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John T. Hood, Jr.*

INTRODUCTION

The legal profession has been subjected to more public criticism during the past decade than has occurred at any other time during this century. Most of the criticism is leveled at the increasing number of lawyers who have failed to measure up to the standards of integrity expected of them, the organized bar's failure to discipline its members, and the bar's failure to provide legal services for many needy Americans.

The American Bar Association, aware of this growing criticism, appointed a Special Committee on Evaluation of Disciplinary Enforcement in 1967, the purpose of the committee being to study grievance procedures in the states, with the view of recommending improved methods of assuring observance of professional standards. The Honorable Tom C. Clark, former Associate Justice of the United States Supreme Court, served as Chairman of that committee. After studying these problems for three years, the committee submitted its report entitled Problems and Recommendations in Disciplinary Enforcement. The report was approved by the House of Delegates of the American Bar Association in August, 1970.

The disciplinary deficiencies in the profession which were reported by the Clark Committee have been magnified in the public mind by the involvement of several prominent lawyers in recent political scandals. The fact that most of the improprieties attributed to those attorneys were committed in their non-professional capacities has not mitigated the damage which all lawyers suffered as a result of the adverse publicity. Attorneys have always been subject to censure for improper acts committed within and without the scope of their professional duties, and it is normal for the public to expect them to conduct themselves ethically at all times.

The 1970 report of the Special Committee on Evaluation of Disciplinary Enforcement began with a statement that a "scandalous situation" existed which required the immediate attention of the profession. The committee found that many attorneys were hostile

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1. 96 REPORTS OF AMERICAN BAR ASS'N 783 (1970).
2. Id. at 797.
or apathetic to disciplinary enforcement, and it noted that in many jurisdictions, procedures for enforcing professional standards were antiquated and were totally ineffective. The committee identified thirty-six major disciplinary problems, including inadequately financed and understaffed disciplinary agencies, the reluctance of agencies to initiate large scale investigations of professional conduct in the absence of specific complaints, the failure of local agencies to take steps to remove incapacitated attorneys from practice prior to evidence of their misconduct, and the reluctance of attorneys and judges to report professional misconduct.3

The Clark Report provided impetus for the creation of the ABA’s Standing Committee on Professional Responsibility and the Association’s Center for Professional Discipline. The function of the last mentioned body is to work under and with the Standing Committee on Professional Responsibility “to develop new ideas, to foster concern and reform in place of apathy and to inform the state and local leaders responsible for day to day disciplinary enforcement.” Its primary goal is to encourage investigations and disciplinary complaints and the filing of charges and enforcement of discipline where warranted.

The problem of making legal services available for all persons who need such services has been rendered more acute by recent decisions of the United States Supreme Court which make it necessary for legal assistance to be provided in some cases where previously it was not necessary to do so.4 The problem persists despite the increased number of recent law school graduates. Various methods of providing such services have been suggested, and in many instances plans designed to provide the needed legal services have been implemented.

The Code of Professional Responsibility,5 adopted by the American Bar Association in 1969, represents a major effort on the part of that association to solve these problems and to eliminate some of the criticism which is directed toward the legal profession. The most notable feature of the new Code of Professional Responsibility is that it contains mandatory disciplinary rules which prohibit specific acts or conduct by members of the bar and it provides for disbarment or disciplinary action in the event those rules are violated. The new Code was designed primarily to cure the disciplinary ills of the profes-

3. Id. at 815-987.
5. ABA CODE OF PROFESSIONAL RESPONSIBILITY. The ABA CODE, as adopted by Louisiana, is found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR Ass’n art. XVI, La. R.S. 37, ch. 4, app. (Supp. 1971).
profession. It has been criticized, however, for failing to deal with the problem of making legal services readily accessible to all persons who need them.

Any long range program designed to maintain high standards of efficiency and integrity in the legal profession must begin with an effective means of weeding out those who are not qualified or fit to practice law, and to admit to the bar only those who are able and are of good moral character. The program also must include an effective procedure for disciplining practitioners who do not conform to the standards of professional responsibility set by the profession.

The purpose of this article is to review briefly some of the jurisprudence relating to requirements for admission to the bar and to generally discuss the new Code of Professional Responsibility, focusing on one important disciplinary rule which requires attorneys to report instances of professional misconduct.

INHERENT POWER OF THE COURT

In almost every American jurisdiction, the regulation and discipline of the legal profession is vested in the judiciary as a part of its "inherent power." The "inherent power" of a court has been defined as such authority as is essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction.6 Attorneys traditionally have been deemed officers of the courts, and the authority to regulate the practice of law and to supervise and control the conduct of those who practice in the courts has always been regarded as one of the essential and necessary powers of the judiciary.

The right to practice law is not a natural or constitutional right, but it is a privilege or franchise granted by the courts, although courts may not unreasonably withhold that privilege.7 While the power to regulate admissions to the bar is vested in state courts, the legislature of a state can prescribe reasonable rules and regulations relative to admission which do not conflict with or deprive the judiciary of its inherent power to control such admissions.8

Incidental to the judiciary's power to regulate admissions to the

8. In re Mundy, 202 La. 41, 11 So. 2d 398 (1942); State v. Rosborough, 152 La. 945, 94 So. 858 (1922); Board of Commrs Miss. State Bar v. Collins, 59 So. 2d 361 (Miss. 1952).
bar is its authority to discipline, suspend and disbar those who have been admitted to practice. This power, of course, cannot be exercised unreasonably or arbitrarily by the courts.

