to convince white people that involuntary servitude was both unfair and socially destructive.[86] From 1908 to 1911 he worked successfully with Booker T. Washington and others to overturn a 1903 labor statute that had criminalized breaches of labor contracts.[87]

Freed from the burden of seeking votes, Jones was willing to pursue his thoughts even to the point of constitutional innovation. Enraged by a 1904 episode in which a Huntsville mob lynched a black prisoner after setting fire to the jail, he determined to his own satisfaction that racially motivated lynching could be punished as a denial of federally protected civil rights.[88] The U.S.

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jurisdiction. See also Wechsler, "Black and White Disenfranchisement," 56-57. For pertinent discussion of Justice David Brewer's stance on *Giles*, see Riser, "Of Pigs, Sows, and Judicial Cognizance," 2-6.

[86] Daniel, *Shadow of Slavery*, 43-64; Freyer and Dixon, *Democracy and Judicial Independence*, 117-120; Aucoin, "Rift in the Clouds," 130-144; and see Jones' grand jury charge in the *Peonage Cases*, 123 *Federal Reporter*, 671-692 (1903). At the same time, Jones imposed lenient sentences upon convicted peon-masters, believing that he could in this way placate white public opinion.

[87] Daniel, *Shadow of Slavery*, 63-81; Freyer and Dixon, *Democracy and Judicial Independence*, 121-122; Aucoin, "Rift in the Clouds," 144-147; and *Bailey v. Alabama*, 219 *United States Reports*, 219-250 (1911). Jones had already declared Alabama's 1901 labor law to be unconstitutional, in that it sought to punish laborers for breaking contracts without the permission of their employers, thus subjecting the former to a virtual state of serfdom; see *Peonage Cases*, 123 *Federal Reporter*, 684-692 (1903).

[88] Aucoin, "Rift in the Clouds," 147-178, contains a full account of these events. As Jones sorted out his ideas, he was in contact with a number of judges and other legal officials, including Judge David Shelby of the Fifth Circuit Court of Appeals and Judge Jacob Trieber of

Supreme Court undermined his position by reaffirming, in a contemporary case from Arkansas, the doctrine that only states or their agents could violate the equal protection clause of the Fourteenth Amendment.[89] That did not stop Jones from setting forth his own interpretation, arguing that the Thirteenth and Fourteenth amendments made an absolute guarantee of civic equality to former slaves, an equality that lynch mobs denied by lawless force. In such cases, Jones asserted that federal courts could intervene when the states could not or would not enforce their own laws. Thereby the national government, far from encroaching on states-rights, would be "arrayed behind the power of the state."[90]

Throughout the evolution of his thought, Jones considered himself to be the man he had always been—sobered, perhaps, by the persistence of problems he had hoped could be settled. Yet his sense of inner peace would be sorely tested by the final great controversy of his career, involving his role as trial judge in the long-running (1907-1914) battle between Alabama railroads and the administration of Governor Braxton Bragg Comer. The L&N was prominent among the litigants challenging state regulations, and Jones, who issued a number of injunctions at the rail-

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the Eastern District of Arkansas. Trieber was thinking along similar lines. See his opinion in *United States V. Morris*, 125 *Federal Reporter*, 322-331 (1903).

[89] *Hodges v. United States*, 203 *United States Reports*, 1-38 (1906). For related precedents, see the *Cruikshank* and *Civil Rights* citations above, note 74.

[90] Quoted passage in Aucoin, "Rift in the Clouds," 176. For Jones' argument at length, see *Ex Parte Riggins*, 134 *Federal Reporter*, 404-423 (1904), and *United States v. Powell*, 151 *Federal Reporter*, 648-664 (1907). See also Thomas Goode Jones, "Has the Citizen of the United States, in the Custody of the State's Officers, Upon Accusation of Crime Against Its Laws, Any Immunity or Right Which May Be Protected by the United States Against Mob Violence?" in *Proceedings of the Twenty-Eighth Annual Meeting of the Alabama State Bar Association* (Montgomery: Woodruff Co., 1905), 200-235.

roads' request, was widely perceived as a partisan judge.[91] In 1911, Comer lashed out at him as the "czar of our laws" and as a man "environed" by large corporations.[92] Jones responded by reading into the record a denunciation of Comer as a demagogue.[93]

This unseemly exchange between the governor and the judge was reported in the state's newspapers, whose readers might well have concluded that each man was right. Still, there was no mistaking Jones' shock that anyone would question his integrity. It is clear that over the course of a long career, he had never doubted his ability to subordinate personal interests to principles. A patrician survivor, he was now forced to confront his own obsolescence—to understand that in the New South, while old times may not have been forgotten, old-time virtue was largely irrelevant. Poignantly, in the midst of his defensive anger, he was at pains to sum up his ethical life. "The environment by which men's lives are shaped and their motives to be judged," he declared, "is found in their ideals of honor, fidelity to trust and unselfish devotion to duty, as exemplified in their daily lives."[94]

[91] See generally James F. Doster, *Railroads in Alabama Politics, 1875-1914* (University: University of Alabama Press, 1957), 102-225, *passim*.
[92] 1911 *Journal of the Senate of the State of Alabama*, 64-67.
[93] Birmingham *Age-Herald*, March 12, 1911.
[94] *Ibid*.

