

# The Roots of Legal Ethics

Research on the root of ethics began with an antique business card and an antique book. The business card of C.C. Baldwin, lawyer, belonged to Cornelius Clark Baldwin, licensed to practice law in Virginia on April 18, 1835 who for most of his professional career maintained his office in Balcony Falls, Rockbridge, Virginia. He was of a distinguished family, attended West Point for a time, and was owner and editor of the Rockbridge newspaper. His business card tells us that he has been “very lucky in collecting old and doubtful claims” and that his “[f]ees in plain cases are less than the usual rates.” Baldwin was able to advertise for clients without interference from or regulation by any governmental authority because rules of professional ethics did not exist at that time to regulate the content of advertising by lawyers.

The antique book is *An Essay on Professional Ethics* by George Sharswood, was published in 1869, and based on a series of lectures given at the University of Pennsylvania Law School in 1854. Sharswood was a judge of the district court in Pennsylvania, and later became the Chief Justice of the Supreme Court of Pennsylvania. In 1850, he revived the law department of the University of Pennsylvania which had suspended operations. C.C. Baldwin’s advertis-

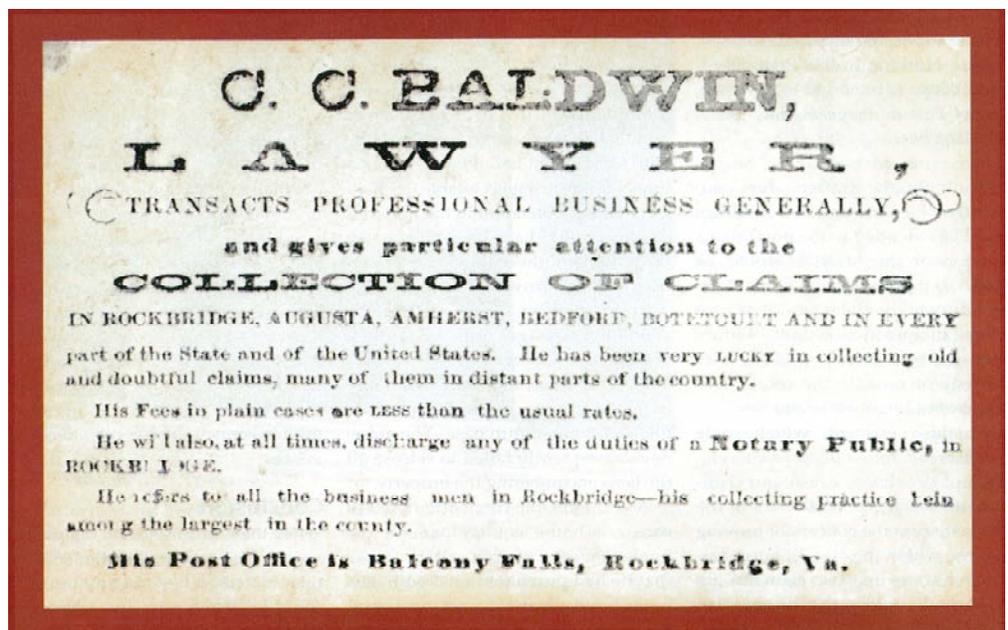
ing and George Sharswood’s essay on ethics piqued our curiosity about the “beginnings” of rules of ethics and professional conduct in the United States.

Modern codes of ethics did not begin with Sharswood. Actually, Baltimore lawyer, David Hoffman, had great influence on our standards of professional conduct. Hoffman was born into the family of a prosperous Baltimore dry goods merchant in

*David Hoffman and The Shaping Of A Republican Legal Culture*, 38 Md. Law Review 673, 678 (1979).