The Louisiana supreme court has asserted its inherent power to supervise the admission and discipline of attorneys on several occasions. In *Ex parte Steckler*, for instance, the court said:

> It is admitted judicially—almost if not quite universally—that the prescribing of the ultimate qualifications for admission to the bar is a judicial function . . . . The inherent power of the Supreme Court to admit or disbar attorneys at law may be aided and regulated by statute, but it cannot be thereby frustrated or destroyed. . . .

Most state courts enlist the aid of members of the bar in ascertaining the qualifications and fitness of applicants for the practice of law. In doing so, however, the courts do not surrender or delegate their inherent power to regulate the practice of law. The Supreme Court of Louisiana has followed this procedure for many years.

In 1940, the Louisiana legislature specifically recognized the inherent power of the Louisiana supreme court to regulate the practice of law. An act was adopted that year memorializing the supreme court “to exercise its *inherent powers* by providing for the organization and regulation of the Louisiana State Bar Association; by providing rules and regulations concerning admissions to the Bar, the conduct and activities of the Association and its members; . . . and by providing for the discipline, suspension or disbarment of its members.” Acting pursuant to that memorial, the supreme court organized the Louisiana State Bar Association by order dated March 12, 1941, and by the same order it made the articles of incorporation of the association the rules of the court by which the association, as an agency of the court, is governed. One of the purposes of the association, as an agency of the court, is to “regulate the practice of law” and to “uphold the honor of the courts and of the profession of law.”

10. *Id.* at 422, 154 So. at 45.
The Articles of Incorporation of the State Bar Association have been amended by the Louisiana supreme court from time to time. In their present form, Article XIV regulates admissions to the bar, Article XV regulates discipline and disbarment of members, and Article XVI contains the Code of Professional Responsibility.

Admission to the Bar

American jurisdictions universally require applicants for admission to the bar to produce satisfactory proof that they are of good moral character. Most jurisdictions require as a prerequisite for admission that applicants be of a certain age, and that they demonstrate their legal proficiency by graduating from an accredited law school and passing a state bar examination. In several states, the right to practice law is restricted to citizens of a state or of the United States, or to those who have met minimum residency requirements.

In Louisiana, an applicant for admission to the bar must produce satisfactory evidence that he is: (a) of good moral character; (b) twenty-one years of age; (c) a citizen of the United States of America; and (d) a graduate of a law school that is approved by the American Bar Association. He also must take a bar examination and be certified to the Louisiana supreme court by the Committee on Bar Admissions as having satisfactorily passed that examination.16

Good Moral Character

Many courts have undertaken to define "good moral character," as that term is used in requirements for admission to the bar. One typical definition, given by the Supreme Court of Missouri, is "the character to conform to higher standards of ethical conduct than are ordinarily considered necessary in business relations which do not involve the same fiduciary and confidential relations."16

The United States Supreme Court has upheld the validity of a requirement by a state court that an applicant be of good moral character before he can be admitted to the bar. The Court said in Konigsberg v. State Bar of California,17 however, that:

The term, 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is usually ambiguous. It can be defined in an almost unlimited number of

15. Id. art XIV, § 7.
ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law. 18

Some courts have indicated that applicants for admission to the bar may be rejected on grounds that they lack good moral character for a number of reasons, including the commission of criminal offenses, 19 intemperate or irresponsible conduct, 20 falsifying information in applications for admission, 21 forging certificates of good moral character, 22 being a member of the Communist Party, 23 refusing to disclose to bar examining committees information which they felt was material in assessing the applicant's character, 24 and allowing another to take the law school aptitude test for the applicant. 25

18. Id. at 262-63.
19. Lark v. West, 289 F.2d 898 (D.C. Cir. 1961). In West, the applicant had been convicted of mail fraud and received a limited pardon after serving seven years of a twelve year sentence. The violation occurred while he was a member of the West Virginia Bar Association. The court held that he could not be admitted to the bar of the United States District Court for the District of Columbia. See also Application of Brooks, 355 P.2d 840 (Wash. 1960) (applicant violated Selective Service Act by refusing to report to wartime work camp for conscientious objectors).
22. In re Woodward, 27 Mont. 355, 71 P. 161 (1903). Although this case did not involve the denial of an applicant's admission to the bar, it indicates that a forged letter of recommendation or certificate of good moral character would be grounds for a denial of admission.
23. In Application of Patterson, 210 Ore. 495, 302 P.2d 227 (1957), Oregon's supreme court denied the application of one who had once been a member of the Communist Party due to the applicant's failure to tell the truth "about the real character and the aims of the Communist Party and his belief in them." Id. at 502, 320 P.2d at 234. The court was impressed with the fact that the applicant was not remorseful for having once held membership in the Party and only objected mildly to its activities at the time of the hearing. The United States Supreme Court vacated the case and remanded it "for consideration in light of Konigsberg v. State Bar, 353 U.S. 252 (1957) and Schwarcz v. Board of Exam., 353 U.S. 232 (1957)." 353 U.S. at 952-53 (1957). See text at notes 29-35, infra, for a discussion of these cases. On remand, the Oregon supreme court reaffirmed its position, basing its decision on the ground that the applicant testified falsely about the ultimate aims of the Party and that his untruthfulness indicated a lack of fitness for the practice of law. Application of Patterson, 318 P.2d 907 (1957), cert. denied, 356 U.S. 947 (1958). In Martin v. Law Soc'y of British Columbia, [1950] 3 D.L.R. 173 (Ont. 1950), an applicant was denied admission because he was a Marxist Communist.
Other courts have admitted applicants to the bar despite a history of mental illness, depression and suicide attempts,\textsuperscript{26} conviction of petty larceny where a full pardon was granted,\textsuperscript{27} and conviction of misdemeanors while participating in civil rights demonstrations.\textsuperscript{28}