APPENDIX I

CODE OF ETHICS[1]

We are gratified to know that the Alabama Bar is as pure and upright as any that exists, and that its standard of honor and integrity is lofty and worthy of all commendation; still, we must confess that, like all other human organizations, it has its weak and corrupt vessels who bring shame and reproach upon it.

The courts of the country afford ample redress against these, but it is an invidious task for any one person to undertake it, and "what is everybody's business is nobody's business."[2] Judicial 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.

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. With such a guide, pointing out in advance the

[1] This material represents the text from Thomas Goode Jones' call for a Code of Ethics included in his "Report of the Committee on Judicial Administration and Remedial Procedure" to the Third Annual Meeting of the Alabama State Bar Association. *Report of the Organization and of the First, Second and Third Annual Meetings of the Alabama State Bar Association* (Montgomery: Smith and Armstrong, Printers, 1882), 235-236.

[2] Daniel Defoe, *Every-Body's Bufinefs is No Body's Bufinefs; or Private Abufes, Publick Grievances* . . . (London: Printed for W. Meadows in Cornhill . . . , 1725).

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. We would no longer find lawyers advertising in the public papers, under the head of news, their achievements in litigation in which the public at large has no interest. We would no longer hear of any lawyer boasting of "personal influence" with a Judge, or urging that as a reason why he should be employed. The Judge who may be inclined to favoritism, will walk more circumspectly when a powerful, organized sentiment, working in the advancement of justice, watches his dispensation of judicial favors. Happily, this baleful influence exists more frequently in the imagination of individuals seeking to profit by its supposed existence than in fact; but the sentiment which resents and will crush out this influence will also protect the reputation of upright judges, (who seldom know of the pre-emption rights claimed upon their honor), by effectually silencing the boaster, who would learn that his claim, whether true or false, was none the less his shame. What just complaint exists of lawyers stirring up strife, or being swift to originate or initiate litigation for selfish greed, or energetic and eager to prevent amicable adjustment of controversies, would vanish when the profession throughout the State raises its warning voice, in advance, against these pernicious practices. The lawyer who shall frame such a code need ask no greater or more enduring fame. Nothing would more effectually promote the ends of justice, or tend more to advance judicial administration.

We, therefore, earnestly recommend that the Association appoint a committee, with instructions to report a Code of legal ethics for consideration, at the next annual meeting.

APPENDIX II

THE ALABAMA STATE BAR ASSOCIATION DEBATE CONCERNING THE CODE OF ETHICS[1]

The President:[2] The next business in order is the report of the committee to prepare a Code of Legal Ethics, by the chairman, Thos. G. Jones, Esq.

Mr. Thos. G. Jones: Mr. President—The committee heretofore appointed to report a Code of Ethics for the consideration of the State Bar Association, instruct me to present the accompanying code and recommend its adoption. As required by resolution adopted at the last meeting of the Association, the proposed code has already been distributed by the secretary for the information of members. Having fully discharged its duty in the premises, the Committee pray to be discharged.

Mr. Hewitt:[3] Would it not be well to escape a second reading, that we adopt it by sections as we pass along, as the report of the committee, or the rules that they have adopted, has been published, and I suppose every member of the Association has a copy and has read it.

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[1] *Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association* (Montgomery: Brown Printing Company, 1888), 8-22.

[2] Henry Clay Tompkins (1845-1898) of Montgomery was a Confederate veteran and Democratic politician who served as state Attorney General (1878-1884) and lieutenant colonel of the Second Regiment of state troops. Like several of the lawyers cited below, he was a member of the firm headed (1880-1888) by Daniel S. Troy (1832-1895). See Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography* (Spartanburg: Reprint Company, 1978 (1921)), IV: 1674-1675, 1685-1686.

[3] Goldsmith Whitehouse Hewitt (1834-1895) of Jefferson County was a Confederate veteran, state legislator, and four-term Democratic congressman (1875-1884). *Ibid*., III: 805-806.

Mr. Thos. G. Jones: The reason I made the suggestion to read it as a whole, was that very often on reading one section, it occurs to a member that something is left out, which is in fact provided for in other sections; and reading as a whole will prevent unnecessary suggestions and debate, as to such matters, and save time. I suggest that its final adoption be made a special order for this afternoon.

The Code of Legal Ethics was then read by the chairman.

Mr. Moore:[4] I move that the report be received and the committee discharged, and that the further consideration of the report be made a special order for 4 o'clock.

Mr. London:[5] Mr. President—Before the committee is discharged, it seems to me that if the Association adopt the Code of Ethics, the most natural consequence would be the means of enforcing it, and I think there is no one so competent at this present meeting to suggest that to the Association as the committee who prepared the code, and before discharging the committee, I suggest the question be passed upon by the Association—that before the committee is discharged, that that question be decided on. I therefore move to amend Mr. Moore's motion, so as to strike out the part discharging the committee.

Mr. Moore: I accept the amendment.

The motion was then put to the Association and adopted as amended.

Mr. Hewitt: I would like to ask the chairman of that committee if he has any printed copies of the report here?

Mr. Thos. G. Jones: I think the secretary has.