Hoffman lectured as Professor of law at the University of Maryland. In addition he established an institution he called the *Maryland Law Institute*. A circular prepared by Hoffman explained:

[T]he establishment has been opened in a spacious and com-



1784. He attended St. John’s College in Annapolis for three years before returning to Baltimore to “read the law” for another three years. By 1816, he conducted a lucrative law practice in Baltimore, which netted him \$9,000 per year. Maxwell Bloomfield,

modious building...and arranged in every respect for the accommodation of students. The advantages of this institution are, in brief, *a course of methodical study adapted to the student’s pro-*

*gress, and their separate views in regard to the place in which they design to practice their profession; colloquial examinations; union of practical with theoretical knowledge; oral and written discussions of legal subjects; frequent presentation of questions vexatœ, and resort to an extensive library in every department of legal science and general knowledge.*

Hoffman's teachings were based on a book he published in 1817, entitled *A Course of Legal Study*, which outlined a curriculum that commenced with the study of the Bible, and according to Hoffman's vision, would take 6 years to complete, and would conclude with an office apprenticeship. Bloomfield, *supra*, 679. The second edition of this book published in 1836 contained *Fifty Resolutions in Regard to Professional Deportment*. These *Resolutions* are today acknowledged to be America's first code of ethics.

Throughout nearly all of the nineteenth century, the conduct of lawyers was principally regulated by common law rules. It was not until 1887 that the first code of professional ethics was adopted by the Alabama State Bar Association. The Alabama code provided the foundation for the Canons of Professional Ethics adopted by the American Bar Association in 1908.

Thereafter, rules of professional conduct were adopted by the American Bar Association and prescribed by state legislatures and courts to assure certain standards of conduct and to provide a system of discipline. In each of these codes or rules you will find many of the principles contained in Hoffman's *Resolutions* and Sharswood's *Essay*. Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 Ala. L. Rev. 471 (Winter 1998).

Certain of Hoffman's *Resolutions* read more like rules of etiquette than rules of ethics. Marston, *supra*. For example, compare Resolutions IV and

VI with Rule 3.5(a) (9) of the Maryland Lawyers' Rules of Professional Conduct:

IV. Should judges, while on the bench, forget that as an officer of their court, I have rights, and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.

VI. To the various officers of the court I will be studiously respectful, and specially regardful of their rights and privileges.

Rather than mandate a particular manner in which one must address the court, Rule 3.5(a) addresses the types of conduct that are not to be exhibited by a lawyer before the tribunal or during the litigation process.

(a) A lawyer shall not engage in conduct intended to disrupt a tribunal.

David Hoffman also dealt with professional jealousy and the "proper" behavior of a lawyer who is not as successful as another lawyer. Modern codes of ethics and the Maryland Lawyers' Rules of Professional Conduct ("Rules") are devoid of such "proper" behavioral pronouncements:

XXXVII. Should a professional brother by his industry, learning and zeal, or even by some happy chance become eminently successful in causes which give him large pecuniary emoluments, I will neither envy him the fruits of his toils or good fortune, —nor endeavor, by any indirection, to lessen them; but rather strive to emulate his worth, than enviously brood over his meritorious success, and my own more tardy career.

Many of Hoffman's *Resolutions*, however, find parallel in Maryland's Rules of Professional Conduct. Resolution XX is the foundation for

Rule 1.1 that addresses competence:

XX. Should I not understand my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case, may probably be better than my own.

Hoffman's *Resolutions* also address the commingling of the funds of a client with those of the attorney:

XXV. I will retain no client's funds beyond the period in which I can with safety and ease, put him in possession of them.

XXVI. I will on no occasion blend with my own, my client's money: if kept *distinctly as his*, it will be less liable to be considered *as my own*.

A careful reading of Resolutions XXV and XXVI reveals that combined, they form the basis of a Maryland lawyer's ethical obligations with respect to our present Rule 1.15 on the safekeeping property.

