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LAWYER CREEDS AND MORAL SEISMOGRAPHY

James E. Moliterno*

Unquestionably, “popular respect for the legal profession is steadily falling”; there is “much cause for discouragement and some cause for alarm.”1 “[L]awyers . . . are blamed for some serious public problems,” including the enormous costs of increased litigation.2 “Year by year the various law schools send increasing armies of new recruits, far beyond the requirements of even this litigious community.”3 Lawyers act with “exaggerated contentious[ness],”4 as if they were “gladiator[s]” in a war, making every effort to “wipe out the other side.”5 Among the causes of this crisis is the attitude that the law is no longer a profession, but a mere competitive business in which its members face increased “economic pressure[s].”6 Better legal education may not even help because “[t]he evil . . . is not so much a professional as an American fault. It has its source in our inordinate love for the almighty dollar.”7

Without the footnotes, it takes some care to distinguish the previous paragraph’s turn of the twentieth century quotations from its turn of the twenty-first century quotations.8 Remember,

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1. MORRIS GISNET, A LAWYER TELLS THE TRUTH 11-12 (1931).
3. 10 THE LAW STUDENT’S HELPER 35 (Sprague 1902) (on file with the author).
8. Facts are always perceived within the context of their times; today’s perceived problems are not always tomorrow’s. For example, in 1959, an ABA Special Committee on the Economics of Law Practice concluded that the major problem facing the profession was that too few people were entering the law schools.
“[d]issatisfaction with the administration of justice is as old as the law,” raising issues of professional decline with some regularity.\(^9\)

Some incivility among lawyers has always existed and inevitably always will. The lawyer’s role in the adversarial system by its nature puts the lawyer in the midst of strongly partisan and sometimes emotionally charged activity. Human nature dictates that no matter how honorable a lawyer might be, some combative conduct will occasionally occur.\(^10\) Once again, however, as a moral shift is occurring in the American legal profession and the society within which it exists, the profession is wringing its hands hoping to find a solution to this “problem.” A major piece of the profession’s solution to the current crisis has been the adoption of professionalism creeds.

### INTRODUCTION

Professionalism creeds are sweeping the nation. At a time when Rule 11 sanctions abound, when the definition of “hardball litigation” is debated, and when the bar conducts seminars on dealing with the S.O.B. lawyer, bar associations across the nation are racing to adopt good manners oaths.\(^11\) But are these developments solely the result of a decaying moral fabric among lawyers? Might there also be an inherent, cause and effect relationship between changes in the nature, format and tone of the American Bar Association’s (ABA) model ethics pronouncements and the rise of the voluntary, aspirational creeds? What will happen if, as has been indicated in recent decisions, courts or bar association disciplinary committees begin to enforce these voluntary, aspirational creeds?\(^12\) And, whether enforceable or not, upon what should these creeds be based?

The practice and the bar have changed dramatically, in some ways undoubtedly for the worse, but in other ways for the better, since the days of David Hoffman’s aspirational resolutions,\(^13\) elitist

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10. See Susan Davis, Burnout, AM. HEALTH, Dec. 1994, at 48 (reporting the nature of stress and burnout that are implicit in the legal profession); Warren E. Burger, The State of Justice, A.B.A. J., Apr. 1994, at 62 (“We Americans are a competitive people and that spirit has brought us to near greatness. But that competitive spirit gives rise to conflicts and tensions.”); Milo Geyelin, Court­room Rudeness Has Americans Pining for Civil Litigation, WALL ST. J. EUR., July 9, 1991, at 1, available in 1991 WL-WSJE 2026228 (suggesting that the adversarial system is incompatible with civility).
11. See, e.g., Texas Lawyer’s Creed—A Mandate for Professionalism (1989). For a discussion of the Texas Lawyer’s Creed—A Mandate for Professionalism, see infra notes 126-40 and accompanying text.
12. For a discussion of recent court decisions enforcing creeds, see infra Part II.
bar admission policies,¹⁴ and client and self-interested drafting and adoption of legal ethics rules.¹⁵ Indeed, among the first impeti to have bar associations was the fear that the children of southern and eastern European immigrants and other undesirables were going to infiltrate the club.¹⁶ The organized bar, happily, can no longer rely on the homogeneity of its membership and its membership’s virtually common, elitist upbringing to ensure maintenance of its definition of civility among the group’s members. To the extent the new creeds are merely a hoped-for return to the moral force of formerly common values in the membership’s actions toward each other, toward the court, and toward its clients, the creeds are bound to fail and to retard the progress toward pluralism of the profession in the process.

The reality is that lawyers in the golden age¹⁷ were not civil to fellow lawyers who were outside of their own socioeconomic group and practice orientation. To the extent that lawyers were more civil in the golden age than they are today, that former civility only existed within a commonly interested group of lawyers who had essentially agreed not to compete with one another for clients,¹⁸ and who together formed a profession-ruling class that recognized the enemy, to whom they were anything but civil, as all lawyers who looked or spoke or thought differently from them. Not coincidentally, at some of these historical junctures, the outsider’s clients were largely people who had claims against the clients of the profession’s ruling class.¹⁹ Civility has, at various times in the history of the American legal profession, been what members of particular practice cohorts gave to one another, but not to those members of the profession who were outside the cohort. During such times, outsiders of one description or another have been the object of uncivil conduct by the most well-established members of the profession.²⁰

The perceived need by both the public and the profession²¹ for enhanced ethics in the legal profession is the basis for acceptance by

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¹⁴. See Auerbach, supra note 7, at 94-101.
¹⁵. See id.
¹⁶. See id. at 107-09. For a discussion of bar associations’ history of discrimination based on race, religion, sex, ethnicity, class, and family background, see infra Part III.B.
¹⁷. A “golden age” is a moving target, probably corresponding to the fifty years preceding the professional memory of those currently in the practice, estimated today to be from roughly 1900 to 1950.
¹⁹. See Auerbach, supra note 7, at 44-48.
²⁰. See id.
²¹. For an analysis of the differences between the public’s view and the profession’s view of the current problems, see Deborah Rhode, Lawyers: The Public’s View and the Profession’s View, 39 WM. & MARY L. REV. (forthcoming 1997).
both lawyers and non-lawyers of a need for professionalism creeds. What is far less clear is whether a return to the civility of the past actually represents the higher ethical standard that its proponents would have the profession and public believe it to be.22

Lawyers, as well as the public, recognize the need for more integrity and civility in the legal profession. Some lawyers blame the decline in lawyer civility on incessant hardball among lawyers.23 Hardball, according to Chicago lawyer Philip Corboy, "is when a lawyer, whether plaintiff’s or defense, is personally antagonistic or insistent on all of the procedural rules being followed."24 Defining "antagonistic or insistent," however, is not easy. Given a lawyer's unquestioned duty to his or her client, characterizing "insistence" as a negative attribute is hardly a proposition that is universally accepted.25

The hardball approach, some assert, arises from the transition in the minds of many lawyers that lawyering is now as much a business as a profession. A bottom-line mentality of "win-at-any-cost" often exacerbates tensions in lawyer relationships.26 But this so-called mind-set change is not of recent origin. Rather, it has accompanied times of prior professionalism crises.27

The profession may, in fact, need lawyer creeds to fill an aspirational niche. According to a survey commissioned by the ABA, public perception of lawyers is relatively unfavorable.28 The survey suggested, for instance, "a disturbing pattern that the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower an individual's opinion of them."29 When asked to volunteer in their own words

22. See Burger, supra note 10, at 62; Blueprint, supra note 2, at 251.
25. See, e.g., Goldberg, supra note 23, at 52; MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 6-10 (1990); ELLIOT E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION 182-84 (2d ed. 1955).
27. See id. at 639-42 (discussing the author's experiences with aggressive lawyers as a practicing attorney from 1948 through 1964, and from 1977 through 1979); 1906 AALS Proceedings, supra note 7, at 10-11.
29. Id. at 62.
changes that should be made in the legal profession, the largest segment of respondents—twenty-two percent—suggested improvements in ethics, integrity, and accountability. These responses suggest that lawyer creeds would be supported by the public, and that the profession would benefit by articulating properly framed and based aspirations and then fulfilling them. But again, history reminds us that the public has before blamed increases in litigiousness on lawyers rather than on the cultural and societal changes that have largely spawned the grounds for the litigation increase.

The current wave of creeds may be little more than a natural outgrowth of the change in tone of the ABA model ethics pronouncements. The change of ABA model ethics pronouncements and their adoption by the states over the twentieth century have made the rise of the modern creeds all but inevitable. The new creeds are, however, inappropriate and unwise bases for disciplinary or judicial sanctions enforcement because they are valuable only as aspiration and because many of the current creeds are erroneously and dangerously based on a pragmatic, client-interest rationale and are reflective of a past era's false civility. If the profession will inevitably have creeds, and hopefully unenforceable ones, the current crop is ill conceived. They are to too great an extent a harking back to a happily-lost moral basis for the profession that, if it ever was, is no longer dominant. To create a creed that would be useful beyond its public relations effects, a new, more inclusive, less elitist, moral basis must be found for the profession that can serve as the creed's foundation.

I. A History of Codes and Creeds

A. Colonial and Pre-Colonial Lawyer Ethics Pronouncements

As early as the fourteenth century, lawyers were being held to a high ethical standard. An English statute of 1403 mandated that attorneys admitted to the bar be "virtuous, learned, and sworn to do their duty." Furthermore, these fifteenth century attorneys were required to take an oath pledging that they would "be good and vir-

30. See id. at 64.
31. See CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 214-16 (William S. Hein & Co. 1990) (1911) (recounting the popular opinion regarding the sharp increase in debt collection following the American Revolution).
32. For a discussion of the ABA's movement from aspiration to mandate in its ethics pronouncements, see infra Part I.C.
33. For a discussion of the ineffectiveness of creeds relying on a past era, see infra Part III.B.
34. For a discussion of the creation of a new creed, see infra Part III.C.
35. See WARREN, supra note 31, at 24.
36. Id. at 26.
A 1729 statute required attorneys to "swear, that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability." These early oaths were a combination of minimum, enforceable standards and aspiration. They were meant to set an enforceable standard of behavior but were, in part, cast in aspirational language with a moral rather than pragmatic basis. The statutes were aimed at admitting only good and virtuous men who worked according to their best ability; the oaths aim at an ideal level of conduct and move on moral terms beyond what is necessary to maintain a minimum acceptable level of behavior and competence.