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[4] George Fleming Moore was associated in the early 1880s with Montgomery lawyers Daniel S. Troy and Alexander Troy. From the first through the second Cleveland administrations, he was an assistant United States Attorney. *Ibid*., IV: 1224-1227.

[5] Alexander Troy London (1847-1908) of Montgomery was a Confederate veteran and lawyer, the partner (1885-1888) of Daniel S. Troy (his uncle) and Henry Clay Tompkins. *Ibid*., IV: 1064, 1686.

The President: I would suggest to the secretary, that if he has any copies of the report, he would distribute them to the members. I think the members should carefully consider it, so that when it is adopted, each member be required to keep up with its requirements.

The secretary[6] explained that he had already distributed the Code among the members of the Association, through the mails, and that each member should have received a copy; that he had only a few copies left, and would take pleasure in giving them to those gentlemen who desired them.

Mr. E. W. Pettus:[7] Mr. President—I move we adjourn until 4 o'clock.

Hon. John F. Dillon:[8] Mr. President—I would like to make an inquiry, with the consent of the Association. I have been very much interested in the paper read by Mr. Stringfellow[9] on "The Inter-State Commerce Law," and I rise to inquire what the rules of the Association are in respect to the publication of these papers. I think it would interest a great many lawyers outside of Alabama to be permitted to read that paper.

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[6] Alexander Troy (born 1853) of Montgomery was the nephew of Daniel S. Troy, under whom he read law; from 1880 to 1888 he practiced with Troy and Henry Clay Tompkins. He was Secretary of the Alabama State Bar Association for more than forty years from its founding in 1879. *Ibid*., IV: 1685-1686.

[7] Edmund Wilson Pettus (1821-1907) of Selma had been a lawyer, judge, and Confederate general. Elected in 1897 to the United States Senate, he served until his death. *Ibid*., IV: 1351-1352.

[8] Guest speaker John Forrest Dillon (1851-1914) was a New York corporate lawyer, legal scholar, and former federal circuit judge. Allen Johnson and Dumas Malone, editors, *Dictionary of American Biography* (New York: Charles Scribner's Sons, (1959) (1931)), III-1: 311.

[9] Horace Stringfellow, Jr. (born 1860) of Montgomery was a member of the firm Sayre, Stringfellow and LeGrand. *Northern Alabama: Historical and Biographical* (Spartanburg: Reprint Company, 1976 (1888)), 611.

The President: The newspapers generally publish them, and they are published in the proceedings of the Association.

Mr. E. W. Pettus: Mr. President—I now renew my motion to adjourn until 4 o'clock.

The motion was adopted.

AFTERNOON SESSION

The Association re-assembled at 4:30 p. m. The President called the meeting to order.

The President: The special order for this afternoon's session, is the discussion of the Code of Ethics.

Mr. London: Mr. President—I move we proceed section by section.

Mr. Moore: Mr. President—I suggest as a substitute for that, that we adopt the preamble, and then proceed by section.

Mr. Wagner:[10] Mr. President—I second the motion.

Mr. E. W. Pettus: Mr. President—It seems to me that the best course would be to let any of the gentlemen propose any amendment they desire, and after all the amendments are disposed of, let us vote on the matter as a whole. I do not see that it is worth while to adopt a section at a time, unless some one has some objection to a certain section. If he has let him make it known.

Mr. London: My proposition was not to adopt it by sections but to consider it, and after we had considered the whole of it, then the question would arise whether the Association would now adopt it or postpone it to some

[10] C.G. Wagner (born *circa* 1820) of Shelby County was a former Confederate official. Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1712.

other meeting; because, as I take it, this is a very serious matter and we should not act upon it hastily.

Mr. Hewitt: I would suggest that we proceed with the reading of it, and when we come to a section where any objection is taken or amendment desired, let the member offer it.

The President: It is moved and seconded that the preamble of the Code be adopted. Is the Association ready for the question?

Mr. London: Mr. President—I do not see how we can adopt the preamble unless we are going to adopt the Code. We are not here to adopt the preamble. We are here to adopt the Code. And I suggest, if the gentleman foregoes his motion, we can accomplish what he wants and what Gen. Pettus desires.

Mr. Moore: I withdraw the motion.

Mr. London: I move that the Code be read for consideration, and adopted section by section.

Mr. Moore: I second the motion.

The motion was put to the Association and adopted, and the Secretary instructed to read the Code, commencing with the preamble.

Mr. Thos. G. Jones: I suggest, Mr. Secretary, that you had better read from the original report—I mean the report read this morning—as there are one or two changes in the printed copy. They do not, however, amount to anything.

The Secretary first read the preamble.

On motion of Thos. G. Jones, seconded by Thos. H. Watts, Sr.,[11] it was ordered that unless there be objection made to any section of the Code, it be considered adopted as read.

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[11] Thomas Hill Watts (1819-1892) of Montgomery was Attorney General of the Confederacy (1862-1863) and Governor of Alabama (1863-1865); though formerly a leader of the Whigs, he was a post-war Democrat. He was father-in-law of both Daniel S. Troy and Alexander Troy. *Ibid*., IV: 1732-1733.

There being no objection to the preamble as read, it was duly adopted.

The Secretary then read section 1 of the Code.