In the first \textit{Konigsberg} case,\textsuperscript{29} decided in 1957, plaintiff Konigsberg refused to answer questions propounded to him by the California Committee of Bar Examiners relating to his political affiliations, editorials and beliefs, including inquiries as to whether he was a member of the Communist Party or whether he associated with members of that party. The committee refused to certify him to practice law on the ground that he had failed to prove (1) that he was of good moral character, and (2) that he did not advocate the overthrow of the government of the United States or California by unconstitutional means. Konigsberg petitioned the California supreme court to review the action of the committee, but that court refused to do so, and the United States Supreme Court thereupon granted certiorari. The Supreme Court, with Justice Black as author of the opinion and three justices dissenting, held that the plaintiff's refusal to answer the questions did not justify an inference of bad moral character, and that there was no other evidence in the record which rationally justified a finding that he had failed to establish his good moral character or that he advocated the overthrow of the government. Concluding that Konigsberg had been denied due process under the fourteenth amendment, the Court reversed the judgment of the California court and remanded the case.

On the same day the first \textit{Konigsberg} case was decided, the United States Supreme Court also rendered judgment in \textit{Schware v. Board of Bar Examiners of the State of New Mexico}.\textsuperscript{30} In that case, the plaintiff had applied for admission to the New Mexico bar in 1953. His application and the evidence showed that Schware had used certain aliases between 1933 and 1937, that he had been arrested several times prior to 1940, and that he joined the Young Communist League in 1932. He subsequently left the Communist Party, but rejoined it later for a brief period of time. He was arrested and indicted in 1940 for violation of the Neutrality Act of 1917, but the charges were later dismissed. His conduct appeared to have been exemplary after 1940. The New Mexico Board of Bar Examiners denied him the

\begin{footnotesize}
\bibitem{26} Petition of Schaengold, 422 P.2d 686 (Nev. 1967).
\bibitem{27} \textit{In re Florida Bd. of Bar Exam.}, 183 So. 2d 688 (Fla. 1966).
\bibitem{28} Hallinan v. Committee of Bar Exam., 55 Cal. Rptr. 228, 421 P.2d 76 (1966).
\bibitem{29} Konigsberg v. State Bar, 353 U.S. 252 (1957).
\bibitem{30} 353 U.S. 232 (1957).
\end{footnotesize}
right to take the bar examination, and the action of that Board was upheld by the state supreme court.31 After reviewing the case, the United States Supreme Court reversed the state court judgment and remanded the case. The Court, with Justice Black authoring the opinion and the same three justices who dissented in Konigsberg also dissenting here, held that Schware had been deprived of due process in denying him the opportunity to qualify for the practice of law.

On remand of the first Konigsberg decision, the California court referred the matter to the State Committee of Bar Examiners where additional hearings were held. At those hearings Konigsberg produced evidence tending to prove his good character, and no evidence was introduced tending to show the contrary. Konigsberg, however, persisted in his refusal to answer questions relating to his membership in the Communist Party. The committee again refused to certify him, this time on the ground that his refusals to answer had "obstructed a proper and complete investigation of applicant's qualifications."32 The California court refused to review the action of the committee,33 and the United States Supreme Court again granted certiorari.

In the second Konigsberg case,34 decided on April 24, 1961, the Supreme Court affirmed the decision of the California court by a 5-4 vote. The effect of that decision was to deny Konigsberg's application for admission to the state bar. The majority opinion was written by Justice Harlan, with Chief Justice Warren and Justices Black, Douglas and Brennan dissenting. The court held that "the Fourteenth Amendment protection against arbitrary state action does not forbid a state from denying admission to a bar applicant so long as he refused to provide unprivileged answers to questions having a substantial relevance to his qualifications."35

On the same day the opinion in the second Konigsberg case was handed down, the Supreme Court also decided In re Anastaplo,36 which involved substantially the same issues as those presented in the second Konigsberg case. There, the petitioner, having passed the Illinois bar examination, was denied admission to the bar of that state on the ground that he had refused to answer questions relating to his character and particularly that he had refused to state whether he was a member of the Communist Party. The United States Su-

35. Id. at 44.
Supreme Court, again by a 5 to 4 decision, with Justice Harlan as author of the opinion and the same four members dissenting, followed the ruling in the second *Konigsberg* case and held that Anastaplo had obstructed the investigation by the state of his qualifications for admission to the bar by refusing to answer material questions and that the action of the state bar committee and the state court in denying him the right to practice law did not offend any provision of the Federal Constitution. The Supreme Court thus affirmed the action of the state bar committee.

After the *Anastaplo* and the second *Konigsberg* cases were decided, the law seemed settled that a bar examining committee or a state court had the right to inquire whether an applicant for admission to the bar was a member of the Communist Party, and that it could refuse to admit him, without offending the Constitution, if the applicant refused to answer that question. That law, however, again became somewhat confused by judgments rendered by the United States Supreme Court in three cases, all of which were decided on the same date, February 23, 1971.

In *Baird v. State Bar of Arizona,* the applicant refused to answer a question as to "whether she had ever been a member of the Communist Party or any organization 'that advocated overthrow of the United States government by force or violence'," and the Arizona bar committee thereupon declined to process her application further or recommend her admission to the bar. The state supreme court upheld the action of the committee, and the United States Supreme Court, after reviewing the case, held that the action of the bar committee violated the first amendment in that it denied the applicant "freedom of mind" and "the right of association." The Court held that:

> [W]hatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes . . . . Without detailed reference to all prior cases, it is sufficient to say we hold that views and beliefs are immune from bar associations inquisitions designed to lay a foundation for barring an applicant from the practice of law. Clearly Arizona has engaged in such questioning here."