This English tradition was wholly embraced by colonial legislatures, which universally adopted the practice of swearing in attorneys. Colonies that adopted regulations prior to 1729 simply stipulated that attorneys had to be "sworn in". Colonies that prescribed an attorney oath after 1729 adopted the English version almost verbatim. The colonies, then, thoroughly adopted the English tradition of adopting requirements that were a combination of mandatory minimum standards and aspirational promises.

37. The Punishment of an Attorney Found in Default, 4 Hen. 4, ch. 18 (1602) (Eng.).
38. An Act for the Better Regulation of Attorneys and Solicitors, 2 Geo. 2, ch. 23, § 13 (1729) (Eng.).
39. See WARREN, supra note 31, at 43.
40. See id. at 53 (Maryland (1674)); id. at 72-73 (Massachusetts (1686)); id. at 141, 218 (Rhode Island (1705)); id. at 130 (Connecticut (1708)); id. at 121 (South Carolina (1712)); id. at 139 (New Hampshire (1714)); id. at 109 (Pennsylvania (1726)); id. at 126 (Georgia (1731)); id. at 202 (Delaware (1741)); id. at 43 (Virginia (1748)); id. at 113 (New Jersey (1763)); id. at 125 (North Carolina (1777)); id. at 295 n.1 (New York (1777)). In Virginia and several other colonies, early attempts to regulate admission to the bar followed several periods of prohibition of lawyering for fee. Id. at 40-42. Lawyers have been required to take oaths aimed at unusual ends: Rhode Island lawyers, for example, were required to swear that they would accept paper money in payment of fees. Id. at 218.
42. See, e.g., An Act for Regulating the Practice of Attorneys, 22 Geo. 2, ch. 47 (1748) (Va.). Virginia amended its oath in 1785 but the text remained partly mandatory and partly aspirational in character. An Act Regulating the Admission of Attorneys, 6 Va. Stat. 169, ch. 29 (1785). The statute stipulated that only those of "good moral character" would be admitted to the bar. Id. The oath reflected this motive:

> You solemnly swear, that you will do no falsehood, nor consent to the doing of any in Court, and if you know of an intention to commit any [you shall prevent it]; You will not wittingly or willingly promote or sue any false, groundless, or unlawful suit . . . you will delay no man for lucre or malice; but will conduct yourself . . . according to the best of your knowledge and discretion, and with all good fidelity . . . .

Id.
B. Hoffman and Sharswood Were Effectively the First American Aspirational Creeds

Until the 1880s, when state bar associations began to adopt comprehensive ethical standards, bar associations had not attempted to codify ethical standards except for attempts to regulate bar admission standards, including educational requirements. Rather, the treatises and essays of David Hoffman and George Sharswood "governed" the legal ethical culture in the loosest sense. Both men adopted a primarily aspirational approach—an approach that exhorted the attorney to the nineteenth century gentleman-lawyer ideal. This ideal was grounded in a moral framework; their work put in print the attributes of the ideal lawyer the earlier oaths had sought to require and mold. Hoffman's Resolution XXXIII most clearly represented this morally based, aspirational approach: "If, therefore, there be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing, I unhappily come in collision with what is . . . too often denominated the policy of the profession." 46

Other resolutions more specifically articulate this gentleman-lawyer ideal. Hoffman exhorted the attorney to "be always courteous" with professional brethren, and called for the lawyer to not countenance "frivolous and vexatious defenses." Resolution XXXII states: "I will never permit myself to enter upon a system of tactics . . . by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity [and] suspicion . . . . Reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character . . . ." 47

The overall focus of Hoffman's Resolutions is on the profession, the appropriate treatment of professional brethren, and the lawyer's officer-of-the-court role. The client service ethic exists in Hoffman's
Resolutions, but is subordinate to devotion to the profession itself and to the system of justice. 51

The moral framework articulated by Hoffman was seized upon by Judge George Sharswood. Sharswood’s *An Essay on Professional Ethics* 52 clearly articulated the much-admired “gentleman-lawyer” ideal, and served as an ethical beacon for lawyers for more than one hundred years, first on its own and later as the model for most of the early state ethics codes and then the 1908 ABA Canons. 53 Sharswood’s ethical precepts were not, of course, meant to be enforceable norms, but they manifest the moral/aspirational basis of nineteenth century professional ethics. 54 Sharswood began the section concerning the duties the lawyer owes to his professional brethren by asserting that “[t]here 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.” 55 He continued by citing with approval the spirit of the traditional English oath. 56 The explicit ethical duties that Sharswood enunciated were aspirational in nature. 57 Sharswood and Hoffman, taken together, clearly reflect the profession’s tradition that these ethical pronouncements exist not primarily to ensure certain minimum standards of conduct, but to exhort the lawyer to a certain level of ideal conduct. 58

C. *Alabama Code Begins the Process; the ABA Moves from Creed to Code and Aspiration to Mandate in its Successive Model Pronouncements*

Beginning in the late 1880s, state bar associations began to adopt ethical codes that articulated existing professional norms. 59

51. *See id.* at 752-55, 764 (Resolutions V, VII, XII, XIII, and XXXII).
52. Sharswood, *supra* note 45.
53. For a discussion of the early state ethics codes’ and the 1908 ABA Canons’ reliance on Sharswood’s *Essay*, *see infra* Part I.C.
54. Sharswood’s preface hints at the aspirational-moral bent of the ethics rules to come: Discussing lawyer/legislators, Sharswood comments that “[theirs] is the noblest work in which the intellectual powers of man can be engaged, as it resembles most nearly the work of the Deity.” Sharswood, *supra* note 45, at 10.
55. *Id.* at 55; *see also id.* at 55 (asserting that “high moral principle is [the] only safe guide” for the young attorney).
56. *Id.* at 58.
57. *See, e.g., id.* at 74 (The attorney “should never unnecessarily have a personal difficulty with a professional brother. He should never give nor provoke insult . . . Let him shun most carefully the reputation of the sharp practitioner”).
58. The distinction is important, for these different rationales have a potent effect on their concomitant legal/ethical cultures.
59. *See Report of the Committee on Code of Professional Ethics, in 31 A.B.A. Rep.* 676, 676-78 [hereinafter 1907 Committee Report]. The following states drafted codes of ethics during the late 1880s to the early 1900s: Alabama in 1887, Georgia in 1889, Virginia in 1889, Michigan in 1897, Colorado in 1898, North Carolina in 1900, Wisconsin in 1901, West Virginia in 1902, Maryland in
The Alabama Code began the parade, and almost all other states relied heavily on it when drafting their own ethics codes.\footnote{1902, Kentucky in 1903, and Missouri in 1906. \textit{See id.} at 676. Although the ethical standards thus became "official" policy, they were loosely, if ever, enforce. \textit{See Blueprint, supra note 2, at 258.}}

The Alabama Code had had its own influence: Sharswood's 1854 \textit{Essay on Professional Ethics},\footnote{60. \textit{See 1907 Committee Report, supra note 59, at 678 ("With the exception of the Louisiana Code, all the State Bar Associations Codes are formulated, almost \textit{totidem verbis}, upon that of Alabama . . . . ").}} originally delivered in part to the University of Pennsylvania Law School, where Sharswood was a professor. "Anyone who is familiar with the little book by Judge Sharswood on 'Legal Ethics' will readily see how large a part of this [Alabama] code has been drawn from that source. Many of its maxims have been transferred word for word from Sharswood's treatise . . . ."\footnote{62. \textit{1907 Committee Report, supra note 59, at 678 (quoting the chairman of the committee drafting Kentucky's code of ethics).}} Sharswood's \textit{Essay} was "doubtless the inspiration for the Alabama code.\footnote{63. \textit{Id.}}" Not surprisingly, the Alabama code has been described as "more a code of etiquette than ethics."\footnote{64. \textit{Michael Hegarty, Note, Constitutional Law—First Amendment Commercial Speech—Attorney Solicitation—In Re Von Wiegen, 34 U. KAN. L. REV. 191, 194 (1985).}}

In response to the states' movement, the ABA moved in 1905 to formulate its own code of professional ethics.\footnote{65. \textit{See Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association, 28 A.B.A. REP. 3, 132 (1905).}} In 1907, the Committee on Professional Ethics, reporting the sources it was consulting for the forthcoming code, had Sharswood's treatise printed as an addendum to the record of the annual meeting and had copies distributed to the general membership.\footnote{66. \textit{1907 Committee Report, supra note 59, at 680; Sharswood, supra note 45.}} In addition to Sharswood, the Committee reported that it was primarily consulting the Alabama Code,\footnote{67. \textit{1907 Committee Report, supra note 59, at 678-79, app. B.}} three attorney oaths,\footnote{68. \textit{Id.} at 678-79, app. D, E, & I. The oaths were The Lawyer's Oath in the State of Washington, \textit{id.} app. D; The Oath for Advocates Prescribed by the Laws of the Swiss Canton of Geneva, \textit{id.} app. E; and The Oath Administered to lawyers in Germany on Admission to the Bar of the Respectable Monarchical States, \textit{id.} app. I.} a Lawyer's Prayer,\footnote{69. \textit{Id.} app. F.} and David Hoffman's Resolutions.\footnote{70. \textit{Id.} app. H.}

The 1908 ABA Canons of Ethics,\footnote{71. \textit{CANONS OF ETHICS, reprinted in 33 A.B.A. REP. 575 (1908).}} like the 1887 Alabama Code, were, by design, similar to Hoffman's and Sharswood's works. In fact, many portions of the Alabama Code actually appeared verba-
tim in the ABA Canons. The ABA's committee established to consider the adoption of a code of professional ethics added the author of the Alabama code, Judge Thomas Goode Jones, to the committee as it began to draft its own canons of ethics. Consequently, Judge Jones attended the three-day session from which the 1908 Code emerged. Judge Jones's attendance likely made the influence of the Alabama Code even greater.

