

Fall 1981

Lawyer Discipline in Missouri: Is a New Ethics Code Necessary

James R. Devine

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

James R. Devine, *Lawyer Discipline in Missouri: Is a New Ethics Code Necessary*, 46 MO. L. REV. (1981)
Available at: <https://scholarship.law.missouri.edu/mlr/vol46/iss4/1>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI LAW REVIEW

LAWYER DISCIPLINE IN MISSOURI: IS A NEW ETHICS CODE NECESSARY?

JAMES R. DEVINE*

I.	<i>Introduction</i>	709
II.	<i>The Early Years: Setting the Stage</i>	712
	A. <i>Legislative Action</i>	712
	B. <i>Judicial Interpretation</i>	716
III.	<i>Into the Twentieth Century</i>	719
IV.	<i>The Influence of the Bar Association</i>	726
V.	<i>Issue and Answer Joined</i>	733
VI.	<i>Confirming the Power</i>	741
VII.	<i>Rulemaking and Its Aftermath</i>	747
VIII.	<i>The Process of Refinement</i>	752
IX.	<i>Conclusion: The Future, As Seen from the Past</i>	760

I. INTRODUCTION

It is conceivable that the [legal] profession could not regulate itself even if it tried. . . . As things now stand the license [to practice law] and its implications, unaccompanied by the reality of self-regulation, interfere with the free flow of services, information, and exchanges in the market.¹

The increase in suits against the bar involving advertising and trial publicity,² the rise in malpractice litigation, and the influx of lay persons

*Associate Professor of Law, University of Missouri-Columbia. A.B., 1970, Franklin & Marshall College; J.D., 1975, Seton Hall University.

1. Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 236.

2. See, e.g., *Bates v. State Bar*, 433 U.S. 350 (1977); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

into the bar disciplinary process increasingly have exposed the practice of law to public scrutiny.³ Because of the involvement of lawyers in the Watergate tragedy, the public may wonder whether "legal ethics" is a contradiction in terms.⁴ Alarming statistics abound. A Gallup poll indicated that only twenty-five percent of the people interviewed gave lawyers high ethical marks.⁵ Another poll showed that only thirteen percent of those interviewed had "high confidence" in law firms.⁶

As a result of the profession's new conspicuousness, of the surge of new lawyers, and of constant public pressure, some authorities denounce "voluntary compliance with professional standards" as ineffective and advocate a "shift to a coercive system."⁷ Against this backdrop, the American Bar Association appointed, in 1977, the Commission on Evaluation of Professional Standards, known as the Kutak Commission.⁸ On May 30, 1981, this commission released its final draft of the Model Rules of Professional Conduct, which is currently the subject of nationwide debate.⁹ These rules follow by a decade the current Code of Professional Responsibility, adopted by the ABA in 1969,¹⁰ and by the Missouri Supreme Court in 1970.¹¹

A new code or substantial revision of the current code may be needed. Perhaps legal ethics should not be considered in terms of moral precepts, but in terms of law, the disobedience of which results in discipline.¹² Public pressure on the bar is high; public confidence in it low. The proposed code, however, is the first since Watergate, an event that suggested lawyer behavior needed immediate improvement.¹³ Given the attorney's poor public image and the bar's slow response to improve it, an attorney is left with a feeling of malaise, with a feeling that the bar has failed to police

3. See Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUNDATION RESEARCH J. 953, 959; Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1272-74 (1980).

4. See *Florida Bar v. Hirsch*, 342 So. 2d 970, 972 (Fla. 1977). On the general subject of the impact of Watergate on the psyche of the profession, see Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 623-24 (1978).

5. J. SMITH, PREVENTING LEGAL MALPRACTICE 1 (1981).

6. See *The American Lawyer*, Apr. 1981, at 4, col. 2.

7. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUNDATION RESEARCH J. 953, 959.