The President: Is there any objection to that rule?

Mr. Morrisett:[12] Mr. President—I understand the motion of Col. Jones to go to each rule as well as the preamble.

The President: I think it would be proper for the Chair to ask if there is any objection to each section as it is read.

Mr. Stansel:[13] Certainly; to give members an opportunity to object to any section they might hear.

The President: There being no objection Rule 1 is adopted.

The Secretary then read Rule 2.

There being no objection to Rule 2, it was adopted as read.

The Secretary then read Rule 3.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial personal and official relations between bench and bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

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[12] Edmund Pendleton Morrisett (born 1837) was a graduate of Wade Keyes' law school in Montgomery, a Confederate veteran, and an 1884 candidate for the Democratic nomination for Attorney General. *Ibid*., IV: 1246-1247.

[13] Martin Luther Stansel (1822-1903) of Carrollton was a Confederate veteran, Democratic state legislator, legal author, and editor. *Ibid*., IV: 1613.

Mr. Semple:[14] Mr. President—I would like to know the necessity for that rule. There is no doubt about the fact that if there is a common practice, such as is condemned by the rule in order to secure favors from a judge, or from judges, it will be well to put it down. But the object of the Code of Ethics is to condemn practices which have prevailed, and which should be avoided, and to set the seal of the condemnation of the Association upon certain conduct which has been practiced to the detriment of the profession. I do not see myself the necessity for that. Of course you may say it is unbecoming the members of this Association for a Solicitor practicing before a Chancellor to say to the Chancellor on the bench, "you are an ass." All such expressions are unbecoming and calculated to bring the profession in contempt. Suppose for instance another rule were adopted, declaring that it was highly unbecoming to say to a judge upon the bench that he was a dotard and a driveller! Of course it would be well understood there was no occasion for such a thing as that. And I do not see why this should be put forward. If there is reason for it—if there has been any such abuse, probably the committee can tell us of it; and if there has been, there is no man who would be more willing than I to adopt it.

Mr. E. W. Pettus: Mr. President—We have already adopted a rule, the first we adopted, wherein it is said a lawyer shall not call a judge an ass, that he shall treat him with deference and respect. That means the same thing. We are not adopting rules for our guidance here merely because certain practices have become obsolete in the land; we are adopting what we consider a sound code of morals for the practice of the law. If these practices have not obtained, if they are evil, we ought to mention them as being

[14] Henry Churchill Semple (1822-1894) of Montgomery was a Confederate veteran and prominent practitioner. *Ibid*., IV: 1527-1528.

one of the evils of the profession. We all know that such things have happened. Not here, but we all know they have happened. There is not a man at the Bar who has years of experience that has not heard of such a thing—perhaps not in Alabama. Mr. President, the fact of the matter is, the favorite of the judge is the most detestable animal that ever got out of the woods.

Mr. Thos. G. Jones: Mr. President—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 times past a necessity for having and acting upon such a rule. I refer to Busteed.[15] There were others whom I might mention. The rule does condemn the pointed and marked hospitality sometimes thrust upon judges by attorneys who would not offer such hospitality to the man if he were not a judge. It warns against such courtesies "when the relations of the parties are such that they would not otherwise be extended." It does not prevent any member of the Bar from extending proper courtesies to a judge. It is intended to prevent such unusual hospitality when the mere man, who holds the judicial office, would not be offered the same treatment. It is intended to discourage efforts by such practices to gain personal friendship with the judge, merely because he is judge. It is a good rule of conduct, and ought to be adopted.

[15] Richard Busteed (1822-1898) was a former Union general appointed in 1863 as federal District Judge in Alabama. He served until his resignation (under threat of impeachment) in 1874. Paul M. Pruitt, Jr., and David I. Durham, editors, *The Private Life of a New South Lawyer: Stephens Croom's 1875-1876 Journal* (Tuscaloosa: University of Alabama School of Law, 2002), 27-28, 79.

Mr. Stone:[16] Mr. President—The truth is that most of the recommendations of the committee 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. That is not the main purpose, as I understand it, of this Code. Of course it calls attention of members of the Bar to those important provisions, and to the importance of enforcing them in their every-day intercourse with the courts; but it is intended in a greater degree to call the attention of the younger men in the profession—many of them not having the advantages that others have had—not having been trained in the law schools or the courts—not having gone through or had those advantages of development that others and more experienced men have had. It seems to me if you adopt the proposition of the gentleman from Montgomery (Mr. Semple) you exclude from this Code every rule that you do not know has been violated—every rule that you do not see a present necessity of enforcing, we would exclude most of it. A large portion of it will never be enforced, because there will be no occasion for it. The courtesy prevailing among the members of the bar, and between them and the judiciary, is such that there will be no call for it. But it is important to call these rules to the attention of the younger members, and enforce them, because there may be instances where they ought to be enforced. I think the remarks of the gentleman from Montgomery (Mr. Jones) are perfectly right and proper. I think it would endanger the Code to strike that rule out.

[16] Lewis Maxwell Stone (1819-1890) of Carrollton was a Harvard law graduate, former legislator, Speaker of the House (1868-1869), and member of the state constitutional conventions of 1861 and 1875. Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1629.