Another, though lesser, influence on the ABA Canons was David Hoffman's Resolutions in Regard to Professional Deportment, fifty suggestions for lawyers included in his 1836 book on a general course of study for lawyers. Both Sharswood's and Hoffman's works were reprinted in the ABA Reports. Sharswood's Essay was given its own volume within the Reports, and Hoffman's Resolutions appeared in the appendix to the ABA Report of the Committee on Code of Professional Ethics. The basis of both the early state codes and the ABA Canons, therefore, remained strongly moral and aspirational.

With these strongly moral-based premises in mind, the ABA promulgated its comprehensive Canons of Professional Ethics in 1908. The provisions of the Canons themselves often evince their aspirational underpinnings. Canon 17 states: "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... n Canon 22 exhorts the attorney to always act with "candor and fairness" in his professional dealings. 82 With the 1908 Canons of Ethics, the moral foundations of the "gentleman-lawyer" ideal were articulated as the national profession's ideal. Despite this code-like articulation, however, the moral, aspirational nature of the prevailing ethical philosophy did not change: with advertising and solicitation rules excepted, the Canons were not drafted in language of nor primarily intended to be applied as enforceable rules. 83

Virtually the only substantive changes from Hoffman and Sharswood to the Alabama code and then the ABA Canons relate to direct client-getting and contingent fees. These changes reflected a largely self- and client-interested activity by the Canons' drafters whose moral standards and clients' accounts were offended by the pursuit of claims by injured plaintiffs against their corporate clients. Such claims would be far less likely to be brought if urban, ethnic, underclass lawyers could be restrained from advertising about their services, soliciting the business of injured persons, and offering contingent fee arrangements to those unable to afford a pay-as-you-go lawyer fee.

Although it is clear that many client-getting activities had long been subject to disdain, the additions to the Canons regarding client-getting from the very limited mention of them in the Canons' models—Sharswood and Hoffman—are striking in their reproval: Canon 27 grudgingly approves of business cards as being "not per se improper. But solicitation of business by . . . advertisements, or by personal communication . . . is unprofessional. . . . [S]elf-laudation . . . [is] intolerable." 85 Thus, during the period leading up to and then proceeding from the adoption of the 1908 Canons through the next thirty years at least, the bar got stronger, not weaker, in its insistence on no advertising: in 1854 Sharswood said nothing about

81. CANONS OF ETHICS Canon 17, reprinted in 33 A.B.A. REP. 575, 580 (1908).
82. Id. Canon 22, reprinted in 33 A.B.A. REP. 575, 581 (1908); see also id. Canon 23, reprinted in 33 A.B.A. REP. 575, 583 (1908) ("Attitude Toward Jury"); id. Canon 29, reprinted in 33 A.B.A. REP. 575, 583 (1908) ("Upholding the Honor of the Profession"); id. Canon 32, reprinted in 33 A.B.A. REP. 575, 584 (1908) ("The Lawyer's Duty in Its Last Analysis").
83. The Canons were not meant to have the effect of positive law; they would, however, come to be regarded as important guidelines for lawyer conduct the violation of which might lead to discipline. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2, at 55 (practitioner's ed. 1986). By 1914, 30 states had adopted the ABA Canons "with little or no change." Report of the Committee on Professional Ethics, 39 A.B.A. REP. 559, 560-61 (1914).
84. See WARREN, supra note 31, at 25; WOLFRAM, supra note 83, § 14.2.2, at 776-77.
85. CANONS OF ETHICS Canon 27, reprinted in 33 A.B.A. REP. 575, 582 (1908).
advertising restrictions;\(^{86}\) in the 1880's the Alabama Code permitted a fair amount of newspaper advertising.\(^{87}\) Warvelle allowed for some as well.\(^{88}\) Some early writers professed to find tolerable even in-person solicitation, though they would not engage in it personally.\(^{89}\) In the nineteenth century, testimonials of satisfied clients were also reportedly used.\(^{90}\) But since 1937, a year in which the Canons were amended,\(^{91}\) "all such advertisement has been condemned."\(^{92}\)

The 1908 Canons of Ethics were the principle touchstone for attorney conduct for many years. "A consensus grew among the bar, however, that the Canons were incomplete, unorganized, and failed to recognize the distinction between the inspirational and the prescriptive."\(^{93}\) Consequently, the ABA promulgated the Code of Professional Responsibility in 1969.\(^{94}\) In 1983, the ABA adopted the Model Rules of Professional Conduct as a replacement for the 1969 Code.\(^{95}\)

The 1908 Canons remained the official governing norm of the legal profession until the ABA promulgated a comprehensive reformulation in 1969.\(^{96}\) Prior to the 1969 Model Code, the ethical norms of the profession were largely rooted in the moral consensus of the leaders of the organized bar. Thus, the ethical restrictions governing attorneys were largely aspirational\(^{97}\) rather than mandatory in character. With the 1969 Code of Professional Responsibility\(^{98}\)—and the subsequent Standards for Lawyer Discipline and Disciplinary

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86. See DRINKER, supra note 18, at 213.
87. ALA. CODE OF ETHICS Rule 16, reprinted in DRINKER, supra note 18, app. F at 356.
88. WARVELLE, supra note 18, § 86, at 52.
89. See DRINKER, supra note 18, at 213 (quoting JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 608 (Random House, Inc. 1950) (1791)).
92. DRINKER, supra note 18, at 213.
95. See WOLFRAM, supra note 83, § 2.6.4, at 60-63 (discussing the criticism of the Model Code of Professional Responsibility, and the ABA's subsequent promulgation of the Model Rules of Professional Conduct).
97. Pre-1969 norms of conduct were not codified into a strict set of enforceable rules. See WOLFRAM, supra note 83, § 2.6.2, at 55. This nonenforceable nature enabled earlier codes to appeal to the attorney's moral suasions—they were, therefore, aspirational.
Proceedings— the ABA sought for the first time to lobby state judicial systems to officially adopt and enforce the ABA’s ethical framework. This fundamental change of purpose marked the beginning of the shift from aspirational goals toward mandatory minimum standards and rules. In order to make the 1969 Code palatable—i.e., practically enforceable—the outwardly moral, almost purely aspirational stance of the 1908 Code had to be abandoned. In the attempt to establish minimum enforceable standards of behavior, the ABA largely abandoned its moral rationale for promulgating its code of ethics in the first place. The moral rationale and aspirational focus were retained in a more limited form in the Ethical Considerations which followed each Canon and Disciplinary Rule in the 1969 Code, but the Ethical Considerations were now meant to provide “guidance” and were no longer considered essential attributes of the “good” attorney. Moral aspirations are largely absent from the 1983 Model Rules—the ethical culture of the legal

100. See Wolfram, supra note 83, § 2.6.3, at 56.
101. See Blueprint, supra note 2, at 258. “The message [of the 1908 Code] was lofty, but hard to enforce. If the Bar was to rid itself [of bad lawyers] ... both more formal disciplinary procedures and more precise statements of professional standards were required.” Id.; see also Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1250-51 (1993). Hazard states that [the Canons] presupposed that right-thinking lawyers knew the proper thing to do and that most lawyers were right-thinking. ... [T]he Canons had no direct legal effect ... [and] functioned not as enforceable legal standards but as evidence of such standards.

The transformation of the norms of professional conduct was principally effected by the ABA’s Code of Professional Responsibility.... Id. Indeed, the Professionalism Report was itself a later attempt to replaced the beginning-to-be-lost aspirational element of organized bar ethics pronouncements.
102. See Jack L. Sammons, Lawyer Professionalism 63-64 (1988). Sammons stated that the evolution from the 1908 Canons to the 1969 Code to the 1983 Model Rules was evolution from morals to ethics to ethical regulation to rules of law. It is an evolution moving constantly in the direction of increasing coerciveness and, as it does, necessarily reducing the profession’s guidance from aspiration to minimally acceptable conduct. We went very quickly from what not to be to what not to do. ... It is easy ... to confuse compliance with the rules with being moral and it is easy to confuse minimally acceptable conduct with acting as a professional.” Id. See also Edmond Cahn, The Moral Decision: Right and Wrong in Light of American Law 38 (1966) (stating that legal codification can utilize a minimum-standards approach at the expense of the aspiration for an ideal form of behavior).
104. See id.
profession now wholly embraced a pragmatic minimum-standards basis.\textsuperscript{105}

In fact, the notion of an adopted, enforceable lawyer code is of quite recent origin. The first ABA pronouncement, the 1908 Canons, based as they were on the work of Hoffman and to a greater degree Sharswood, was in fact more creed than code. The ABA made little effort to encourage states to adopt the Canons as enforceable standards.\textsuperscript{106} Even in the 1970s, as the ABA changed its course to a more aggressive pressing on the states of the Model Code as a proposed enforceable code of conduct, the model urged was the familiar combination of rules—the Disciplinary Rules—and aspirational statements—the Ethical Considerations. A former faculty colleague related the telling first day experience as a student in his late 1970s professional responsibility course. The instructor explained his trick for remembering the relative importance and roles of the Disciplinary Rules and the Ethical Considerations: he said that if a lawyer did not heed the Disciplinary Rules (DR's), she would create a "Darned Ruckus," but that she should only consider the Ethical Considerations (EC's) if she wanted to be "Extra Careful." In effect, the Model Code straddled the uncomfortable fence between a creed-like system and a code-like system. The structure of the Model Code is itself a clear indication of the bar's ambivalence about enforceable rules and its continued clinging to the notion that lawyers did not need ethics rules, they needed a voluntary creed to which a pledge of good behavior could be made.

In truth, the Model Rules were the first pure code for lawyers. As the Kutak Commission drafted the Rules,\textsuperscript{107} and as the ABA debated, adopted and then urged them on the states, an important feature of the Rules was the change to a more statute/restatement-like format from the awkward marriage of rule and aspiration that had been the Model Code's format. Ironically, but perhaps not coincidentally, the ABA's move toward enforceable, mandatory rules and away from aspirational statements has coincided with the popularity of state and local bar adopted creeds.\textsuperscript{108} Indeed, the ABA

\textsuperscript{105} The \textit{Model Rules of Professional Conduct} (1969) and \textit{Code of Judicial Conduct} (1972) only furthered the retreat from a moral rationale of ethics by abandoning the Code's Ethical Considerations.