8. See MODEL RULES OF PROFESSIONAL CONDUCT, Chairman's Introduction (Proposed Final Draft, 1981).

9. *Id.*

10. See 94 A.B.A. REP. 389 (1969).

11. See note 293 *infra*.

12. See Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUNDATION RESEARCH J. 953, 955 & n.12.

13. See Lindgren, *The Model Rules: A Forward*, 1980 AM. B. FOUNDATION RESEARCH J. 923, 924. See also Wolfram, *supra* note 4, at 623-24 & nn.18-20.

itself. With such a feeling among the organized bar, it is little wonder that an already distrustful public thinks lawyers have forsaken all professional responsibility.¹⁴

Doubts about the Missouri bar's commitment to high ethical standards, however, are unsupported by the history of lawyer discipline in Missouri. Before adopting a new code or a substantial revision of the current code, the bar must acquaint itself with the lessons of this history, which should be a source of pride rather than disdain.

Although there ostensibly are two sources of control over the practice of law, one by statute and one by court rule,¹⁵ the Missouri Supreme Court now has plenary control over the discipline of lawyers, the admission to the bar, the bar association, and the unauthorized practice of law. This control originated with the recognition of the "inherent power" doctrine in 1834, and not because of public outcry or legislative mandate. Although

14. Cf. Wolfram, *supra* note 4, at 620-21 (self-regulation by vague ethical prescriptions; attempts to regulate from outside legal profession met with resistance from judiciary). Wolfram foresees the charge that the profession is no more than a special interest group. *Id.* at 621.

15. Compare RSMO §§ 484.010-.270 (1978) with MO. SUP. CT. R. 5. The statute provides for removal or suspension from practice (1) for being convicted of a crime involving moral turpitude; (2) for retaining a client's money unlawfully, or for malpractice, deceit, fraud, or misdemeanor in a professional capacity; or (3) for failing to disclose discipline in another state when making application for a Missouri license to practice law. RSMO § 484.190 (1978). Charges may be filed in the supreme court, the court of appeals, or the circuit court, *id.* § 484.200, after which the court sets a date for a hearing, *id.* § 484.210. The hearing is before the court unless the matter is filed in the supreme court or one of the courts of appeals, in which case the original hearing can be before a commissioner. *Id.* § 484.250. The hearing may be held *ex parte* on failure by the attorney to appear. *Id.* § 484.230. If the attorney has been convicted of a crime involving moral turpitude, discipline may be determined summarily. *Id.* § 484.240. Appeals from decisions in the circuit court are made directly to the supreme court. *Id.* § 484.260. These provisions have not changed substantially since the 1919 statutory revision.

Under the court rules, there is a bar committee in each circuit. MO. SUP. CT. R. 5.10, .12-.13. The bar committees are authorized to investigate "any matter of professional misconduct." *Id.* 5.12. The standard applied is the Code of Professional Responsibility, which has been enacted as a separate rule. *See id.* 4. The hearing before the bar committee serves a probable cause function. *Id.* 5.12, .13(h). Final determination in such matters is left to the supreme court, which appoints the bar committees. *See id.* 5.10, .18. The probable cause hearing may be eliminated if an attorney has been convicted of a crime involving moral turpitude, with further proceedings in the matter held in the supreme court. *Id.* 5.20.

There are also two sets of rules regulating admission to the bar, with the supreme court rules being more extensive. Compare *id.* 8 with RSMO §§ 484.040-.120 (1978).

subject to several definitions, including an English definition,¹⁶ a regulatory definition,¹⁷ and a sinister definition,¹⁸ the doctrine arose because existing legislation did not ensure the competence of the bar and because efforts to enact improved legislation were unsuccessful. The bar sought the adoption of court rules, which supersede legislation in disciplinary matters, as it worked with the supreme court to protect the public. Indeed, the development of legal ethics in Missouri exemplified cooperation between the courts and the bar to ensure professionalism in the practice of law.

To understand the supreme court's current control of discipline, a review of early legislation and court decisions is necessary. This Article will examine some of the problems that the early legislation caused for the courts and will explore the extent of the influence of the organized bar in Missouri. This Article then will discuss the court's reaction to the bar activities. After providing the background, this Article concludes that the power of the supreme court to regulate attorney conduct is dependent neither on statute nor on an express constitutional grant of power, but exists inherently based strictly on the nature of the judicial department and its need to protect the public from untrustworthy officers of the court. As a result, this Article suggests that a new ethics code is not necessary to ensure the proper functioning of discipline in Missouri.