Hoffman's Resolutions XLIII and XLIV are similar to Maryland Rules 4.2 and 4.3, each of which contains the duties of a lawyer when communicating with persons represented by counsel and those who are not. Hoffman recognized that an attorney should not "enter into a conversation with my opponent's client relative to his claim or defense, except with the consent and in the presence of his counsel." If the party does not have counsel, then Hoffman states that communication should be done "in writing only."

In addition, Hoffman recognized a lawyer's duty to avoid conflicts of interest in a manner continued today under Rule 1.7. His sentiments are eloquently captured in Resolution VIII as follows:

If I have ever had any connection with a cause, I will never permit myself (when that connection is

from any cause severed) to be engaged on the side of my former antagonist. Nor shall any change in the formal aspect of the cause induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present but the ghost of the former cause.

The nature of fees for services charged by a lawyer is also carefully addressed by Hoffman. He expands upon his duty to the public by advocating in Resolution XVIII what we now refer to as *pro bono* service:

To my clients I will be faithful; and in their causes, zealous and industrious. Those who can afford to compensate me must do so; but I shall never close my ear or heart, because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.

Hoffman clarifies that the charging of fees is permissible for "what my judgment and conscience inform me is my due," and he remarks that he is clearly to be the sole judge of what "is his due." As Resolution XXVII states:

"If that be withheld, it will be no fit matter for *arbitration*; for no one but myself can adequately judge of such services, and after they are successfully rendered, they are apt to be ungratefully forgotten. I will then receive what the client offers, or the laws of the country may award,—but in either case, he must never hope to be again my client."

A curiosity is Hoffman's resolution to avoid the "*taking of half fees.*" Hoffman explains in Resolution XXVII that he will charge for his services what his judgment and conscience

inform him is his due, and nothing more. Hoffman regards as eminently dishonorable all *underbidding* of my professional brethren." (Resolution XXVIII)

Hoffman does not repudiate the taking of contingent fees, rather in Resolution XXIV he states that "... they are sometimes perfectly proper, and are called for by public policy, no less than by humanity." Hoffman's position on contingency fees is surprising because contingency fees were by no means universally endorsed at that time. Indeed, George Sharswood, in his essay on legal ethics, includes a lengthy discussion on the tendency of contingency fees "to corrupt and degrade the character of the profession." (p. 162)

While the concepts contained in Hoffman's Resolutions addressing lawyer-client relations are reflected in our present rules of professional conduct, his views on the lawyer as an advocate are widely divergent from present practice. Hoffman's view of professional accountability stems from his refusal to separate private from public morality. Bloomfield, *supra*, 684. "What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom", Hoffman stated in Resolution XXXIII. Injecting his private morality into his role as an advocate, Hoffman states in Resolution XII:

"I will never plead the Statute of Limitations, when based on the mere efflux of time; for if my client is conscious he owes the debt; and has no other defence than the legal bar, he shall never make me a partner to his knavery."

Similarly, he states in Resolution XIII that the bar of infancy should not be raised against an otherwise valid claim.

Hoffman defines his duties as a lawyer by the solemn obligation to exercise moral judgment. His vision of the lawyer's role is to obtain a just result more than to secure the client's

goal. "If after duly examining a case, I am persuaded that my client's claim or defence ... cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it." To do otherwise, Hoffman believed would "be lending myself to a dishonourable use of legal means." (Resolution XI)

Hoffman further maintained that the lawyer is to be in complete control of the representation. Resolution XIV provides, "In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it." To make bad law would be dishonourable and produce "a gangrene that might bring death to my cause of the succeeding day." Neither should a lawyer employ "disingenuousness in negotiation of a settlement — "reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character," rather, the lawyer should form a firm offer and communicate it. (Resolution XXXII)

Hoffman's view on the responsibility of the criminal defense lawyer is also at odds with current standards of professional responsibility. Guilty clients were entitled to "a fair and dispassionate investigation of the facts of their cause, and the due application of the law," and nothing more. Resolution XV provides:

"... [a]ll that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community."