\textsuperscript{106} See \textsc{Wolfram}, supra note 83, § 2.6.2, at 54.

\textsuperscript{107} See id. § 2.6.4, at 60.

\textsuperscript{108} This same move has also coincided with a move toward "other law" based ethics rules. As the rules have become enforceable, they have had to reference and account for the existence of coordinate areas of law that have always governed lawyer civil and criminal liability. See \textsc{Wolfram}, supra note 83, §§ 4.1 to .2, at 146-50, § 6.7.3, at 299, § 13.5.3, at 713 (agency); id. § 4.2, at 148-54, §§ 6.3.1 to .3.2, at 250-52 (contract); id. § 13.3.6, at 698-701, §§ 13.5.2 to .5.8, at 712-27 (fraud). "One perusing the 1969 Code and the 1983 Model Rules will discover that, in the last analysis, little is required of lawyers that is not already required by other law—the law of crimes, torts, contracts, property, agency, evidence." Id. § 2.6.1, at 49.
The model creed is itself partly a replacement of the Code's lost aspirational side.

D. The Rise of the Modern Creed

Chief Justice Warren Burger addressed the American Bar Association in 1984 and decried a decline in professionalism. Burger enunciated a widespread perception that the Bar only lived up to the minimum standards as articulated in the Model Rules of Professional Conduct. The ABA's prompt response in the form of the Blueprint for the Rekindling of Lawyer Professionalism validated this perception, and essentially argued that the strictures of the Model Rules, in and of themselves, did not create an acceptable level of professionalism. Among other recommendations, the report advocated the adoption of non-enforceable ethical creeds that would exhort the lawyer to conform to standards above the minimum standards of the Rules. In 1988, the ABA House of Delegates recommended that state and local bar associations adopt creeds of professional conduct. Subsequently, the ABA Torts and Insurance Practice Section adopted such a creed. The ABA House of Delegates also approved a creed created by the Young Lawyers' Section called a Lawyer's Pledge of Professionalism. The ABA creed was similar to the 1989 Texas Lawyer's Creed—A Mandate

110. Id., reprinted in 52 U.S.L.W. 2471, 2471 (Feb. 28, 1984). In 1984, Justice Burger was speaking at a time when few states had actually adopted the Model Rules of Professional Conduct, which were adopted by the ABA's House of Delegates in 1983. See Wolfram, supra note 83, § 2.6.4, at 62-63.
111. Blueprint, supra note 2.
112. See id. at 265 (“All segments of the Bar should: . . . [r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct.”).
113. The ABA Blueprint for Professionalism attributed some of the shortcomings to external economic pressure, and thus stopped short of totally internalizing the blame. Id. at 257 (“Rhetoric about the 'special' character of the profession remains, but the reality is that, as a matter of law, lawyers must now face tough economic competition with respect to almost everything they do.”).
114. See id. at 296-97.
116. See id.
117. See id.
for Professionalism.\textsuperscript{118} State and local bar associations quickly seized the bait and began to draft non-binding creeds.\textsuperscript{119}

The interest in new creeds has grown dramatically in recent years. While it has been said that the proliferation of creeds is a response to the “recent awareness of the civility crisis, or more appropriately, the shift in focus to the cure of the civility crisis,”\textsuperscript{120} the rise in creed-need has also paralleled the change in ABA model standard focus from aspiration to rule orientation.

Much of the substance in the new wave of creeds mirrors the work of Hoffman and Sharswood, whose work was more creed than code. The irony of the Hoffman/Sharswood story is this: they wrote a description of the ideal nineteenth century lawyer, to which lawyers should aspire; their work was used by the organized bar to form the basis of the profession’s first uniform ethics pronouncements; these ethics pronouncements in turn formed the basis for the profession’s first sets of enforceable rules; and traces of their work are now evident in the organized bar’s effort to revitalize aspiration by way of the creeds.

II. CREEDS, AS ASPIRATION, ARE NATURAL, GOOD AND INEVITABLE, BUT THEY SHOULD NOT BE ENFORCED

Because creeds are a nearly inevitable response to the profession’s need to aspire, we will always have them. It is perfectly natural and healthy for a profession to aspire to something beyond enforceable norms. The best of such aspiration performs service for the profession by encouraging conduct that both complies with the enforceable norms and expresses the moral understanding, the moral common-ground of the profession’s members.\textsuperscript{121}

If creeds are to exist, they should not be enforceable for two reasons. First, making an aspiration enforceable converts it to a rule. That conversion creates a new “aspiration gap,” such as was created by the ABA’s move from aspiration to rule in the models.\textsuperscript{122} New forms of aspiration to replace the old will be found, and the cycle will continue: aspiration should remain aspiration unless and until its theme becomes incorporated through normal process into enforceable rules; enforcement without such a normal process conver-

\textsuperscript{118} See generally Eugene A. Cook et al., A Guide to the Texas Lawyer’s Creed: A Mandate for Professionalism, 10 REV. LITIG. 673 (1991) (discussing and analyzing the Texas Lawyer’s Creed—A Mandate for Professionalism).

\textsuperscript{119} As of late 1995, twenty-six states and sixty-two local bar associations had adopted creeds. See Rob Atkinson, A Dissenter’s Commentary on the Professionalism Crusade, 74 TEx. L. REV. 259, at 278 n.74 (1995).

\textsuperscript{120} Brent E. Dickson & Julia Bunton Jackson, Professionalism in the Practice of Law, 28 VAL. U. L. REV. 531, 537 n.49 (1994).


\textsuperscript{122} For a discussion of the ABA’s move from aspiration to rule in the models, see supra Part I.C.
sion eliminates the benefit of aspiration. Second, the current creeds should not be enforceable because they are based in part on a rationale that may be sensible for exhortation but that fails as a rationale for an enforceable rule: namely the rationale expressed within many of the creeds saying essentially that, “I will be civil because doing so furthers my client’s interests.” Enforceable rules are interpreted to apply when their rationales are furthered by the results of their application. Because most uncivil lawyers’ standards are based on the stated purpose of furthering their clients’ interests, and because some uncivil behavior undoubtedly does further client interest, the current creeds will not be followed and ought not apply to a wide range of conduct because the rule’s stated rationale is undermined by enforcement of the rule.

Unfortunately, there is a serious risk that the creeds will be mistakenly enforced by courts and perhaps state bar disciplinary authorities. Just as some courts used the Model Code’s non-mandatory Ethical Considerations to support the imposition of discipline, some courts are edging toward the use of the creeds to support various sanctions.

The creed most often cited in case law is the Texas Lawyer’s Creed—A Mandate for Professionalism, adopted November 7, 1989. Although the Creed’s Order of Adoption states that the rules are “primarily aspirational,” the Creed has been used as a basis for penalties, such as sanctions, as some of the following cases illustrate.

When a plaintiff filed a motion for sanctions and censure against the defendant’s attorney, a federal district court sanctioned the attorney for intentionally misleading opposing counsel in order to obtain ex parte interviews with opposing party witnesses. The Horner court cited both the Texas Lawyer’s Creed and the section of

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123. See, e.g., Texas Lawyer’s Creed—A Mandate for Professionalism (1989) (“The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating . . . in our state . . . abusive tactics which have surfaced in many parts of our country. We believe such tactics are . . . harmful to clients.”).

124. See, e.g., Goldberg, supra note 23, at 48.

125. See, e.g., Committee on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Durham, 279 N.W.2d 280, 285-86 (Iowa 1979).

126. See Cook, supra note 118, at 674-75.

127. See, e.g., McLeod, Alexander, Powel & Apffel v. Quarles, 894 F.2d 1482 (5th Cir. 1990). In McLeod, the defendant, proceeding for part of the case pro se as a former client of the plaintiff-law firm, failed to respond, without good cause, to discovery requests by the plaintiff. Id. at 1483-84. The appeals court, upholding the district court’s adoption of a magistrate’s order of default judgment against the defendant, cited the specific rule of the Federal Rules of Civil Procedure used by the magistrate—Rule 37—for default judgment. Id. at 1484-86. The appeals court also cited a section of The Texas Lawyers’ Creed—A Mandate for Professionalism, which requires attorneys to comply with reasonable discovery requests. Id. at 1486-87.

the Texas Disciplinary Rule prohibiting dishonesty with another attorney.129 Although the court referred only to the disciplinary rule as "mandatory and [having] the status of law,"130 the court cited the Creed as a part of its reasoning toward the imposition of sanctions.131 The sanctions were attorneys' fees and relevant expenses incurred by the plaintiff incident to the motion.132

The same court had previously threatened application of the Texas Lawyer's Creed as a sanctions rule in another case.133 Ruling on various discovery motions filed in a patent infringement lawsuit, the court, after granting the defendant's motion to compel the completion of a deposition, stated, "Counsel are admonished that their failure to comply with the Texas Lawyer's Creed—A Mandate for Professionalism promulgated by the Supreme Court of Texas and the Texas Court of Criminal Appeals and adopted by this court will result in monetary sanctions being imposed against counsel individually."134 The court's warning is effectively an enforcement of the creed.