On motion of Mr. Moore, duly seconded, Rule 3 was adopted as read.

There being no objection to Rule 4, as read, it was adopted.

The Secretary then read Rule 5.

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, treating a repealed statute as in existence—knowingly misquoting the language of a decision or text-book—knowingly misstating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel—offering evidence which it is known the court must reject as illegal, to get it before the jury, under guise of arguing its admissibility and all kindred practices—are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening argument, positions intended finally to be relied on, in order that opposite counsel may not discuss them, is unprofessional. Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side-bar" remarks and sparring discourse, to influence the jury or bystanders. Personal colloquies between counsel tend to delay, and promote unseemly wrangling, and ought to be discouraged.

Mr. Hewitt: Mr. President—There is one thing there, if we want these rules to be enforced, we might as well strike out. It is this: "offering evidence which is known the court must reject as illegal, to get it before the jury, under guise of arguing its admissibility." Very frequently we know the court will reject evidence as illegal, which we may think is

legal and which we might want the Supreme Court to decide. I move to strike that from the rule.

Mr. Stone: Mr. President—I only desire to say to the Association that it seems to me, if I understand the object of the rule, that it is eminently proper. Now, if an attorney in a criminal case, for instance, knowing that the Supreme Court has a rule against the admissibility of certain evidence—knowing that fact and knowing that the judge will rule against him, tries to introduce it for the purpose of influencing the jury and getting the practical benefit of the testimony before the jury, that the law does not authorize him to get—it gives him an advantage, to which, I do not think he ought to be entitled. I once saw it done myself, and where the judge supposing it was done with that intention, sent the jury out during the argument on the question. It was a question in the defense where a party was guilty, and the question was whether the character of the parties could be introduced. I think the rule is eminently proper.

Mr. Stansel: Mr. President—There is still another objection to striking it out, and that is, there are attorneys practicing in the courts in Alabama who will use it in civil cases to rob an opponent. They will attempt to introduce evidence which they know themselves is utterly illegal. It is simply to affect the jury and obtain a verdict by trickery and deceit, which they could not otherwise get. I think the rule eminently proper, and it ought not to be stricken out.

Mr. London: Mr. President—I do not think the objection Col. Hewitt makes is tenable. If the lawyer knows that the court must reject, then he is bound to believe himself that the evidence is illegal, and the proposition Col. Hewitt states would not arise. But under this rule he can present evidence which he knows the judge will rule out notwithstanding this rule; but if he knows the law is against him, then he practices the very conduct Col. Stansel speaks of. Now, if he knows he is entitled to it, he

can introduce the evidence, knowing the judge will rule it out. That, it seems to me, obviates the proposition made by Col. Hewitt, and the rule might stand and still not affect his proposition.

Mr. Hewitt: Mr. President—In adopting rules we ought to have an eye to adopting such as we are sure will be enforced. You may put this in your Code, but there will not be a great deal of respect paid it anywhere in your courts. You leave it to every lawyer to determine whether he knows that the judge will reject it. Most of these lawyers who will resort to these tricks do not know much about ethics, and they can get out always on the idea that they did not know. But there is another question. Even though we may know that the Supreme Court has passed upon a point of evidence and has ruled that such cannot be admitted, yet we know that sometimes the Supreme Court overrules a decision that it has previously made. If we are not to introduce any evidence that the Supreme Court has ruled on, why then we ought not to ever make any point in any case where we know the Supreme Court has passed adversely on the point made, and if we enforce these kind of rules we would never get a question up to the Supreme Court to settle again. Now, I am as much opposed to this trickery and practice as my friends from Pickens and Montgomery, but I do not want to put anything in these rules which I do not think will be enforced or can be enforced.

Mr. Thos. G. Jones: Mr. President—I do not think the rule is fairly susceptible of the criticism of my friend from Jefferson. Take the case put by him. The Supreme Court has ruled that certain evidence is inadmissible. Counsel wish to raise the point again, for the *bona fide* purpose of getting the question again passed on by the Supreme Court. He does not offer it for the purpose of getting it improperly before the jury, but he offers *bona fide* to raise a question of law which he believes arises in his case. He does not

offer it for a mean or improper purpose, and that is all that rule means.

Now, I have seen cases where both lawyers plainly knew that proposed evidence was utterly inadmissible. One attorney will not offer it for this reason. The other attorney offers it for the purpose of getting it in improperly and arguing it before the jury, when he knows it is illegal. That is the class of cases which that section is made to cover—a case where a man knows in his own heart and conscience that he is trying to drive round the law and court, and to get evidence improperly before the jury to get a verdict contrary to law.

Mr. Hewitt was here called to the Chair.

Mr. Tompkins: Mr. President—It is evident to me that the whole trouble here arises out of a misunderstanding of the effect of this rule. I think it can be put in language so plain that there can be no doubt, and I therefore put it in this way: I would offer evidence in behalf of my client which the Supreme Court said was inadmissible, and I would have the right to present it to the Supreme Court again and have it reverse its decision on that point, but to offer evidence and argue it for the purpose of getting its effect before the jury is not professional. That is what the friends of this rule contend is its effect. It is evident from the discussion here that there is room for doubt, and therefore I propose as a substitute, the following: "arguing the admissibility of evidence which it is known the court must reject for the purpose of getting it before the jury." You are not bound to offer to prove to the court these facts. The objectionable feature of it is the arguing of facts before the jury, but I am bound to get them to the court for the purpose of getting the question again presented to the Supreme Court.