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38. Id. at 4-5.
39. Id. at 6.
40. Id. at 7.
The judgment of the state court was reversed and the case was remanded.

In Application of Stolar, the applicant, after having obtained a license to practice in New York state, applied to the Ohio bar for admission to practice law in that state. He provided the Ohio bar committee with the answers he had given to questions propounded by the New York committee, but he refused to answer questions as to whether he had ever been a member of the Communist Party, of a Socialist Party or of the Students for a Democratic Society. He also refused to state whether he had been or presently was a member of any organization which advocates the overthrow of the government of the United States by force. The committee denied his application to take the bar examination, and the Ohio supreme court affirmed the denial. On certiorari, the United States Supreme Court reversed the state court and remanded the case. The court held that:

Ohio may not require an applicant for admission to the Bar to state whether he has been or is a 'member of any organization which advocates the overthrow of the government of the United States by force.' . . . [T]he first amendment prohibits Ohio from penalizing a man solely because he is a member of a particular organization . . . . Since this is true, we can see no legitimate state interest which is served by a question which sweeps so broadly into areas of belief and association protected against government invasion. 4

The majority opinions in Baird and Stolar were authored by Justice Black, with Chief Justice Burger and Justices Blackmun, Harlan and White dissenting.

The third case involving similar issues and decided on the same day as Baird and Stolar was Law Students Civil Rights Research Council, Inc. v. Wadmond. There, the plaintiffs were organizations and individuals claiming to represent a class of law students and law graduates similarly situated who were seeking or were planning to seek admission to the bar in New York. The Supreme Court, with Justice Stewart authoring the majority opinion and Justices Black, Douglas, Marshall and Brennan dissenting, held that state bar examiners could ask applicants about their affiliations with the Communist Party as a preliminary to further inquiry into the nature of the association, and they could exclude applicants who refused to answer.

41. 401 U.S. 23 (1971).
42. Id. at 30.
Although the last mentioned series of cases leaves the law unsettled, it is logical to assume that state courts and state bar examiners will be permitted to require an applicant for membership to the bar to answer questions pertaining to membership in the Communist Party or in any other organization as a preliminary to further investigation as to whether the applicant advocates or has ever advocated the violent or forceful overthrow of the government. It seems to the author that the courts ultimately must hold that mere membership in an organization which advocates the overthrow of the government of the United States by force will constitute a sufficient ground, in itself, to deny an applicant the right to practice law. It is difficult to understand how the applicant could take an oath to support the constitution and laws of a state and of the United States while supporting such an organization. The present jurisprudence indicates, however, that mere membership in an organization of that kind, alone and without anything more, will not serve as the basis for preventing the applicant from practicing law.

Three cases have been decided recently by the Louisiana supreme court relating to that court’s requirement that an applicant for admission to the bar produce satisfactory evidence that he is of good moral character. In *Moity v. Louisiana State Bar Association*, the court held that an applicant who was denied the right to take the bar examination because of his failure to produce satisfactory evidence of good moral character and who complains that the action of the committee was arbitrary and unreasonable is entitled to a hearing, at which he will have the right to be represented by counsel, to introduce evidence and to cross-examine witnesses against him. The court determined that such a hearing should be conducted before a commission appointed by the court, in accordance with the procedures used in disciplinary and disbarment proceedings set out in the Articles of Incorporation of the state bar association.

In *Ex parte Minor*, the Louisiana supreme court upheld the right of the Committee on Bar Admission to require that each applicant execute a “Certificate of Waiver” authorizing the committee to obtain information about the applicant from other sources. The refusal of the applicant to sign such a waiver may constitute sufficient grounds for the committee to deny his application.

In the recent case of *In re Dileo*, the Committee of Bar Examiners denied an applicant the right to take the Louisiana bar examina-

44. 239 La. 1081, 121 So. 2d 87 (1960).
45. 280 So. 2d 217 (La. 1973).
46. 307 So. 2d 362 (La. 1975).
tion because of his conviction of two criminal offenses in 1970, his violation and revocation of probation and his subsequent imprisonment for several months in a correctional institution. The applicant was granted a full pardon and restoration of state citizenship in 1972, and he thereafter maintained an excellent academic record while attending law school and while working as a part-time law clerk. The Louisiana supreme court concurred in the committee's denial of the applicant's admission to the bar, but after noting the applicant's apparent rehabilitation it held that his conduct did not involve "such a degree of moral turpitude that it would forever bar him from the practice of law." The court authorized the applicant to reapply as of April 1, 1975, and ordered the committee to certify him as being morally fit for admission to the bar if he continued to rehabilitate himself up to that time.

There is no indication from the above cases, or from an examination of the Articles of Incorporation of the Louisiana State Bar Association, that any of the rules and procedures applied in the state are vulnerable to attack as being in conflict with the Federal Constitution.

Residency and Citizenship

Several cases decided by federal courts have considered the validity of state statutes or court rules which condition the right of an applicant to practice law or to take the bar examination upon residence in the state or on citizenship of the state or of the United States. Most courts in deciding these cases have applied the "rational connection" test of Schware, that "any qualification for admission must have a rational connection with the applicant's fitness or capacity to practice law." In several cases, however, it has been held that the applicant's constitutional rights were violated by residency or citizenship requirements.