The Texas Lawyer's Creed was also referred to in two state court decisions. Shortly after the adoption of the Creed, a concurring judge condemned the action of an attorney who served as both counsel and witness for his client.135 The attorney should be sanctioned, said the judge, by whatever punishment the Texas Supreme Court or the district grievance committee deems appropriate.136 The judge cited the two-week old Creed as additional authority.137 Although the judge did not say that sanctions should flow directly from the Creed, he remarked that the Creed is a necessary response to the increasing abuse in the legal system.138

A pro se attorney seeking to recover damages and attorneys fees from a former client was held to have acted unethically and to have violated the Texas Lawyer's Creed by seeking a default judgment against parties who had filed their answer under the wrong case number, and who the attorney knew were represented by legal counsel.139 The court cited the Creed provision that states that a lawyer will "not take advantage, by causing any default or dismissal to be rendered, when [he or she knows] the identity of an op-

129. Id. at 603.
130. Id.
131. See id. (citing Texas Lawyer's Creed—A Mandate for Professionalism (1989)).
132. See id.
134. Id. at 674.
136. Id.
137. Id. at 531 n.3.
138. Id.
posing counsel, without first inquiring about that counsel's intention to proceed.140

The Dallas Bar Association Lawyer’s Creed and Guidelines for Professional Courtesy, both adopted in 1987, were used as the basis of a federal district court’s adoption of standards of litigation conduct.141 The standards, in eleven sections, were taken nearly verbatim from sections of the two Dallas Bar Association documents.142 Prefacing the newly adopted standards, the court commented on the need for litigation standards, which, like creeds, are becoming increasingly necessary to combat lawyers’ indirect attacks on the administration of justice.143 The court described its view of the need for and appropriate role of lawyer creeds:

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.144

The courtesy creed discussed and adopted as an enforceable, sanction-supporting code by the court was applied in a wrongful refusal to pay insurance claims case.145 The insurance company’s lawyers filed a late brief,146 arguably emulating their client’s delaying tactics that were the subject of the plaintiff’s claim.147 Not only was the brief filed late, but it was filed late without the lawyers either requesting consent for the late filing from the plaintiff or seeking leave of court to excuse the lateness.148 The insurance company lawyers had “clearly violated” the filing and leave of court requirements.149 The court was justifiably concerned about the company’s

140. Id. at 720 n.2 (quoting Texas Lawyer’s Creed—A Mandate for Professionalism).
142. See id.
143. Id.
144. Id. at 286.
145. See id. at 285.
146. See id. at 286.
147. See id. at 285, 289.
148. See id. at 291.
149. Id.
When the plaintiff's lawyer moved to strike the late filing, as the court's rules explicitly and understandably authorized them to do, the court indicated its inclination to sanction the plaintiff's lawyers under the courtesy creed. Speculating on its view that attorney conduct has deteriorated, the court mentioned several possible causes: the increase in the size of the bar has decreased collegiality; the legal profession has become merely a business; and veteran attorneys have ceased to teach new lawyers proper standards of conduct.

Unlike the Dallas Bar Association Lawyer's Creed and Guidelines for Professional Courtesy, which do not mention sanctions or other methods of enforcement, the district court in Dondi does discuss consequences of creed violations. Violations of these creeds will result in "an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: 'a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances.'"

Aspirational creeds should not be used to police lawyer conduct that complies with the language of procedural rules such as Rule 11 of the Federal Rules of Civil Procedure, default judgment rules, or filing deadlines enforcement rules. If a currently authorized practice, such as moving for default judgment when no answer has been timely filed or moving to strike a late-filed brief, ought rather to be prohibited, then the procedural rules should themselves be amended to reflect the measure of diligence with which lawyers should be expected to enforce violations. Rule 11 is the best example: in 1993, it was amended to include a safe-harbor provision, requiring notice to opposing counsel and an opportunity to cure a defect before proceeding to court enforcement of Rule 11's strictures. If lawyers should be expected to notify opposing counsel that opposing counsel's brief or pleading is late before proceeding to seek default judgment or late filing sanctions, then the appropriate rules should be amended to reflect such a requirement. Lawyers ought to be expected to seek enforcement of the rules as those rules are written rather than be expected to be a gentleman to opposing counsel while compromising client interests. This is not a new, uncivil way

150. Id.
151. Naturally, as contemplated by the rules, in the first instance the option of complaining about party misconduct such as late filings should rest with the opposing party.
152. Dondi, 121 F.R.D. at 287-89; see also Monroe Freedman, In the Matter of Manners, LEGAL TIMEs, March 11, 1991, at 23 (recounting the Dondi court's stated intention to impose sanctions on lawyers who violate the courtesy creed).
154. Id. at 288 (citing Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988)).
155. See FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.
of thinking. Warvelle described the late nineteenth and early twentieth century "general practice" as follows:

[I]t is the client's right to have his cause tried at the time set; to have adverse pleadings filed within the time allowed; and to insist that his attorney shall take every legal advantage the case may afford, and this duty an attorney may not capriciously avoid nor is he at liberty to withdraw from the case merely because his client insists upon the strict observance of his rights. Whatever the feelings of counsel may be toward the counsel for the other side, and however much he may desire to accommodate him in matters of practice, he is yet under a paramount duty to follow his client's instructions in all matters pertaining to the legitimate conduct of the litigation.156

A. The Creeds Should Not Be Enforceable Because Enforcement Defeats the Aspirational Nature of the Creeds' Statements

There is a place for both aspiration and rule in the official organized bar and court statements about lawyer behavior. Mandatory rules are needed to provide reliable standards for the imposition of discipline and to give the public a set of standards by which it is fair for them to expect lawyers to abide as a group.157 Clients and the public have a justifiable expectation that the licensing of lawyers, like other professionals, includes an acceptance by the individual professional and an enforcement by the profession of a set of concrete standards. These standards are not aspirational; they are mandatory.158

There is also a place for professional aspirational statements. Aspirational pronouncements provide both a psychological159 and a pragmatic, public relations benefit to the individual professional and to the profession. The desire for these benefits are in significant measure responsible for the rise of the modern lawyer creeds; they have replaced the aspirational elements of the former organized bar ethics pronouncements when they were stripped first from

156. WARVELLE, supra note 18, § 317, at 197; see also JOSEPH G. BALDWIN, THE BENCH AND THE BAR (1854) (stating that older lawyers in the 1830s took advantage of "quirks and quibbles" to prevail for their clients against those of younger lawyers), reprinted in DENNIS R. NOLAN, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 113-15 (1980).
157. See, e.g., Andrew S. Watson, Some Psychological Aspects of Teaching Professional Responsibility, 16 J. LEGAL EDUC. 1, 3 (1963).
the Canons to the Model Code and then almost entirely eliminated from the Model Code to the Model Rules. 160

To a very great extent, the modern creed is a sought-for replacement for the former, now lost, ABA sponsored aspirational statements of the Canons and Code. To this extent, the modern creed drafter must attend to the goals of that aspirational activity, and courts and disciplinary bodies should refrain from enforcing them. Once enforced, an aspirational statement becomes a rule and then benefits derived from aspiration are lost. Inevitably, the profession needs and will have aspirations. Enforcing aspirations converts them to rules and leaves the need for aspiration wanting.

B. The Creeds Should Not Be Enforceable Because Their Rationale Will Fail to Support Effective Rule Enforcement

There are two categories of rationales for the promises or commitments of a creed: moral rationales and pragmatic ones. Simply and very generally stated, commitments based on moral rationales discourage conduct that is wrong and encourage conduct that is right; 161 pragmatic rationales discourage conduct that fails to further instrumental ends—it doesn’t work—and encourage conduct that does further instrumental ends—it works. 162

Creeds, dating back to the aspirational sections of the lawyer oaths and Hoffman and Sharswood’s descriptive writings, 163 even while being aspirational have been based largely on the moral rationale and only occasionally on the pragmatic rationale. 164 Many aspects of the modern creeds are unfortunately based in part on pragmatic, specifically client-furthering rationales. For example, the Virginia Lawyers’ Creed requires the lawyer to promise to “always recognize that uncivil conduct does not advance and may compromise the rights of my clients.” 165 Lawyers who engage in uncivil conduct are not buying. Lawyers who engage in uncivil conduct do so primarily to further their clients’—and vicariously their own—interests: “Hardball is vigorous advocacy for your client.” 166 “[T]he tug between doing right by your client and [doing] justice”

160. See Blueprint, supra note 2, at 257-59.
161. For example, “I will not lie to my client because it is wrong to lie,” or “I am civil to opposing counsel because it is right to behave so.”
162. For example, “I do not lie to my client because I will lose clients or because poor communication with my client will diminish the service I can provide for my client,” or “I will be civil to opposing counsel because such conduct will produce referrals to me or because such conduct will allow me to make a better deal for my client or represent my client more effectively in court.”
163. For a discussion of Hoffman’s and Sharswood’s writings as the first American creeds, see supra Part I.B.
164. For a discussion of the moral basis of Hoffman and Sharswood’s writings, see supra Part I.B.
166. Goldberg, supra note 23, at 49.
makes hardball a way of life for the lawyer.167 "[A]nyone . . . [who] cannot fulfill the prescribed obligations of a professional [including the use of aggressive tactics for a client] should not undertake those obligations." Lawyers treat litigation as "war" to impress clients, send a message to opposing parties, and prove that the best defense is a good offense.168

In a real way, the same pragmatic rationales that filtered somewhat into Sharswood's work and that appear in many of today's creeds are in the same form that animated the early bar's client-interested emphasis on the advertising and contingent fee rules in the ABA Canons. Just as Sharswood advises against engaging in certain conduct because the conduct harms—at least fails to further—the lawyer's interests or harms—at least fails to further—the client's interests, so may be seen the Canons' emphasis on prohibiting advertising and contingent fees.170 The Canons drafters did not advertise because it was unnecessary to their business interests;171 they did not advertise because doing so would not further their or their clients' interests; they prohibited advertising and restrained contingent fees because doing so did further their business interests and their clients' interests.

In his classic work, Holmes argued that it was the province of the law to establish certain minimum enforceable standards of behavior.172 He argued that to enforce such minimum standards, the law must address the "bad man."173 This "bad man," caring nothing for the moral norms embodied in a stricture, is only concerned with the material consequences of breach—he is only concerned with how his behavior will materially affect his well-being.174

167. Id. at 50.
169. Haig & Getman, supra note 5, at 26 (quoting a local bar president).
170. In some forms, of course, client-getting and contingent fees were always prohibited as maintenance and champerty, but so were fraud and conversion always prohibited. Some further explanation of the early bar's emphasis on advertising and contingent fees other than the traditional criminal sanctions for maintenance and champerty is needed to explain their prominence and distinction among topics addressed in the Canons. See generally Max Radin, Maintenance by Champerty, 24 CAL. L. REV. 48 (1935) (discussing the Canons in relation to contingent fees and advertising).
171. They had essentially agreed not to compete with one another for clients. See DRINKER, supra note 18, at 5, 190-91; WARVELLE, supra note 18, § 324, at 205-06.
172. See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897), reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167 (1920).
173. Id., reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 170 (1920).
174. See id., reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 170-71 (1920) (presenting the clearest statement of his thesis).
Arguably, more lawyers are today modeled on Holmes' “bad man.”\textsuperscript{175} As such, their behavior must be governed to a greater extent by pragmatic interests than by moral suasion. This the ABA has effectively done by moving its models from aspiration to enforceable rule.\textsuperscript{176} Although the Model Rules are not generally-legislated norms of the type addressed by Holmes, the ABA essentially used Holmes' rationale and philosophy in promulgating the new standards.\textsuperscript{177} As with legislation, the Model Rules are an attempt by the ABA to establish enforceable minimum standards of professional behavior; they adopt the assumption that lawyers are “bad men.”