II. THE EARLY YEARS: SETTING THE STAGE

A. Legislative Action

In 1804, Missouri was under the jurisdiction of the District of Louisiana. On October 4 of that year, the judges of the Indiana Territory, who

16. See Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 473 (1937). Under this definition, inherent power is authority that can be implied and that is effective only until the legislature removes it. *Id.* This use was, for English lawyers, "the only sense in which . . . [the phrase "inherent power" was] ever used." *Id.* For an adaptation of this definition in Missouri, see note 102 and accompanying text *infra*. See also notes 65 & 68 and accompanying text *infra*.

17. See Williams, *supra* note 16, at 474. In the regulatory sense, inherent power is power that is not derived specifically from an express grant of statutory or constitutional power, but rather power that exists because it is essential to the necessary function of the judicial branch. It is a power which legislation cannot remove. *Id.* This definition was approached at numerous points in Missouri's history. See notes 53, 55, 66, 100 & 217-22 and accompanying text *infra*. It was this definition that the supreme court eventually adopted. See notes 282-91 and accompanying text *infra*.

18. See Williams, *supra* note 16, at 474. Inherent power becomes sinister when the court, merely because it is a court, assumes power without regard for a statutory or constitutional provision of power. See *id.* At numerous times, it was alleged that the court was moving in this direction. See notes 83-84 & 222-30 and accompanying text *infra*.

were the government of the District of Louisiana, enacted "A. Law regulating the practice of Attornies" and thereby created the first post-colonial power to discipline Missouri attorneys.¹⁹ The law contained provisions for licensing attorneys within the territory²⁰ and provided for their discipline:

If the Judges of the general court, either in the general court, or any of the inferior courts, from their own observation, detect any mal practice in either of the said courts, in any attorney of those courts, or if complaint in writing be made to them of such mal practice in any of the said courts, the party accused shall be summoned to shew cause why an information shall not be filed against him; and if such information shall be ordered, and the attorney thus offending shall be found guilty of the matter therein charged, the said Judges either in the general court or any of the inferior courts, as the case may happen, may either suspend his license during a certain time, or vacate it all together, as they may judge most proper²¹

The 1804 law governed attorney conduct until 1824,²² when the Missouri

19. Law of Oct. 1, 1804 (repealed 1824) (compiled in 1804-1824 LAWS OF THE DISTRICT OF LOUISIANA ch. 7 (1842)). These provisions can be considered the first for the Louisiana Territory, the land that was ceded to the United States by France under the treaty signed April 30, 1803.

As a result of the treaty and in order to effectuate the transfer of the land to the American government, Congress, on October 31, 1803, authorized the President "to take possession of, and occupy the territory ceded by France to the United States," and, unless otherwise provided for by Congress, to provide for the interim government of the new territory. Act of Oct. 31, 1803, ch. 1, § 1, 2 Stat. 245 (1803).

Further action by Congress came in March 1804, and provided for the division of the new territory into two territories, the Territory of Orleans and the District of Louisiana. Act of Mar. 26, 1804, ch. 38, § 1, 2 Stat. 283 (1804).

20. Law of Oct. 1, 1804, § 1 (repealed 1824) (compiled in 1804-1824 LAWS OF THE DISTRICT OF LOUISIANA ch. 7 (1842)). This initial law presumed that lawyers would come to Missouri from other jurisdictions. It provided for licensing following production of "a certificate from any court in any one of the United States, where he last resided, that he is a person of honest demeanor, or a license . . . to practice in any court of any one of the United States . . ." *Id.* The law also required a minimum age of 21. *Id.*

There were lawyers in Missouri at this time, "mostly French who had come up the Mississippi . . . [and who had] practiced in St. Louis." Chroust, *The Legal Profession in Early Missouri*, 29 MO. L. REV. 129, 129 (1964). For a history of these early years, see authorities cited in *id.* at 129 n.1. See also English, *The Practice of Law in Territorial Days*, 32 J. MO. B. 273 (1976).