In the case of In re Griffiths, the United States Supreme Court held that the appellant, a resident alien, had been deprived of equal protection under the fourteenth amendment by a rule of the Supreme Court of Connecticut which provided that only citizens of the United States could take the bar examination and be admitted to practice law in that state. The applicant was a citizen of the Netherlands who married a citizen of the United States and became a resident of

47. Id. at 365.
49. Id. at 239.
Connecticut. She met all of the qualifications to practice law in Connecticut, except the requirement that she be a citizen of this country. The Court held that since "alienage" was a "suspect classification," the state of Connecticut bore a heavy burden of showing that such a classification was necessary to promote or safeguard its interests, and that the state had failed to meet that burden. The Court noted that the applicant's alienage did not prevent her from taking an oath to support the Constitution of the United States and the State of Connecticut, and it observed that if the state had any doubts about her ability to affirm those oaths in good faith, it could "quite properly conduct a character investigation" to determine whether she is one who "swears to an oath pro forma while declaring or manifesting his (her) disagreement with or indifference to the oath." While recognizing that lawyers are "officers of the court," the opinion states that they nevertheless are not "officials of government," and that their status of holding a license to practice law does not place them so close to the core of the political process as to make them formulators of government policies.

The decision rendered in Griffiths invalidates and effectively removes from the Articles of Incorporation of the Louisiana State Bar Association the requirement that an applicant for admission to the bar be a citizen of the United States.

Several states, by statute or by court rule, provide that an applicant will not be permitted to take the bar examination or to practice law unless he has resided in the state or county for a specified period of time. The required period of residency varies from state to state, but in some states at least it runs from six to twelve months. Suits have been filed attacking these requirements on constitutional grounds, and the jurisprudence is now established that a residency requirement of twelve months is constitutionally objectionable and void. In making that determination, the courts have applied the "rational connection" test of Schware, and have held that there was

51. Id. at 726.
52. Id.
53. Id. at 728.
54. Id. at 729.
55. ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XIV, § 7(B)(C), LA. R.S. 37, ch. 4, app. (Supp. 1971).
56. See, e.g., WEST VIRGINIA CODE OF RULES FOR ADMISSION TO THE PRACTICE OF LAW, Rule 1.000 (1973); WISC. STAT. ANN. § 256.28 (1971).
57. See, e.g., HAWAII SUP. CT. R. 15(c) as amended (1970) (six months); MISS. CODE ANN. § 73-3-13 (1972) (one year), as amended by Miss. Laws 1974, ch. 510, § 1 (bona fide resident).
no such connection between the applicant's residency in the state for that period of time and his qualification to practice law.

The case of *Smith v. Davis,*\textsuperscript{59} for example, involved the validity of a West Virginia statute which in effect prohibited the issuance of a license to practice law to an applicant who had not been a resident of the county for at least one year. The applicant met all of the requirements for admission except that of residency, and the state Board of Law Examiners refused to certify him on that basis. He filed suit, and a three judge federal court decreed that West Virginia's residency requirement was unconstitutional and void, being in contravention of the due process and equal protection clauses of the fourteenth amendment.

One member of the three judge court which decided *Smith v. Davis* filed a vigorous dissent which reads, in part, as follows:

I take this course on principle, and as a protest to the menacing thrust of the 'new federalism' into every facet of our political life and the consequent erosion of the powers of local government. This has been accomplished, in my opinion, under the guise of a sort of 'freedom for everything for everybody' concept supposedly reposed in the Constitution. It is this 'free swinging' interpretation of the Fourteenth Amendment which virtually renders it a vehicle for remaking our political order that I cannot embrace. Subverted also is the constitutional right to freedom of travel from state to state. I fail to see any infringement of this right by the statutory requirement in question.\textsuperscript{60}

In *Potts v. Honorable Justices of Supreme Court of Hawaii,*\textsuperscript{61} the plaintiff attacked a rule of the Superior Court of Hawaii which provided that no person shall be examined for or admitted to the practice of law "unless he has physically resided in Hawaii continuously for a period of six months after attaining the age of 15 years."\textsuperscript{62} Finding no reasonable basis for a residency requirement of six months which need not be met immediately prior to filing an application for admission and which conceivably could be fulfilled several years before filing, a three judge district court held the residency requirement invalid.

In *Suffling v. Bondurant,*\textsuperscript{63} however, a rule of the New Mexico supreme court which required a residency of six months in that state

\textsuperscript{60} Id. at 1230 (Knapp, J. dissenting).
\textsuperscript{61} 332 F. Supp. 1392 (D. Hawaii 1971).
\textsuperscript{62} HAWAII SUP. CT. R. 15(c) as amended (1970).
\textsuperscript{63} 339 F. Supp. 257 (D.N.M. 1972).
before being admitted to practice was held to be reasonable, not constitutionally objectionable, and valid. The three judge district court which decided the case reasoned that six months was a reasonable period of time within which to afford the Board of Bar Examiners an opportunity to investigate the morals and character of the person seeking to become a member of the bar. The court also justified the six month residency requirement on the ground that it provided a reasonable time within which members of the bar in that locality could observe the applicant and certify as to his moral character, as required by another rule of the supreme court. The Suffling case was appealed to the United States Supreme Court, where the judgment of the district court was affirmed.64

The jurisprudence indicates that a state may validly require that an applicant for admission to the bar reside in that state for a short period of time, perhaps not over six months, before he will be permitted to take the bar examination or before he will be admitted to practice. The test to be applied in determining the constitutional validity of such a requirement is to inquire as to whether it has a "rational connection" with the applicant’s fitness or capacity to practice law. There unquestionably is a rational connection between a residency requirement and the applicant’s fitness in that it gives the bar admissions committee a better opportunity to observe and to examine the applicant. The courts have indicated, however, that only a relatively short period is needed for that purpose, and that a residency requirement which exceeds the time reasonably required for such an investigation will be held to be invalid as an infringement of constitutional rights.