This pragmatic, sanction/benefit-based rationale works quite well as the basis for enforceable rules in the Model Rules, but it is misplaced in the currently dominant creeds. At the heart of the creed movement is an attempt by the organized bar to infuse lawyers with a “spirit” of professionalism.\textsuperscript{178} Each creed is an attempt by the bar to exhort lawyers to move beyond the minimum standards as enunciated by the ABA.\textsuperscript{179} It is, no doubt, an attempt to change lawyers from “bad men” to “good men,” such as the creed promoters recall them to have been in earlier times.\textsuperscript{180} A pragmatic basis for such a creed is self-defeating, for it embraces the notion that one should act according to the material consequences of one’s behavior. If the creed’s purpose is to encourage lawyers to act without reference to such self- or client-serving interests, then a pragmatic base will fail in both encouragement and enforcement.\textsuperscript{181} Even if the purpose of the present creed movement was not to exhort attorneys to look beyond the material consequences of their actions, a pragmatic rationale would still be inappropriate in an enforcement environment. Enforceable rules are no better than their rationales. These enforceable rules are no different. If an enforce-

\textsuperscript{175} See Kronman, supra note 121, at 126-27.
\textsuperscript{176} See Blueprint, supra note 2, at 257-59 (stating that the ABA codes of conduct have moved from aspirational terms to minimum-standards rules).
\textsuperscript{177} See id. at 259 (“[L]awyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions . . . .”).
\textsuperscript{178} See id. at 257-58.
\textsuperscript{179} See id. at 259.
\textsuperscript{180} See Thomas L. Shaffer, Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument, 26 Gonz. L. Rev. 393, 398 (1991) (“The recurrent movement to call or recall lawyers to professionalism is a moral argument.”); see also id. at 397 (“I think that the A.B.A.'s unidentified ideal . . . when it claims that to be professional is to be a good person, is the American gentleman-lawyer.”).
\textsuperscript{181} Self interest, such as the love of money has long (always?) been a source of uncivil or unethical attorney conduct. A member of a Texas law faculty said in 1906, “I doubt whether a course of lectures on moral conduct will revolutionize the morality of the Bar. The evil . . . is not so much a professional as an American fault. It has its source in our inordinate love for the almighty dollar.” 1906 AALS Proceedings, supra note 7, at 10-11.
able creed's rationale is pragmatic, then the creed's rules should not apply when their pragmatic rationale would not be furthered by enforcement of the rule; the "bad man's" analysis would say that when the pragmatic rationale fails, so does the rule. Whenever breach would further the client's ends, the lawyer would—and should—choose not to abide by a creed that was pragmatically based. As both Hoffman and Sharswood did, telling lawyers that discouraged conduct is ineffective conduct may work well as a hortatory device, but a like-based demand in an enforceable rule fails.

As the creeds become treated as if they were enforceable rules, their rationale, of course, becomes critical. As with any other legal rule, the rule is its rationale, and it may be expected that an enforceable lawyer rule will be appropriately ignored when its rationale fails to account for a particular proposed application of the rule. A particular error of some of the creeds has been the tendency to base them in part on client interests. Some creeds purport to rest in part on the rationale that, as a lawyer, one should not be uncivil with opponents because such conduct harms the client's interests. Unfortunately, a creed based on such a rationale is doomed to fail. It may be that uncivil, hardball conduct sometimes harms client interests, but lawyers who engage in such conduct do so largely because they believe that it furthers client interests. When, as is almost inevitable, a lawyer believes that uncivil conduct will further client interest, lawyers who would normally apply the rule will appropriately ignore it. Even the ABA, and not merely the bad apples of the profession that the ABA has always complained of, stages seminars designed to introduce lawyers to the methods of "Killer Cross." These are tactics that lawyers, including leaders of the organized bar, believe benefit their clients at least some of the time.

183. "As a professional, I should always . . . recognize that uncivil conduct does not advance and may compromise the rights of my clients." The Virginia Bar Association Creed (1986) (on file with author). "I will act at all times to preserve the mutual feeling of camaraderie among lawyers . . . because without it my clients and I suffer." Pulaski County Bar Association Code of Professional Courtesy ¶ 23 (1986) (on file with author). "Excessive zeal may be detrimental to my client's interests . . . ." ABA Torts and Insurance Practice Section Lawyer's Creed of Professionalism ¶ C(1) (1988) (and numerous state and local bar creeds modeled after the ABA model) (on file with author). "For us, the idea that civility and candor stand in the way of desired results in fact inconsistent with the achievement of long term goals, including successful results for our clients." Los Angeles County Bar Association Litigation Guidelines pmbl. (1989) (on file with author).
184. See, e.g., Texas Lawyer's Creed—A Mandate for Professionalism (1989) (stating that "abusive tactics" are harmful to clients).
185. For a discussion of the pragmatic rationale of lawyers' uncivil conduct, see supra notes 165-69 and accompanying text.
A moral rationale underlying such a rule, however, forces attention in the rule's application on the larger policy implications of the conduct to which the rule is proposed to apply. Such a rule applies to conduct in a way that furthers the "good" that is meant to result from compliance, forcing consideration of the more appropriate material: when the reason for delay or obfuscation is to offset an unjust imbalance of power, when it is to avoid greater moral harm than the tactic will cause, when, as Freedman argues, for example, a truthful witness's credibility is being attacked because that is the only path to a just result, a creed provision should and would yield to this greater good. The "good" that would be the rationale cannot be based upon the "business-as-usual" ethic of the nineteenth century organized bar, but on another more closely related to the state of the profession today and the values of the society within which it exists.

III. THE CURRENT CROP OF CREEDS ARE ILL-CONCEIVED AND WILL FAIL

If creeds can be appropriately confined to aspirational topics, and can be written to reflect the new rather than the old common moral ground of the profession, they will be valuable. Unfortunately, the current crop of creeds are not confined to appropriate topics, have not effectively avoided merging into enforceable standards, and are based on an outdated, common moral ground.

A. The Creeds Should Confine Themselves to Appropriate Topics for Aspiration

The current creeds contain a mixture of statements that simply restate the current enforceable law governing lawyers, statements that contradict or confuse the current enforceable law governing lawyers, and statements that aspire to unenforceable but morally sound ends. Only the last of these three should be included in a creed.

Some of the provisions of the new creeds are mere restatements of the current law governing lawyers. For example, some creeds include provisions like these from the Seventh Circuit's Standards: "In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipu-

188. For a discussion of creeds as aspirations, see infra Part III.A.
189. For a discussion of why creeds should remain unenforceable, see infra Part III.A.
190. For a discussion of rewriting creeds for the present time, see infra Part III.C.
"We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information." These do no good and some harm by diminishing the clarity of the enforceable norms that they paraphrase and by diminishing the force of the enforceable norms by commingling the enforceable with the aspirational nature of the creed's main focus. No good, save that of public relations, comes from requiring a lawyer to promise to do what the law already requires.

Mandatory rules and aspirational expressions have an important relationship to one another. Some mandatory ethics rules implicate lawyer duties that aim unswervingly in one direction, while others are an attempted balance among competing duties and goals, all of which are appropriate duties and goals but none of which exists nor can be furthered in isolation from others. Only the former are appropriate subjects for so-called "higher standards and aspiration." For example, "protect and do not misappropriate client funds," or "charge reasonable fees," or "be diligent and competent" are all statements of mandatory lawyer rules that primarily implicate a single duty. For such duties, aspiration is appropriate, simple, and uncontroversial: for example, "Be extra careful with client funds," "be clear in communicating fee information to clients," and "prepare thoroughly and diligently" work well as aspirational statements that encourage a bit more than the rules require without burdening other competing duties. By contrast, most lawyer duties and rules represent a balance among competing legitimate duties. For example, revealing client fraud or prospective criminal conduct implicates a balance between the duty to the public and the duty to protect client confidences. Rule 1.6 of the Model Rules of Professional Conduct, and the various state-adopted counterparts, seek to locate a place where one duty should yield to the other. When a so-called higher standard toward which a lawyer is urged to aspire is imposed on such a rule, the balance is moved in one direction or the other. For such rules, aspiration beyond a solemn commitment to balance carefully the competing interests is aspiration

191. SEVENTH CIRCUIT STANDARDS FOR PROFESSIONAL CONDUCT ¶ 9 (1997). Query: Under Dondi, would it be uncivil to file a motion for sanctions against a lawyer who would not so stipulate? For a discussion of Dondi, see supra notes 145-54 and accompanying text.


toward one competing duty and away from another competing one. As a result, such an exhortation in a creed is not a call for the familiar “higher standard than the minimum imposed by the rules”; rather, it is a call for a different balance of competing duties than is currently mandated by the governing, enforceable rule. Even increased civility to fellow lawyers implicates a diminished zeal for clients and public service duties.

The *Dondi* case is a prime example. When the defendants failed to timely file their brief, the rule of procedure allowed the plaintiff’s lawyers to move the court for sanctions. When the plaintiff did so, the court threatened the plaintiff with sanctions for failing to accommodate the defendant’s counsel, essentially implicating a Rule 11-like safe harbor provision on the ground that it would be more civil for plaintiff’s lawyer to have asked defendants about their intentions before filing the permitted motion with the court. All the plaintiff did in *Dondi* was what the law permitted. Even in the good old days, which the creeds seem intent on recreating, a client was permitted to insist that the lawyer take advantage of procedural defaults of an opposing party. Imposing an aspirational goal as a mandatory rule that strikes a balance between competing duties can only alter the balance and create conflicting standards of conduct that cannot both be satisfied by a lawyer.