### Sharswood's Views Differ

While David Hoffman was instrumental in the development of our current ethical rules, it was George Sharswood who distilled those rules into principles that took into account

more than the moral approach to justice. Sharswood's efforts bolstered and helped to preserve the advocacy system as we know it today.

George Sharswood, born in Philadelphia in 1810, was 26 years junior to Hoffman; admitted to the Pennsylvania bar in 1831, he was for a time a contemporary at the bar with Hoffman. In his words, the purpose of his essay was "to arrive at some accurate and intelligible rules by which to guide and govern the conduct of professional life." (Sharswood, p. 56)

Sharswood's views regarding the duty of a lawyer to his client in the role of an advocate differ from Hoffman's. His views are more client-centered and less reflective of the moral activism of Hoffman. He recognized that the topic of fidelity to the client posed some of the most difficult issues regarding the duty of the lawyer. He posed the question "what are the limits of his duty when the legal demands of his client conflict with his own sense of what is just and right?" (Sharswood, p. 82-83)

Sharswood's answer was that the client had the right to have his case decided upon the law and the evidence, that the lawyer as advocate is neither responsible for the act of the party in pursuing an unjust cause nor for the error of the court if it decides in his favor. To Sharswood, for the lawyer to do otherwise would usurp the functions of judge and jury. (Sharswood, p. 85)

With respect to the criminal defense of a client, Sharswood also disagrees with Hoffman, stating that it is not to be termed "screening the guilty from punishment" for the advocate to exert all his skill and ingenuity in defending his client even if he is "perfectly assured" in his own mind of his client's guilt. (Sharswood, p. 91-92)

But Sharswood too imports private morality into his thoughts on advocacy: "It by no means follows, however, as a principle of private action for the advocate that all causes are to be taken by him indiscriminately, and conducted with a view to one single end, suc-

cess." (Sharswood, p. 85) He draws a distinction between the duties imposed on an advocate in civil matters dependent on whether the representation is on behalf of a plaintiff or a defendant. The lawyer is "duty bound" to refuse to be concerned for a plaintiff in pursuit of what is unjust and wrong. It would be "an immoral act to afford that assistance, when his conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him." (Sharswood, p. 97-98)

The defendant has the "right to all the ingenuity and eloquence he can command in his defence, that even if he has committed a wrong, the amount of the damages may not exceed what the plaintiff is justly entitled to recover." (Sharswood, p. 97) But then Sharswood contradicts himself, stating that "there may and ought to be a difference" in the mode of conducting a defense against righteous and unrighteous claims-in the defense against a righteous claim the lawyer should not take advantage of the slips of the opposite party, engage in sharp practice, or special pleading. In defending an unrighteous claim, the lawyer "may fall back upon the instructions of his client, and refuse to yield any legal vantage-ground, which may have been gained through the ignorance or inadvertence of his opponent." (Sharswood, p. 100)

## Conclusion

Much has been written about Hoffman and Sharswood - including discussion about whether their views represented those generally held by the rank and file at the time or were merely a reaction by two members of the professional elite to problems perceived in the conduct of the profession-problems arising from the loosening standards of admission to the bar and the democratization of the profession. Scholarly articles also debate whether our present client-centered, ethical neutrality stance was a response to the demands of business at the close of

the nineteenth century. Some argue that what they perceive to be the presently degraded state of the profession can only be cured by a shift from the present ethically neutral adversary ethic to a principal of personal accountability akin to the nineteenth century justice-centered vision of Hoffman and Sharswood. *Norman L. Spaulding*, 71 *Fordham L. Rev* 1397, 1420-22 (2003).

We make no attempt to address these issues here, as there are numerous excellent articles on the subject. We wish only to demonstrate here that our ethical principles were set forth by two lawyers who endeavored to enhance both legal education and practice. Their vision as expressed in their writings continue to have a significant impact on our profession as we grapple with and debate the issues regarding the professional conduct and responsibilities of lawyers.

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