Law School Graduates

Most states, by statute or by court rule, require that an applicant be a graduate of an accredited law school and that he pass a state bar examination before he can be licensed to practice law.65 Courts universally have upheld the right of the states to impose those requirements.66 It has been recognized, however, that despite those re-

65. See, e.g., ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS’N art. XIV, §§ 7, 9, LA. R.S. 37, ch. 4, app. (Supp. 1971); MINN. SUP. CT. R. III (5).
requirements courts have the inherent power to admit persons to the bar who have not taken or passed bar examinations, where it appears to the court that they are fit and qualified to practice law. A federal court thus validated a Montana “diploma privilege” which relieved graduates of the state law school of the necessity of taking a bar examination required of graduates of other law schools.

A case decided by the United States District Court for Colorado on June 12, 1973, involved a Colorado civil procedure rule which required that every applicant for admission to the bar of that state be a graduate of a law school approved by the American Bar Association. One applicant, Rossiter, was a graduate of a law school which had not been approved by the American Bar Association, and for that reason his application for a license to practice law was rejected. He instituted suit against the Law Committee of the State Board of Law Examiners of Colorado, alleging that the law school from which he graduated met the standards required by the ABA, and that he thus was entitled to be admitted to the bar. The record apparently showed that the American Bar Association assumes that a law school wishing accreditation will initiate the steps required to secure it, but that the law school from which Rossiter graduated had never completed the process that would enable the ABA to pass on the question of whether it complied with its standards.

The court held that Colorado’s delegation of power to approve law schools, without providing the applicant with an opportunity to demonstrate that he had graduated from a school that satisfied the ABA standards, was a denial of the applicant’s right of due process of law. The court decreed that if the ABA does not adopt procedures by which the applicant can demonstrate compliance before that association, due process requirements would be satisfied only if the state provided an alternate procedure by which an applicant could demonstrate compliance.

Although the judgment rendered in that case was intended to grant the applicant a remedy, it is questionable whether he would be able to show that the school he attended actually had met the standards of the ABA, unless the law school itself voluntarily undertook

(1972).

to complete the process which would enable the ABA to make that determination. The law school apparently had chosen not to complete that process prior to the institution of the suit.

The *Rossiter* decision conflicts with or materially modifies the established rule that a state may require that an applicant be a graduate of a law school accredited by the American Bar Association before he can be admitted to practice law. Under the *Rossiter* rule, an applicant who voluntarily attended a law school which deliberately declined to seek accreditation would be entitled to a hearing, either in a state or federal court, at which he would have the opportunity of showing the ABA standards for a law school and of proving that the school he attended had complied with those standards. If he should be successful in making that proof, then presumably, under the *Rossiter* rule, judgment would be rendered ordering that he be admitted to the practice of law, despite the fact that he was not a graduate of an accredited law school as required by state law or by court rule.

**Codes of Ethics**

As already noted, the judiciary has the "inherent power" to regulate the discipline and disbarment of attorneys, as well as to control the admission of applicants to the practice of law. The courts in this country exercised that authority only sparingly, if at all, during the nineteenth century, and no organized effort had been made by members of the bar up to that time to discipline themselves. It perhaps was due to those circumstances that a rampant commercialism of the bar developed during the early and middle part of that century. With the image of the attorneys tarnished, concerned leaders of the bar recognized the need for formulating some standards of professional conduct which could serve as a guide to practitioners. To accomplish that purpose several state bar associations were formed during that period, and the American Bar Association was organized in 1878.

The first statement of professional standards was drafted and adopted by the Alabama State Bar Association in 1887.70 The Alabama Code of Ethics consisted of several statements of general principles, followed by a number of rules of conduct which set out the duties owed by attorneys to the courts, to judicial officers, to each other, to clients and to the public. The Alabama Code served as a model for similar codes which were adopted by other states.71 Some states drafted codes of ethics consisting of "canons," which contained

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70. See Drinker at 24.
71. Id. at 23.
general statements of the standards of conduct and the duties and obligations which attorneys were expected to observe. The Louisiana State Bar Association adopted a Code of Ethics in 1899 which was composed of eight canons.\textsuperscript{72}

One of the first undertakings of the American Bar Association when it was organized in 1878 was to establish uniform requirements throughout the Union for admission to the bar and for regulating the standing throughout the Union of gentlemen already admitted to practice in their own states.\textsuperscript{73} It did not adopt a code of professional conduct, however, until several years later.

In 1908, the American Bar Association, drawing upon the codes of ethics of many states, adopted the "Canons of Professional Ethics," which consisted of thirty-two canons. Many of those canons were subsequently amended, and more were added from time to time. By 1969, the ABA Code of Ethics contained forty-seven canons, and also by that time almost all of the states had adopted canons of ethics which either conformed to or slightly varied from the ABA canons.

The Code of Ethics adopted by the American Bar Association in 1908, while setting forth ethical guidelines for attorneys, did not provide any sanctions for violations of the canons. The courts, however, often considered those canons in determining whether attorneys should or should not be disciplined. One court appropriately observed that:

"Codes of Ethics adopted by bar associations, of course, have no statutory force. They are indicative, however, of and reflect the attitude of the profession as a whole upon those courses of action which they frown upon and interdict, and they are commonly regarded by bench and bar alike as wholesome standards of professional ethics. . . .\textsuperscript{74}"

The old Code of Ethics of the American Bar Association was supplemented by opinions rendered by the association's Committee on Professional Ethics. Over 1,000 opinions, formal and informal, were published during the succeeding years. Weaknesses of the old canons and the opinions which interpreted them, however, were that they were too general in character, they consisted largely of idealistic and sometimes vague statements, and they failed to establish definite or enforceable rules of conduct.