Mr. Stansel: I think that the sentence is qualified as it is, to get it before the jury under the guise of arguing its admissibility.

Mr. Tompkins: Mr. President—My proposition was simply made on the idea that there seems to be a misconstruction of this clause, and I have no objection to the principle enunciated in the rule. I therefore make the motion that the clause be amended as above stated.

Mr. Blakey:[17] Mr. President—I do not see any difference between the rule as amended and the rule as it stands. We have it printed one way, and if we are not going to make any material alteration, I think we had better stick to it as it is.

The motion of Mr. Tompkins was then put to the Association and lost.

The rule as read was then put to the Association and adopted.

The Secretary then read rules 6, 7, 8, 9, 10, 11, 12, 13, which were adopted, there being no objection.

Rule 14 was then read to the Association.

14. An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong; but once entering the cause he is bound to avail himself of all lawful advantages in favor of his client, and can not, without the consent of the client, afterwards abandon the cause.

On motion of H. C. Tompkins, duly seconded, the rule was amended by substituting the word "must" for "may" on the first line.

[17] David Taliaferro Blakey (1833-1902) of Montgomery was a Confederate veteran. *Ibid*., III: 160.

On motion of Thos. R. Roulhac,[18] the rule was further amended by adding the words "or act" after the word "consent" in the next to the last line.

On motion of Thos. G. Jones, the balance of the rule after the word "wrong" on the fourth line[19] was stricken out.

The rule was then read as amended, and adopted.

The Secretary then read rules 15, 16, 17, 18, 19, and there being no objection, they were severally adopted.

The Secretary then read rule 20.

20. An attorney should not conduct his own cause.

Mr. London: Mr. President—Rule 20 says an attorney should not conduct his own cause. I do not see any objection to that; but it is one of the American privileges, to make a fool of yourself, and it is guaranteed by the Constitution, and I do not see anything wrong in it—anything immoral in it, and I move to strike the rule out.

The motion was adopted and the rule stricken out.

The Secretary then read rules 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56, and there being no objection, they were severally adopted.

The President: The question now is upon the adoption of the Code as a whole.

Mr. London: Mr. President—For the purpose of presenting a proposition to the Association, I move the reconsideration of rule 31.[20] It is only for this purpose. A case

[18] Thomas R. Roulhac (born 1846) of Sheffield, Jefferson County, was a Confederate veteran who had formerly practiced in California, Mobile, and the Black Belt town of Greensboro. *Ibid*., IV: 1468-1469.

[19] This reference is to the original printed text. See also *Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887,* above.

[20] Rule 30 in *Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887,* above. The rule concerns attorney discretion.

arose of this kind: The time was sixty days in which a bill of exceptions might be signed. After the expiration of sixty days the opposite counsel asked for the bill then to be signed. What I want to ask is whether after the sixty days is it the right of the client to say, or the counsel to permit the bill to be signed? I can understand, of course, and can see no objection to the rule giving the attorney the utmost latitude, but whether an attorney after having agreed to a time has the right to extend the time, or whether it is put on the client, is what I want to know, and I would like to ask the chairman of the committee whether in that case this rule would put it upon the attorney to judge?

Mr. Thos. G. Jones: I think it would, sir. That is my own opinion merely—that question was not discussed.

The motion was lost.

On motion of G. W. Hewitt, duly seconded, the Code was then adopted as a whole.

Mr. Stone: Mr. President—Would it not be in order now to make a motion for the publication of that Code and its distribution among the lawyers of the State?

The President: Yes, sir.

Mr. Stone: I make that motion then—that the same committee be authorized to have a sufficient number of copies of the Code published for distribution among all the attorneys in the State, and judges.

Mr. E. W. Pettus: I would suggest to my friend, Col. Stone, that we are making laws for this Association, and there are 400 lawyers in the State that do not belong to it.[21] Ought we to send them orders, too?

Mr. Stone: That was my intention—that the action of this convention or Association should be made known to

[21] Pettus (and President Tompkins, below) had probably seen the results of a recent survey. See *A List of Lawyers at the Bar in Alabama, Compiled by Authority of the Alabama State Bar Association, by Alex. Troy, Secretary* (Montgomery: Barrett and Co., Printers and Binders, 1887).

the brethren at the Bar. They are our brethren—are in sympathy with us, feel as deep an interest as we do in the Code, and they are joining us every day.

Mr. E. W. Pettus: I would like to know what the additional cost would be. I withdraw my objection.

The Secretary: Mr. President—I suggest to Col. Stone that the Secretary be instructed to publish the Code with the proceedings of the Association and distribute them among the lawyers of the State.

Mr. Blakey: That would greatly increase the cost.

Mr. Stone: I think if it is printed separately and distributed it would be probably better. Combined with the proceedings, it might be thrown aside.

The President: I would suggest you specify some particular number to be printed. There are about 795 lawyers in the State.

Mr. Stone: If that is so, we ought to have a thousand copies printed and one copy mailed to each lawyer in the State whose address the Secretary has. And I make a motion to that effect.