21. Law of Oct. 1, 1804, § 4 (repealed 1824) (compiled in 1804-1824 LAWS OF THE DISTRICT OF LOUISIANA ch. 7 (1842)).

22. Although the law remained the same regarding attorney conduct, the government changed twice during this period. The first change took place in

General Assembly adopted the first state statute governing lawyer conduct,²³ a statute that substantially revised the 1804 law.

Initially, the new statute allowed only the supreme court to impose the ultimate discipline, *i. e.*, disbarment.²⁴ It permitted any attorney to be struck from the rolls of the state courts for conviction of a felony, for "retaining his client's money after demand made by the client for the same," for gross ignorance, for gross neglect, and for contempt.²⁵ The law retained the phrase in the territorial act permitting disbarment for malpractice.²⁶

The circuit courts could suspend an attorney, but only for "misconduct which, in the opinion of the court, is such as to justify . . . being stricken from the rolls."²⁷ When a circuit court suspended an attorney, the circuit judge had to deliver a copy of the suspension order to the clerk of the supreme court, whereupon the supreme court afforded the attorney an opportunity to show cause why the circuit court order, which was presumptively correct, was in error.²⁸ Following this hearing, the supreme court could issue further orders as were necessary.²⁹

1805 when the District of Louisiana became the Territory of Louisiana. *See* Act of Mar. 3, 1805, ch. 31, 2 Stat. 331 (1805). The Act provided for the government of the new territory, giving it the power to establish courts. *Id.* § 3. The laws and regulations in force prior to the Act continued in force, provided they were not inconsistent with the Act. *Id.* § 9. On October 29, 1805, the General Court of the new territory met and ruled that any attorney previously admitted in the Indiana Territory would be permitted to practice in the Louisiana Territory, merely by taking of an oath of office as an attorney. Chroust, *supra* note 20, at 129. Seven lawyers were admitted that same day, and five more were admitted shortly thereafter. *Id.* at 129-30. The second change occurred in 1812 when the Territory of Louisiana became the Territory of Missouri. *See* Act of June 4, 1812, ch. 95, 2 Stat. 743 (1812). The composition of the territorial government changed at this point from a governor and three judges to a governor, a legislative counsel, and a house of representatives. *Id.* § 4. The original act concerning attorneys remained in force as it was not inconsistent with other sections of the new territorial law. *See id.* § 16.

23. *See* RSMO §§ 1-9, at 158-59 (1825).

24. *Id.* § 6, at 159. Any person disbarred by the supreme court thereby was prevented from practicing in any court in the state. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* § 7. On finding such grounds, the court was directed to provide specifically the cause for suspension in the order. *Id.*

28. *Id.* If the attorney appeared and disproved the allegations, the supreme court was to direct "an order upon the circuit court to dissolve the said suspension." *Id.*

29. *Id.* The Act retained the provision of the territorial laws that appeared to provide a statutory cause of action against an attorney, in the nature of malpractice, for neglect in proceeding with matters in court. *Id.* § 8. That cause

The next major revision of the laws regulating professional conduct was in the revised statutes of 1835,³⁰ which added a new substantive ground for discipline: "mal-practice, deceit, or misdemeanor in his professional capacity."³¹ The Act provided, for the first time, a procedure for disciplining lawyers. A lawyer charged with a violation of the act could be prosecuted either "in the supreme court of the district or the circuit court of the county in which the offense shall have been committed, or the accused resides."³² When a charge was filed, the court had to fix a date for a hearing, to issue process, and to serve the attorney, according to the civil practice rules, with a copy of the process and the charges.³³ All of this had to be done within "a reasonable time before the return day thereof."³⁴ After the charge was filed, if the grounds for discipline were conviction of a felony, mere production of the criminal conviction justified disbarment or immediate suspension for a limited time.³⁵