\textsuperscript{72} Id.
\textsuperscript{73} 1 REPORTS OF AMERICAN BAR ASS'N 26 (1878).
\textsuperscript{74} Herman v. Acheson, 108 F. Supp. 723, 726 (D.D.C. 1952). See also Drinker at 27.
The American Bar Association long ago recognized the need for correcting the weaknesses of the Canons of Ethics, and it undertook to do so in 1928, 1933, 1937 and 1954, but for various reasons little was accomplished on those occasions. Finally, in 1964, under the leadership of President Lewis F. Powell, Jr., now Associate Justice of the United States Supreme Court, the association appointed a "Special Committee on Evaluation of Ethical Standards" to examine the existing Canons of Professional Ethics and to make recommendations for changes. That committee submitted its final draft and recommendations on July 1, 1969, and the code recommended by the committee was adopted by the American Bar Association that year, to become effective in January, 1970. The revision of the old Canons of Professional Ethics and the adoption of new and more effective rules of conduct in 1969 may have been prompted by the same circumstances which induced the American Bar Association to appoint a Special Committee on Evaluation of Disciplinary Enforcement in 1967, under the chairmanship of former Justice Tom C. Clark.

The new ABA Code of Professional Responsibility is divided into separate but interrelated (1) Canons, (2) Ethical Considerations, and (3) Disciplinary Rules. The Canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system and with the legal profession." The number of canons has been reduced from forty-seven to nine. Ethical Considerations are "aspirational in character," and they represent "the objectives toward which every member of the profession should strive." The Disciplinary Rules are mandatory in character. They "state the minimal level of conduct below which no lawyer can fall without being subject to disciplinary action."

The most important feature of the new Code of Professional Responsibility is its inclusion of disciplinary rules which are enforceable. The violation of a disciplinary rule is a ground for disciplinary action against or perhaps suspension or disbarment of the violating attorney, although the Code itself does not provide procedures or penalties for those violations.

75. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, PRELIMINARY STATEMENT (1969).
76. Id.
77. Id.
78. Id. See R.L. WISE, LEGAL ETHICS (2d ed. 1970) [hereinafter cited as WISE].
The new Code of Professional Responsibility is a substantial improvement over the old canons, in that it affords attorneys adequate notice of the type of conduct which is prohibited. The United States Supreme Court has held that actions to disbar attorneys are quasi-criminal in nature, and that disbarment proceedings are subject to the due process of law requirements of the fourteenth amendment.\textsuperscript{80}

One writer, in discussing the effect of the 1970 Code of Professional Responsibility said:

The new Code, therefore, while carrying forward the sound principles in the old canons, transmuted them into inspirational ethical considerations, forming the basis for disciplinary rules which state clearly the obligations which a lawyer must fulfill and the proscriptions he must not disobey, without suffering the consequence of disciplinary action. Further, the considerations and the rules, taken together, form the foundation for clear instruction of the beginning practitioner.\textsuperscript{81}

The ABA Code of Professional Responsibility has been adopted, either verbatim or with minimal changes, by most of the states of the union. It was adopted in Louisiana in April, 1970, to be effective on July 1 of that year. Louisiana thus was one of the early states to adopt the new Code.

Since the adoption of the new Code of Professional Responsibility, a number of attorneys have been disciplined for various reasons, but primarily for the incompetent or improper handling of the affairs of clients and for the commingling or misappropriation of the client's funds.\textsuperscript{82} Some states have tried to correct the problem of incompetent

\textsuperscript{80}. \textit{In re Ruffalo}, 390 U.S. 544 (1968). See also \textit{Roe v. Wade}, 410 U.S. 113, \textit{rehearing denied}, 410 U.S. 959 (1973), where the court cited \textit{In re Ruffalo} for the principle that persons who practice professions are entitled to procedural due process before professional disciplinary sanctions may be imposed. See also, \textit{Goodrich v. Supreme Court of the State of South Dakota}, 511 F.2d 316 (8th Cir. 1975), indicating that state disbarment proceedings are "quasi-criminal in nature." 511 F.2d at 318 n.4.

\textsuperscript{81}. Wisq at 8.

legal services by arranging and encouraging members of the bar to participate in continuing legal education courses and programs.\textsuperscript{83} Such programs for the most part, however, are not mandatory, and it is questionable as to whether they reach the lawyers who need them the most. The bar has become acutely aware of the fact that the publicity which follows the misappropriation of funds by a lawyer severely damages the profession as a whole. That damage has been mitigated somewhat by the creation of client security funds in some jurisdictions, built up by contributions from members of the state and local bar associations.\textsuperscript{84} Unfortunately, the amount on hand in these security funds is sometimes not sufficient to cover the losses sustained by the victimized clients.

**Reporting Attorney Misconduct**

One of the problems specifically listed by the ABA Special Committee on Evaluation of Disciplinary Enforcement headed by Justice Clark was the "reluctance on the part of lawyers and judges to report instances of professional misconduct."\textsuperscript{85} The report states that although lawyers and judges have knowledge of misconduct on the part of attorneys, relatively few complaints are submitted to disciplinary agencies by members of the profession, and that "[t]his fact has been cited as a major problem by nearly every disciplinary agency in the United States surveyed by this committee."\textsuperscript{86} The committee recommended, among other things, that there be "sanctions, in appropriate circumstances, against attorneys and judges who fail to report attorney misconduct of which they are aware."\textsuperscript{87}

Addressing itself to that problem, the drafters of the present Code of Professional Responsibility began the Code with a requirement that lawyers possessing unprivileged knowledge of a violation of any disciplinary rule by another attorney shall report that knowledge to the proper authorities and that failure to make such a report

\textsuperscript{83} As of early this year, the courts and bar associations of several states were considering or were on the verge of implementing compulsory continuing legal education programs. Included among these states are Iowa, Minnesota, Washington, New Mexico, Kansas and Oregon. See 19 AM. BAR NEWS 3 (Nov. 1974).