The motion, being duly seconded, was adopted.

APPENDIX III

The following material provides a comparison of the 1887 Alabama State Bar Association's Code of Ethics and the 1908 Canons of the American Bar Association. The full text of the Code of Ethics appears in the left column opposite relevant excerpts from the American Bar Association's Canons. Following the language from each canon are bracketed numerals which represent the corresponding Code of Ethics sections.

Code of Ethics, Adopted by the Alabama State Bar Association, Dec. 14, 1887.

CODE OF ETHICS

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 their great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries.

"There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and mantraps at every step, and the mere youth at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."—Sharswood.

A comprehensive summary of the duties specifically enjoined by law upon attorneys, which they are sworn "not to violate," is found in section 791 of the Code of Alabama.

Canons of Professional Ethics, Adopted by the American Bar Association...on August 27, 1908.

"There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity, in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide, the only torch to light his way amidst darkness and obstruction."—George Sharswood.

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar...

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of .....;

These duties are:

"1st. To support the constitution and laws of this State and the United States.

2d. To maintain the respect due to courts of justice and judicial officers.

3d. To employ, for the purpose of maintaining the causes confided to them, such means only as are consistent with truth; and never to seek to mislead the judges by any artifice or false statement of the law.

4th. To maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients.

5th. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which they are charged.

6th. To encourage neither the commencement nor continuance of an action or proceeding, from any motive of passion or interest.

7th. Never to reject, for any consideration personal to themselves, the cause of the defenceless or oppressed."

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should

by analogy to the duties enjoined by statute, and the rules of good neighborhood.

The following general rules are adopted by the Alabama State Bar Association for the guidance of its members:

Duty of Attorneys to Courts and Judicial Officers.

1. The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, can not excuse the withholding of the respect due the office, while administering its functions.

2. The proprieties of the judicial station, in a great measure, disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of the judge is necessarily involved in determining his removal from or continuance in office.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

Canon 1. The Duty of the Lawyer to the Courts. It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected. [1 & 2]

Canon 3. Attempts to Exert Personal Influence on the Court. Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communi-

not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial personal and official relations between bench and bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence—knowingly misquoting the language of a decision or textbook—knowingly misstating the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel—offering evidence which it is known the court must reject as illegal, to get it before the jury, under guise of arguing its admissibility—and all kindred

cate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar. [3]

Canon 1. The Duty of the Lawyer to the Courts. ...Judges, not being wholly free to defend themselves, are particularly entitled to receive the support of the Bar against unjust criticism and clamor.... [4]

Canon 22. Candor and Fairness. The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not

practices—are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening argument, positions intended finally to be relied on, in order that opposite counsel may not discuss them, is unprofessional. Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side-bar" remarks and sparring discourse, to influence the jury or bystanders. Personal colloquies between counsel tend to delay, and promote unseemly wrangling, and ought to be discouraged.

6. Attorneys owe it to the courts and the public whose business the courts transact, as well as to their own clients, to be punctual in attendance on their causes; and whenever an attorney is late he should apologize or explain his absence.

7. One side must always lose the cause; and it is not wise, or respectful to the court, for attorneys to display temper because of an adverse ruling.

been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

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

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

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice. [5]

Canon 21. Punctuality and Expedition. It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes. [6]

Canon 29. Upholding the Honor of the Profession. ...The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit

Duty of Attorneys to each other, to Clients and to the Public.

8. An attorney should strive, at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow-man.

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

10. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice. [8]

Canon 15. How Far a Lawyer May Go in Supporting a Client's Cause. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

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

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such

cause, and the exertion of the utmost skill and ability," to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within, and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

11. 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.

12. An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, for-swears himself. The State's attorney is criminal, if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle pros.*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client. [10]

Canon 29. Upholding the Honor of the Profession. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client.... [11]

Canon 5. The Defense or Prosecution of Those Accused of Crime. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every de-

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

fense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible. [13, 12]

14. An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

Canon 30. Justifiable and Unjustifiable Litigations. The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination. [14]

15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

Canon 3. Attempts to Exert Personal Influence on the Court. ...A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor.... [15]

16. Newspaper advertisements, circulars and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency and wholly unprofessional.

Canon 27. Advertising, Direct or Indirect. The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable. [16]

17. Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion

Canon 20. Newspaper Discussion of Pending Litigation. Newspaper publications by a lawyer as to pending or an-

and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.

ticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement. [17]

18. When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client, as to any matter.

Canon 19. Appearance of Lawyer as Witness for His Client. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client. [18]

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

Canon 15. How Far a Lawyer May Go in Supporting a Client's Cause. ...It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.... [19]

Canon 28. Stirring Up Litigation, Directly or Through Agents. It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unpro-

20. 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. Stirring up strife and litigation is forbidden by law, and disreputable in morals.

21. Communications and confidence between client and attorney are the property and secrets of the client, and can not be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

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

23. An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor

fessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred. [20]

Canon 6. Adverse Influences and Conflicting Interests. ...The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. [21, 22]

for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere conveyancer, and was not consulted as to the facts, and, unknown to him, the transaction amounted to a violation of the criminal laws, he may assail it on that ground, in suits between third persons, or between parties to the instrument and strangers.