When the grounds for discipline did not include conviction of a felony, the court could only suspend the attorney, pending full trial on the merits.³⁶ This limitation protected attorneys accused of a criminal offense but who had not been tried.³⁷ If, however, no indictment was found or no criminal trial was held within six months, the suspension had to be lifted.³⁸ In all of these cases, following the charge, the attorney was entitled to a full jury trial of the matter; the court imposed discipline following conviction.³⁹ Following a trial by the circuit court, the attorney was entitled to take exception to the findings and prosecute an appeal to the supreme court, as in any other action at law.⁴⁰ Any judgment of removal or suspension, regardless of the court in which it was pronounced, was entitled to full comity in other courts within the state.⁴¹

With minor exceptions, the courts followed this procedure throughout

of action remains today under RSMO § 484.160 (1978). Such statutes are said to augment the common law contract or tort theories of malpractice liability. *See* R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 81 (1977).

30. *See* RSMO §§ 1-18, at 89-91 (1835).

31. *Id.* § 6, at 90. The statute retained the basic causes of action contained in the 1824 statute, *i.e.*, felony conviction and defalcation of client funds. *See id.*

32. *Id.* § 7, at 90. At the time, the state could be divided into four districts for the purpose of the court's hearing cases. MO. CONST. art. V, § 5 (1820).

33. RSMO §§ 8-9, at 90 (1835). The charges could be served in any county. *Id.* § 8.

34. *Id.* § 9.

35. *Id.* § 11, at 91. The record of conviction was conclusive. *Id.* § 14.

36. *Id.* § 12.

37. *Id.* § 13.

38. *Id.* This rule did not apply if the delay was caused by the absence of the accused. *Id.*

39. *Id.* § 15.

40. *Id.* § 17.

41. *Id.* § 18.

the nineteenth century. Most notable of the exceptions was a provision substituting bench trials for jury trials in ethics proceedings, provided the matter charged was not indictable.⁴²

B. *Judicial Interpretation*

Although the statutory procedure ostensibly protected the public, the court almost narrowed this protection into nonexistence. Failures, primarily in the lower courts, to enforce the statute properly and the absence of a disciplinary mechanism outside the statute forced the supreme court to condone what otherwise would be considered bizarre lawyer conduct.

Thus, in *Strother v. State*,⁴³ later said to be Missouri's first ethics case,⁴⁴ the Circuit Court for St. Louis County, Missouri, suspended an attorney for six months.⁴⁵ The ethics violation arose while the attorney was in trial. After several warnings by the court, primarily about interrupting opposing counsel, he had walked out of court, telling the judge that "he would settle that matter with him, out of doors."⁴⁶ In analyzing the case, the supreme court noted that the circuit court, under the existing statute, could suspend an attorney only if the conduct was worthy of disbarment, which the instant conduct was not. Additionally, any suspension had to be indefinite, not for the six months imposed by the circuit court.⁴⁷ Thus, despite the attorney's actions, the supreme court found that the circuit court had not followed the statute, and consequently, the supreme court reversed the circuit court and reinstated Strother.⁴⁸

The search for solutions to the problems posed by the statute itself and

42. *Id.* § 497 (1879). The other notable change was the addition of the St. Louis Court of Appeals, in 1875, and the Kansas City Court of Appeals, in 1884, to those courts which could admit attorneys and hear disciplinary matters. *See* MO. CONST. art. VI, § 1 (1875); RSMO ch. 11, §§ 605-606, 612 (1889).

43. 1 Mo. 432 (1826).

44. *Strother* is "[t]he first reported decision." *In re Williams*, 113 S.W.2d 353, 358 (Mo. App., K.C.), *opinion quashed sub nom. State ex rel. Clark v. Shain*, 343 Mo. 542, 122 S.W.2d 882 (En Banc 1938). *Strother* was listed as one of 26 lawyers who practiced in St. Louis in 1821. *See* Chroust, *supra* note 20, at 130 & n.8.

45. *Strother v. State*, 1 Mo. at 432.