Once venturing into these areas rather than the noncontroversial, single aim aspirations, a creed is outside its realm and is destined to fail by further confusing and muddling already-difficult balance striking. Such an aspiration should rather be addressed to efforts to amend the governing rule, if that aspiration identifies a wiser, better balance. For example, the *Professionalism Blueprint* encourages as aspiration an emphasis on the lawyer’s role as officer of the court. Such encouragement, if found in a creed, necessarily implicates a diminished zeal for the client. “Where the two conflict, the duty to the system of justice must transcend the duty to the client.” What of the balances struck by the mandatory rules? Are they simply to melt away in favor of a more accommodating nature to opposing counsel or the court?

**B. The Creeds Seek a Happily Lost Past**

This move from creed to code in the ABA models is in part a reflection of the slowly diminishing stratification of the profession. As

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196. *Blueprint*, supra note 2, at 265.
198. See id. at 285-86.
199. Id. at 291-92.
200. See *Warvelle*, supra note 18, § 310, at 197.
201. *Blueprint*, supra note 2, at 264.
202. Id. at 280.
the organized bar has lost full control over admission to the practice, it has recognized in its models that the former moral understanding—the “take care of one another before all other interests” understanding that naturally results from the sort of in-breeding that once dominated the profession—must be replaced. Up until now, the profession has replaced the former moral common ground with rules, a code, that is not aspirational as were the Canons, to some extent the Model Code, and as are the creeds. An attempted re-invigoration of the former understanding will fail because that former moral understanding no longer prevails in the pluralist bar. The former moral understanding cannot be divided away from its sources. Too great a part of the former moral understanding was a devotion to one’s segment of the profession before the client and before public service, easy enough for those lawyers who were members of a club that would not compete with one another for clients and who had no need of regularly attracting new clients through other than social means. The former moral common ground was to too great an extent wedded to the exclusivity of those who formed and announced it. It exists as no more than memories of a golden age, not unlike every other golden age: it is meant to pass and be left behind when social advancements make it irrelevant to current affairs. Only creeds that reflect a new moral understanding that is based not on in-breeding, but on openness in law school admissions, increasing openness in job placement, a pluralist profession, and acceptance of a variety of models of the “good lawyer,” will find the support of the new practitioner.

The profession that operated under the former moral understanding was one in which civility existed but was delivered only within one’s own practice cohort. In particular, outsiders of a wide variety were the recipients not of civility but of scorn, ridicule, abuse, and exclusion. The story of the organized bar’s discrimination against women, African Americans, particular political groups, and religious and geographic ethnic groups is well known by now, and I will summarize only a bit of it here. The point here, however, is that the lost form of civility from that earlier age is too closely associated with the bar’s serious sins, and was not given to all. That form should not be sought. It was a form that encouraged taking care of one’s own socioeconomic/practice cohort, to the exclusion from the practice cohort if not the practice itself those regarded as unworthy because of their skin color, gender, religion, or ethnicity. This is a form of civility that is no longer supported by the profession and therefore must be abandoned as a model for creed and aspiration once and for all.

203. See id. at 257.
204. See id. at 258.
205. See generally Auerbach, supra note 7 (describing the bar’s history of discrimination); Warren, supra note 31, at 303-10.
From colonial times, outsiders were treated by more established fellow lawyers not with civility but with scorn and exclusion. The early Massachusetts bar, rabidly federalist, ostracized the handful of anti-federalist lawyers who attempted to practice in the state. One target of the New York federalist's exclusion fought back. Thomas Addis Emmet, hated because he was Irish and because his brother was an Irish patriot, ascertained the league formed to exclude him and "he did not wait for an attack. He proved the assailant. Whenever he met any of the league at the Bar, he assumed the attitude of professional war, and he lost nothing by contact."

On the nineteenth century western frontier, older lawyers took whatever advantage of younger lawyers that their experience would allow. The older lawyers kept their experience "as a close monopoly," forcing younger lawyers to "run a gauntlet of technicalities" at a "considerable tuition fee to be paid by [the young lawyers'] clients."

In the early 1900s, the stratification in the bar developed between what Auerbach calls the aristocrat lawyer—who represented business—and the country lawyer—who represented individuals and principles. Although the aristocrat and country lawyers had differing education, wealth, and power, they shared a common culture, a common past. This common moral ground was the foundation for yet another stratification between these two groups of established lawyers and lawyers entering the profession as a result of increased immigration, urbanization, and industrialization.

In the twentieth century, the American Bar became stratified, largely based on differences in race, color, sex, class, religion, education, educational opportunities, and social origins. Around the turn of the century, law professors and corporate lawyers—the legal "elite"—who dominated major professional institutions and associations, asserted their influence to define professional interests.

A paramount objective of this elite was to structure the legal profession—its education, admissions, ethics, discipline, and services—to serve certain political preferences at a time when social change threatened the status and values of the groups to which elite lawyers belonged and whose interests they wished to protect.

206. See Warren, supra note 31, at 306.
207. Id. at 303 (quoting Charles G. Haines, Memoir of Thomas Addison Emmet (1829)).
209. Auerbach, supra note 7, at 14-20.
210. See id. at 19-20.
211. See id. at 4.
212. Id.
This struggle created a tension between elitism and democratization in the legal profession. With the proliferation of this new and undesirable "outsider" class of attorneys, the legal "insiders"—the established lawyers—attempted to preserve traditional values, primarily in corporate law firms.

According to folklore, the doors of access to the legal profession always swung open to anyone stung by ambition; lawyers might prefer a restricted guild, but democratic realities required them to settle for less. But this is a half-truth, which conceals the fact that doors to particular legal careers required keys that were distributed according to race, religion, sex, and ethnicity.

In fact, what the profession settled for was much less. The power, prestige, and money flowing from corporate law firms increased the desirability of work there. Yet barriers to non-traditional applicants were growing as well. At the turn of the century, some law schools had admission restrictions based upon race, sex, ethnicity, class, and family background. When law firms began to develop a close relationship with law schools, the elite corporate law firms had the most advantageous access to the "best" law students at the "best" law schools. The recruitment system channeled the legal talent to corporate firms which provided services to a restricted clientele.

The impetus behind the 1908 Canons was in large measure a subterfuge for class and ethnic hostility. Protestant lawyers, disproportionately represented in the ABA, deemed unethical some of the behavior of Jewish and Catholic new-immigrant solo lawyers of lower-class origin. Ethical deviance was "less an attribute of an act than a judgment by one group of lawyers about the inferiority of another."

The elite lawyers' influence was not limited to national associations like the ABA. State and local bar associations, faced with rapid social change as well, also defended stability, order, and control. These bar associations often confined membership, as Simeon Baldwin, a major force in founding of the ABA, said, "to leading men or those of high promise."

\[\text{References}\]

213. See id. at 5-6.
214. Id. at 22.
215. See id. at 25.
216. See id. at 29-30.
217. See id. at 28-30.
218. See id. at 39.
219. See id. at 50.
220. Id.
221. See id. at 64.
222. Id. at 69.
cess was to charge high fees and expect convention attendance and participation in committees. As the associations spoke more and more loudly on behalf of the entire profession, the profession's official view became that of the exclusive membership of the associations.

In 1922, William D. Guthrie, then-president of the New York State Bar Association, opposed compulsory bar association membership. Such bar integration, he said, would democratize the bar at the expense of "the elite of the Bar, the best of the Bar." 

"[I]migrants and their progeny," Guthrie stated, were responsible for "the difficult and grave problem and menace . . . arising from the admission to our bar in recent years of large numbers of undesirable members." 

Another New York example is even more illuminating:

In 1929, after a lengthy, publicized investigation in New York into the evils of ambulance chasing, resulting in recommendations of disciplinary proceedings against seventy-four lawyers, the chief counsel pointedly observed that some attorneys who had testified "could not speak the King's English correctly . . . These men by character, by background, by environment, by education were unfitted to be lawyers." The only remedy, he suggested, was a character examination, prior to law-school admission, to eliminate those who lacked proper antecedents, home environment, education, and social contacts. If such an examination created a legal aristocracy, he told applauding members of the New York State Bar Association, so be it.

Efforts to exclude outsiders at the time were not limited to New York. In Pennsylvania, a member of a special 1925 committee appointed to recommend appropriate changes in the state's bar admission requirements succinctly stated his view about democratization of the bar: "What concerns us . . . is not keeping straight those who are already members of the Bar, but keeping out of the profession those whom we do not want." 

Raising educational requirements could be problematic, because "if we do that we keep our own possibly out." Pennsylvania adopted the preceptor system that required a prospective member of the bar to obtain the assistance of a current member as a sponsor in order to gain admission, with the obvious effect of limiting the admission of outsiders.

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223. See id.
224. Id. at 121.
225. Id. at 121-22.
226. Id. at 48-49.
227. Id. at 125.
228. Id.
a bar function in Virginia, the Vice President of the United States, a member of the Indiana Bar, remarked that “we have permitted to drag their green trunks across and along the planks at Ellis Island thousands and hundreds of thousands of anarchists, revolutionists, ... fellows who propose to take charge of this republic of ours.”

The ABA was, of course, also guilty of blatant efforts at exclusions. When the ABA in 1912 realized that it had admitted three African-American lawyers to membership, the ABA passed a resolution revoking the admission. As the ABA reports state, since the “settled practice of the Association has been to elect only white men as members,” and since the committee was “in ignorance of material facts” such as the applicants’ race, the matter was referred to the entire association for consideration. The ABA, after receiving pressure, readmitted the three lawyers but required all future applicants to identify themselves by race.

One way the elite tried to exclude outsiders was through its attempt to set higher educational standards and higher bar admission standards. The elite lawyers were troubled by the influx of immigrants and Jews into the legal profession—many of whom went to law school by night or via correspondence courses. Night schools, observed the Dean of the Wisconsin law school, enrolled “a very large portion of foreign names.”

An ABA committee recommended that the character of the bar could be improved by raising educational standards in order to “purify the stream at the source.”