\textsuperscript{84} Brown, Some Observations on Legal Fees, CASE & COMMENT 51-52 (May-June 1971); Voorhies, The Case of the Client's Security Fund, J. OF AM. JUDICATURE Soc'y (Feb. 1959). Recently, the states of Kentucky, Massachusetts and Pennsylvania have taken steps to improve their client security programs. See 19 AM. BAR NEWS 3 (Nov. 1974).

\textsuperscript{85} 95 REPORTS OF AMERICAN BAR Ass'n 963 (1970).

\textsuperscript{86} Id.

\textsuperscript{87} Id.
is in itself a violation of the disciplinary rules. Canon 1 of the new Code provides that "A lawyer should assist in maintaining the integrity and competency of the legal profession." Ethical Consideration 1-4 stipulates that "A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules." Disciplinary Rule 1-102 states simply that "a lawyer shall not violate a Disciplinary Rule." Finally, Disciplinary Rule 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

The substance of Disciplinary Rule 1-103(A) was contained in Canon 29 of the original ABA Canons of Professional Ethics, which provided in part:

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

One significant difference between original Canon 29 and DR 1-103(A) is that the former was not enforceable, while the new Disciplinary Rule can be enforced by disciplinary action.

Most attorneys will agree with the Clark Committee that one of the major problems in attempting to maintain high ethical standards in the bar is the failure of lawyers and judges to report known violations by other lawyers. The solution to that problem, however, is very difficult.

The Clark Committee reported that if individual attorneys and judges shirk their responsibility to report violations and permit wrongdoers to escape disciplinary action, the public may conclude that "self policing" is in reality "self protection." It noted several undesirable results which may flow from the failure of judges and attorneys to report violations of disciplinary rules by other members of the bar. Some of them are: (1) a client who retains an unethical practitioner may form his opinion of the entire profession from a single experience, but if other attorneys report the misconduct, the client's respect for the integrity of the bar may be restored; (2) if attorneys who are aware of the misconduct of their colleagues do not report it, the client may conclude that the bar is engaged in a conspiracy to protect "its own;" (3) the attorney who fails to report a known violation by another attorney may subject future clients of the uneth-

88. Id. at 964.
ical practitioner to serious harm, including the misappropriation of funds. 49

An informal opinion of the ABA Standing Committee on Ethics and Responsibility indicates that an attorney who is a member of a State Board of Professional Responsibility has the duty under DR 1-103(A) to report unprivileged knowledge of violations of DR 1-102 to the proper authority. 50 Similarly, the provisions of DR 1-103(A) were judicially recognized in Estates Theaters, Inc. v. Columbia Pictures Industries, Inc., 51 where a federal district court stated:

When the propriety of professional conduct is questioned, any member of the Bar who is aware of the facts which give rise to the issue is duty bound to present the matter to the proper forum, and a tribunal to whose attention an alleged violation is brought is similarly duty bound to determine if there is any merit to the charge. The issue having arisen here on plaintiff’s motion, those attorneys representing other parties to the litigation were obligated to report the relevant facts to the Court for its determination. Indeed, the Code of Professional Responsibility mandates such action. 52

Although DR 1-103(A) was designed and adopted to serve a badly needed purpose, some questions have been raised as to whether it will serve that purpose and, even if it will, whether it is a desirable method of obtaining information as to the misconduct of members of the bar. For example, one writer interprets DR 1-103(A) as a requirement that lawyers “spy” on each other. He refers to the rule as the first “Gestapo” informer system which has been adopted in Anglo-American jurisprudence, and he inquires whether it is a violation for Attorney A to fail to report that Attorney B failed to inform on Attorney C. 53 This last inquiry obviously was made facetiously, but it nevertheless suggests some problems which may be encountered in enforcing that particular disciplinary rule.

It has also been suggested that because of DR 1-103(A) the bar officials who endeavor to enforce any other Disciplinary Rule may encounter problems in obtaining the evidence they need. A lawyer, for instance, may be reluctant to testify in a disciplinary or disbar-

89. PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 220-21 (Preliminary Draft 1970).
90. ABA Informal Opinion No. 1210.
92. Id. at 98.
ment proceeding unless he previously had reported the misconduct to proper authorities. If he had not, then the disclosure of his failure to do so may subject him to disciplinary action.

There is no question that all members of the legal profession suffer because of the misconduct of a few, and that there is an urgent need to discipline the offenders. It also appears from the Clark Committee report that lawyers and judges, who are in the best position to know of violations, are understandably reluctant to report them. Some means must be devised by which the offending lawyers can be reported and in proper cases subjected to disciplinary action.

It is suggested that Disciplinary Rule 1-103(A), which was designed to help solve that problem, is not the answer. Although no specific procedure can be suggested here, the problem is of sufficient magnitude that further studies of it should be made, preferably under the direction of the American Bar Association and of various state bar associations. Also, in view of the inherent power of the court to regulate the practice of law, it would be appropriate for the judiciary to join in such a study. With those studies and perhaps the trial of different suggested procedures, a solution to this perplexing problem may be found.