46. *Id.* *Strother* also was alleged to have "demanded, in a contumacious manner, that his name be stricken from the roll of practising Attorneys." *Id.*

47. *Id.* at 433.

48. *Id.* Other decisions also added procedural definition to the statute. *See State ex rel. Mansur v. Kemp*, 82 Mo. 213 (1884) (ethics proceedings can be maintained by other attorneys, not just state); *State v. Watkins*, 3 Mo. 337 (1834) (refusal to answer circuit court interrogatories concerning alleged falsified records no ground for suspension); *State ex rel. Jewett v. Clopton*, 15 Mo. App. 589 (St. L. 1884) (costs of ethics proceeding can be assessed against complainant if proceeding begun in bad faith).

by its enforcement to the exclusion of other disciplinary methods led to the 1834 discovery of the inherent power doctrine. In *State v. Foreman*,⁴⁹ the circuit court found that an attorney knowingly had passed counterfeit notes.⁵⁰ The attorney was indicted and imprisoned, but later escaped. The circuit court then suspended him.⁵¹ Because there was no conviction, however, the supreme court ruled that the offense was not one of those included in the statute, and the suspension had to be dissolved.⁵² In dissent, Chief Justice McGirk argued that Foreman should have been suspended regardless of the statute because the power existed inherently in the courts, *i.e.*, independent of legislative enactment.⁵³

In 1879, the St. Louis Court of Appeals expanded this concept. In *In re Bowman*,⁵⁴ the court agreed that the right to discipline attorneys was inherent in the courts and that legislation on the subject of professional regulation had not restricted or increased the court's power.⁵⁵

As these decisions indicate, during this period, the court appeared to struggle to protect the public in a manner consistent with separation of powers deference to constitutional legislation. The *Foreman* and *Bowman* decisions, however, hardly settled the issue. Decisions during the remainder of the nineteenth century tantalize the reader, first by asserting inherent power, then by taking it away. For example, in 1855, the St. Louis Court of Appeals dealt with the St. Louis Criminal Court, which was created by statute, and said that the statute on lawyer discipline was "not an enabling act,"⁵⁶ and thus could not be the exclusive source of the court's right to discipline attorneys. The right to discipline, said the court, "is not derived from the Legislature."⁵⁷

49. 3 Mo. 412 (1834).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (McGirk, C.J., dissenting). The opinion of the chief justice was very short: "My opinion is that causes of dismissal exist independent of the statute, and may be inquired into beyond its provisions." *Id.*

As interpreted, *Foreman* stood for the position that the court could not go beyond the scope of the statute in disciplining attorneys. See *Ex parte Wall*, 107 U.S. 265, 281 (1883) (dictum). See also Williams, *supra* note 16, at 485.

54. 7 Mo. App. 567 (St. L. 1879).

55. *Id.* at 568.

56. *State ex rel. Jones v. Laughlin*, 10 Mo. App. 1, 4-5 (St. L.), *rev'd*, 73 Mo. 443 (1881). The court recognized that the statutory language limited charges only to certain courts. 10 Mo. App. at 4. The court said, however, that the statute related only "to the special proceeding to disbar, originating on charges exhibited." *Id.* at 5. The fact that no charges could be exhibited in the court should not leave the court "deprived of its common-law power over its officers." *Id.* Consequently, the statute could not be read to prevent any court from protecting the public or itself. *Id.*

57. 10 Mo. App. at 3.

Nothing is better settled than this: that without statutory provision, and in the absence of any express statutory prohibition, the right to determine who shall appear before it in the capacity of attorneys is incidental to every court of common-law powers; that it is necessary to the preservation of the respectability of the profession, and of that respect for the judiciary which is essential to the due administration of justice, and the preservation of the rights of persons and of property.⁵⁸

In this instance, however, the supreme court disagreed.⁵⁹ While generally agreeing that the right to discipline "exists as a power inherent" in the common law courts,⁶⁰ it found that the St. Louis Criminal Court was a court "of purely statutory origin" and not a common law court.⁶¹ Thus, the criminal court was dependent for its power on the legislature, and if the legislature failed to grant power to disbar, the power did not exist.⁶² The court implied that the will of the legislature determines whether courts possess power to discipline.