Easy access to the bar was also a problem for the elite, who blamed easy access for the bar’s inferior quality, which was blamed for the denial of justice to the poor. The obvious “remedy” was to restrict access to the bar. That urban immigrants, declared George W. Wickersham, Attorney General to President Taft and senior partner in a prestigious New York law firm, “with their imperfect conception of our institutions, should have an influence upon the development of our constitution, and upon the growth of American institutions, is something that I shudder when I think of.”

Eastern European immigrants were described by one lawyer as possessing little fairness, justice, and honor; the result, he continued, would threaten the Anglo-Saxon law of the land.

preceptor approach to admission. Blueprint, supra note 2, at 272 (recommending modified Pennsylvania preceptor approach).

230. AUERBACH, supra note 7, at 132.
232. See id. at 95.
233. AUERBACH, supra note 7, at 100.
234. Id. at 113.
235. See id. at 114-16.
236. See id. at 116.
237. Id. at 115-16.
238. See id. at 107.
A significant measure of the exclusion effort was directed toward Jews, who were disproportionately concentrated at the top of their classes in law school but were also disproportionately concentrated at the bottom of the metropolitan bar. Law firm prejudice against hiring Jews was justified by placing the blame on the prejudice of the firms' clients. Even law professors who helped to find students employment recognized and often participated in prejudice against Jewish students—from identifying students as Jews to listing Jewishness as a handicap.

[With some conspicuous exceptions to the contrary, Jewish law review editors were excluded from partnerships in the prestigious corporate law firms until after World War II; blacks and women were outsiders until their token entry in the late 1960's and early 1970's; and [by the mid 1970's] ethnic minority group members barely begun to gain entry. Consequently, Protestant partners in these firms comprised the professional elite; comprising it, they defined it; defining it, they excluded non-whites, non-males, and non-Christians. Academic achievement was necessary, but insufficient, for entry. Social origins, together with racial, sexual, and ethnic identity, determined both the possibility of academic achievement and the opportunity to reap its rewards.

Although the organized bar's efforts at exclusion retarded the entry of outsiders into the profession, the eventual democratization and diversification of the profession have remade the profession into a diverse, pluralistic entity that would be hardly recognizable to Hoffman, Sharswood, Baldwin, Drinker, Root, and the drafters of the 1908 Canons. If the law is what the lawyers are, and the lawyers are what the law schools make them, then a profession is what its members are, and its moral common ground is that of its members. Backward looking aspiration will fail.

C. Searching for the New Moral Common Ground

To be effective, aspiration must be unenforceable and must be based on the common moral ground of the aspirants. A nonenforceable norm or aspirational statement does not use formalized pressure; to be effective, it must utilize implicit pressure to encourage

239. See id. at 184.
240. See id. at 186.
241. See id.
242. Id. at 29-30.
compliance. The lawyer must feel motivated to conform to the aspiration’s message either by his or her own conscience or by the social pressure exerted by his or her fellow professionals.

Such implicit pressure usually takes, and ought to take, the form of moral consensus, and is uniquely appropriate when the matter under consideration is an aspirational ideal. The more well-tailored a creed is to existing professional standards, the more implicit pressure will be exerted on the individual lawyer. A creed may never be able to exhort the truly “bad lawyer” to abide by its dictates, but insofar as it guides and provides motivation for the rest of the legal community, a moral rather than pragmatic foundation is a necessity. And in any event, the enforceable norms will come from code not creed.

There has been a change in the moral common ground in the profession, not all of which is for the worse. Much of this change is the result of the inability of the bar to control entry and confine it as it once did to the very whitest males. Where will the new moral common ground lie? There is as yet no certain answer; there are only signs pointing in particular directions. To be sure, to have value, creeds must confine themselves to aspiration; and aspiration is effectively a non-mandatory statement of the ideal. There are, as well, models of the ideal that are being proposed. For example, Kronman suggests a refreshing of the lawyer-statesman ideal; Luban might favor the “moral activist lawyer” as the ideal; Freedman proposes an ideal of a more client favoring lawyer who relies heavily on role morality and whose primary moral decision occurs when he or she agrees to represent a particular client.

Our new profession has existed for only twenty or so years, hardly long enough to have expressed a change in moral common ground in a manner that will stick and be dominant for the foreseeable future. It took some time when the business lawyer emerged as the dominant form in the late nineteenth, early twentieth century for the changes to be made clear, but clear they were. The pluralist profession we now have may have may have to accept that there is no single model of the “good lawyer,” unless it is that the good lawyer is the lawyer who is accepting of multiple models of good lawyering. Perhaps that will emerge as the common moral ground, acceptance of multiple models of what makes good lawyering rather than insis-

244. See CAHN, supra note 102, at 47-48 (describing how moral consensus provides for pressure to conform absent legal sanctions).
245. See Blueprint, supra note 2, at 251-52 (describing the increasing diversity of the American Bar).
246. See, e.g., Atkinson supra note 119, at 303-20 (identifying three models of the good lawyer and identifying the one favored by the current creeds).
247. KRONMAN, supra note 121, at 3-4.
249. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4 (1975).
tence on a single model that represents a description of the current professional elite.

If Kronman is right and the former “Lost Lawyer” ideals can be refreshed,250 they must be done so in a way that will permit them to function in a modern, diverse profession. The diversity should produce good for the profession. Kronman says the ideal of practical wisdom is gone.251 Perhaps he is right, perhaps not. The practical wisdom of searching for a satisfying middle ground on which to base decisions and moral consensus remains:252 it is this middle ground that has moved. The middle has moved because there is a more widely divergent range of views about what the profession is and ought to be represented by those who are of the profession. The wider range of views and experiences of life now form the full landscape of the profession's membership; and unlike past times, some of the leadership and power in the profession comes from those who hold a broader view of the profession's mission. The new search is for a new middle, a new middle informed by the new trends in scholarship,253 new diversity at the bar, and new leaders who have not agreed to refrain from competing with one another in favor of joint competition with other, less powerful segments of the bar.

One manifestation of change that may foretell where the new common moral ground will be found can be seen in the change in legal education, and particularly in legal scholarship; changes in legal education have been associated with changes in the profession's moral common ground.254 In 1992, the Michigan Law Review published an article by Judge Harry T. Edwards255 that was to mark a significant moment in the changing character of legal scholarship. Judge Edwards' article criticized in sharp tones the change he perceived in legal scholarship from the practical, the doctrinal, to the impractical, antidoctrinal.256 The response was so overwhelming and mixed that the Michigan Law Review devoted an issue to the responses of some nineteen commentators.257 Included in that issue was an update by Judge Edwards in which he detailed the “extraordinary” reaction to his article, demonstrating the “deep and

251. Id. at 2-3.
252. See id. at 3-5.
253. See id. at 242-67 (the new scholarship is a move away from the lawyer ideal of practical wisdom).
254. See id. at 154 (describing the relationship between the adoption of the Harvard method, and for that matter the university-ization of legal education and the change in the profession of the late nineteenth, early twentieth century).
256. Id. at 34-42.
widespread concern” about the issues he had raised. Judge Edwards and the responders, I believe, describe a phenomenon associated with a change in the profession’s common moral ground. Among the critics of Judge Edwards’ article were Richard Posner and Derrick Bell. Judge Posner had “deep disagreements” with “Judge Edwards’s double barreled blast at legal education and the practice of law”; Professor Bell “vigorously challenged some of Judge Edwards’s assumptions.” Posner and Bell had not heretofore produced scholarship fitting neatly between ‘L and M; rather, they represented widely divergent views on a variety of topics. Nonetheless, they joined together in decrying Judge Edwards’ demand for a narrower range of acceptable scholarship. Sanford Levinson implicitly, and accurately, explained the phenomenon of agreement between Bell and Posner by his criticism of Judge Edwards’s failure to account for “pluralism in the legal academy.”

Broader views of acceptable scholarship are in part a result of the legal academy’s—and the profession’s—move toward demographic consistency with the general population. This development changes the moral common ground of the profession to make it more reflective of American cultural diversity. A profession’s values are those of its members, especially those of its members with power. The early twentieth century leaders of the profession knew this well, and endeavored to keep the profession’s membership “pristine” in a wide variety of ways. The new profession, barely a generation old, has begun to exert its influence on the profession’s moral ground. One way in which that influence is observable is by examination of the breadth of current legal scholarship. While it may be more theoretical than Judge Edwards would like, it is undoubtedly considerate of a wider variety of perspectives on American life than has been true until the recent past.

Until relatively recent times, legal scholarship was within a range from “L to M,” rather than from “A to Z.” It was largely doctrinal, meant to influence in a direct way the development of legal doctrine by influencing courts and legislatures. Lawyers could make immediate, direct use of law review articles in the crafting of their arguments. Recently, a considerable portion of legal scholarship has turned away from the doctrinal toward the critical and

262. Bell, supra note 260, at 2025.
264. For a discussion of discrimination in the ABA, see supra Part III.B.
other genres. Some debate has surrounded the value of such scholarship, but an evaluation of its merit is not my focus. It is, undeniably, one result of the organized bar’s failure to control entry into the profession and eventually the professorate. That such writing is being done is the direct result of the greater diversity of the profession. The organized bar’s values are not the values that are informing this scholarly vein. But these new values and the scholarship they support and inform have begun and will continue to find their way into the practice in the form of new ways of looking at legal problems. From economic perspectives to race and gender perspectives, the best of these ideas will change the way the law and the profession work. They will affect the moral understanding of the profession.

The broader acceptable range of what constitutes the good scholar may foretell a broader acceptable range of what constitutes the good lawyer. There, perhaps, the new common moral ground will lie, forming the basis for a new set of aspirations for the profession.

CONCLUSION

Aspiration is a good thing when it is unenforceable, when it is confined to topics that are not complicated balances of competing interests, and when it is based on a moral rationale that fairly represents the common moral ground of the aspirants. The current wave of professionalism creeds fail on all three counts. Valuable aspiration can be pursued. Its basis must be a new common moral ground, one that accepts and honors a wider range of acceptable models of the good lawyer.


266. Like doctrinal scholarship, some of the new scholarship is excellent, and some of it lacks value.