24. An attorney openly, and in his true character, may render purely professional services before committees, regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

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

Canon 26. Professional Advocacy Other Than Before Courts. A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action. [24]

Canon 6. Adverse Influences and Conflicting Interests. ...It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.... [25]

26. "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and villified."

27. An attorney is under no obligation to minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client can not be made the keeper of the attorney's conscience in professional matters. He can not demand as of right that his attorney shall abuse the opposite party, or indulge in offensive personalities. The attorney, under the solemnity of his oath, must determine for himself, whether such a course is essential to the ends of justice, and therefore justifiable.

28. Clients and not their attorneys are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

29. In the conduct of litigation and the trial of causes the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history, or mental or physical peculiarities or idiosyncrasies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

Canon 18. Treatment of Witnesses and Litigants. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf. [27]

Canon 17. Ill Feeling and Personalities Between Advocates. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided. [28, 29]

30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.

Canon 24. Right of Lawyer to Control the Incidents of the Trial. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety. [30]

31. Where an attorney has more than one regular client, the oldest client, in the absence of some agreement, should have the preference of retaining the attorney, as against his other clients in litigation between them.

Canon 6. Adverse Influences and Conflicting Interests. ...The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. [31]

32. The miscarriages to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

Canon 8. Advising Upon the Merits of a Client's Cause. ...The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to

beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation. [32]

33. Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

Canon 21. Punctuality and Expedition. It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes. [33]

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

Canon 6. Adverse Influences and Conflicting Interests. It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.... [34]

35. An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it he ought to seek to adjust it without litigation, if practicable.

Canon 8. Advising Upon the Merits of a Client's Cause. A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation.... [35]

36. Where an attorney, during the existence of the relation, has lawfully made an agreement which binds his cli-

ent, he can not honorably refuse to give the opposite party evidence of the agreement, because of his subsequent discharge or instructions to that effect by his former client.

37. Money or other trust property coming into the possession of the attorney, should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

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

39. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but after advising frankly with the client, it should be left to his determination.

40. Important agreements affecting the rights of clients should, as far as possible, be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing as required by rules of court.

Canon 11. Dealing With Trust Property. Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him. [37]

Canon 10. Acquiring Interest in Litigation. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting. [38]

Canon 7. Professional Colleagues and Conflicts of Opinion. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as a colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.... [39]

Canon 25. Taking Technical Advantage of Opposite Counsel; Agreements With Him. A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid perfor-

41. An attorney should not ignore known customs or practice of the bar of a particular court, even when the law permits, without giving opposing counsel timely notice.

42. An attorney should not attempt to compromise with the opposite party, without notifying his attorney, if practicable.

43. When attorneys jointly associated in a cause can not agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively; in which event, it is his duty to ask to be discharged.

44. An attorney coming into a cause in which others are employed, should give notice as soon as practicable and ask for a conference, and if the association is objectionable to the attorney already in the cause, the other attorney should decline to take part, unless the first attorney is relieved.

mance of an agreement fairly made because it is not reduced to writing, as required by rules of Court. [41, 40]

Canon 9. Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law. [42]

Canon 7. Professional Colleagues and Conflicts of Opinion. ...When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.... [43]

Canon 9. Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter

45. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party, without notice to his attorney.

46. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset, as to the amount of the attorney's compensation; and, where it is possible, this should always be agreed on in advance.

47. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.

48. Men, as a rule, over-estimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances, and sometimes none at all.

49. An attorney may charge a regular client, who entrusts him with all his business, less for a particular service than he would charge a casual client for like services. The element of uncertainty of with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law. [45]

Canon 14. Suing a Client for a Fee. Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud. [47]

Canon 12. Fixing the Amount of the Fee. In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for oth-

compensation where a contingent fee is agreed on, justifies higher charges than where compensation is assured.

50. In fixing fees the following elements should be considered: 1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2d. Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d. The customary charges of the Bar for similar services. 4th. The real amount involved and the benefit resulting from the service. 5th. Whether the compensation was contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

ers in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade. [48, 49, 50]

51. Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred.

52. Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney, should be rendered without charge in most instances; and where the circumstances make it proper to charge, the fees should generally be less than in case of other clients.

53. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without villification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness' testimony, and often rob deserved strictures of proper weight.

Canon 13. Contingent Fees. Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges. [51]

Canon 12. Fixing the Amount of the Fee. ...The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.... [52]

Canon 18. Treatment of Witnesses and Litigants. A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf. [53]

54. It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue, or hunger, the uncomfortableness of their seats, or the courtroom, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court; whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury towards court or opposite counsel, if such requests are denied. For like reasons, one attorney should never ask another in the presence of the jury, to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard, after the jury withdraws.

55. An attorney ought never to converse privately with jurors about the case; and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color for imputing evil designs, and often leads to scandal in the administration of justice.

Canon 23. Attitude Toward Jury. All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause. [54, 55]

57. An attorney assigned as counsel for an indigent prisoner ought not ask to be excused for any light cause, and should always be a friend to the defenceless and oppressed.

Canon 4. When Counsel for an Indigent Prisoner. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf. [57 (56)]

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