In 1895, however, the supreme court appeared to adopt the opposite view. In *State ex rel. Walker v. Mullins*,⁶³ an attorney was charged with intentionally falsifying a record on appeal in a murder case.⁶⁴ The court found that inherent power over members of the bar did exist, and would exist, "in the absence of statutory enactment prohibiting it."⁶⁵ Thus, in one case, the court had found no right to disbar because the legislature had not given that right, but in the other, it had found the right unless it was taken away. In another decision the same year, arising from the same set of facts as *Mullins*, the court went further by finding it unnecessary to determine if the legislature had granted the courts power to disbar.⁶⁶ If the legislature had granted such a power, the court could use it; if the legislature had not granted such a power, the court could act inherently,

58. *Id.* at 6. Consequently, the lower court had jurisdiction over the disbarment proceeding. *Id.* at 3. The appeals court found that the St. Louis Criminal Court had all the powers possessed by the circuit court. *Id.*

59. See *State ex rel. Jones v. Laughlin*, 73 Mo. 443 (1881).

60. *Id.* at 446. The power existed in all courts "of general and commonlaw jurisdiction." *Id.*

61. *Id.* at 447. The court was one of limited jurisdiction, handling only St. Louis criminal cases. *Id.* Such courts, it was found, are under the general superintendent control of the circuit courts and, as a result, derive all their power from the legislature. *Id.* at 447-48.

62. *Id.* at 448-49. The supreme court noted that the legislature "evidently intended" to deny the disciplinary power to this court. Since the power was never expressly conferred, it therefore did not exist. *Id.*

63. 129 Mo. 231, 31 S.W. 744 (1895).

64. *Id.* at 233-35, 31 S.W. at 744-45.

65. *Id.* at 236-37, 31 S.W. at 745.

66. *State ex rel. Walker v. Harber*, 129 Mo. 271, 294, 32 S.W. 889, 893 (En Banc 1895).

“regardless of legislative aid or action.”⁶⁷ Another 1895 decision, from the St. Louis Court of Appeals, however, only clouded the issue further by stating that “where the statute prescribes the mode of disbarment, it operates as an abridgment of the common law power inherent in courts to regulate the conduct of their attorneys.”⁶⁸

While it appears that Missouri courts recognized that they had a role in regulating the practice of law independent of statute, the extent of this inherent power remained undefined.⁶⁹ This question remained unanswered for the first third of the next century.

III. INTO THE TWENTIETH CENTURY

The first twenty years of this century witnessed many enactments governing the practice of law. The laws of 1901 of the State of Missouri contained major changes for the practice of law, such as defining the compensation relationship between attorney and client and authorizing contingent fee agreements.⁷⁰ The statute overruled prior law to the contrary and gave the attorney a lien on a client’s cause of action to insure the payment of the attorney’s fee.⁷¹ Four years later, the legislature substantially

67. *Id.*

68. *State ex rel. Storts v. Peabody*, 63 Mo. App. 378, 381 (St. L. 1895).

69. It is possible to reconcile the cases. As noted in note 60 and accompanying text *supra*, inherent power exists in courts of general jurisdiction. It can be argued that the phrase “courts of general jurisdiction” includes only those courts which have the power to admit attorneys. *Cf. State ex rel. Jones v. Laughlin*, 73 Mo. 443, 449-50 (1881) (court discovers it is difficult for court with no power to admit to disbar). *See also State ex rel. Walker v. Mullins*, 129 Mo. 231, 237, 31 S.W. 744, 745 (En Banc 1895) (court having legislative power to admit has inherent power to disbar). This approach also would comport with the modern day standard under which all disciplinary functions flow from the supreme court. *See generally MO. SUP. CT. R. 5*. The supreme court has the sole power to admit persons to practice law. RSMO § 484.040 (1978).

70. *See* 1901 Mo. Laws 46, §§ 1-2. The statute provided that “[t]he compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law.” *Id.* § 1. The contingent fee statute was farsighted; seven years passed before the American Bar Association adopted an ethics code permitting the contingent fee, and then only after extended debate. *See* 33 A.B.A. REP. 61-85 (1908).

71. 1901 Mo. Laws 46, §§ 1-2. The statute granted the attorney a lien on the cause of action, which commenced on the filing of a petition or an answer with a counterclaim. The lien was effective against the proceeds of the cause, “in whosever hands they may come” and was unaffected by settlement. *Id.* § 1. The statute also granted a lien on the cause of action in a contingent fee case so that, after notice to the defendant of the attorney’s contingent fee contract, the attorney’s fee could be enforced against a defendant who wrongfully distributed proceeds to the detriment of the attorney. *Id.* § 2.

Prior to this time, Missouri case law had prevented an attorney’s lien. *See Frissell v. Haile*, 18 Mo. 18 (1853); *Young v. Renshaw*, 102 Mo. App. 173, 76

changed the licensing procedures of attorneys. Bar association concern prompted these changes, which made it clear that the power to admit attorneys to the practice of law was vested only in the supreme court,⁷² and not in all of the constitutional courts.

The 1915 and 1919 legislative sessions also changed the law. The 1915 statute defined the practice of law and forbade unauthorized practice;⁷³ the 1919 revision substantially changed the disciplinary process.⁷⁴ Although not adding directly to the inherent powers of the court, neither statute has been changed substantially,⁷⁵ and as a result they formed the basis for subsequent decisions on inherent power. In order to understand the statutes and later decisions of the courts, it is necessary to review the actions of the Missouri courts in disciplinary matters prior to these statutory changes.

Inherent power of the court arose first in the twentieth century in 1903 in *State ex rel. Crow v. Shepherd*,⁷⁶ a contempt of court case involving the nonlawyer publisher of a newspaper article containing allegedly contemptuous material.⁷⁷ The contempt power of the courts had been limited by statute to the punishment of certain actions, not including the conduct at issue.⁷⁸ The court in *Shepherd* could not accept such a legislative limita-

S.W. 701 (St. L. 1903); *Alexander v. Grand Ave. Ry.*, 54 Mo. App. 66 (K.C. 1893); *Roberts v. Nelson*, 22 Mo. App. 28 (St. L. 1886). Thus, the only remedy of the attorney was on the contract. See *Young v. Renshaw*, 102 Mo. App. at 187, 76 S.W. at 706.

The type of lien created by the statute is a special or charging lien. See 2 S. SPEISER, ATTORNEY'S FEES 380-87 (1973). The other common law lien, the general or retaining lien, still is not permitted in Missouri. See Missouri Bar Administration Formal Opinion No. 115 (May 18, 1979).

72. 1905 Mo. Laws 48, § 1. The new law also created the board of bar examiners, members of which were to be appointed by the supreme court, and charged the board with the duty of conducting bar examinations two times per year on certain legal subjects, including legal ethics, as well as providing the application mechanism. *Id.* §§ 3-10. For a discussion of the bar's involvement in the adoption of this statute, see notes 118-20 and accompanying text *infra*.

73. 1915 Mo. Laws 99 (current version at RSMO §§ 484.010-.020, .150 (1978)).

74. 1919 Mo. Laws 151 (current version at RSMO §§ 484.190-.270 (1978)).

75. See statutes cited notes 73 & 74 *supra*.

76. 177 Mo. 205, 76 S.W. 79 (En Banc 1903).

77. *Id.* at 211-12, 76 S.W. at 79-80. The article was published by J. M. Shepherd, publisher of the Standard-Herald, a weekly newspaper in Warrensburg, and alleged "bribery and corruption" by the members of the Missouri Supreme Court. *Id.* at 211, 76 S.W. at 80.

78. See *id.* at 234, 76 S.W. at 88. RSMO ch. 14, § 1616 (1899) delineated certain acts that could be punished by contempt, noting further, with reference to such acts, "and no other." The acts that could be punished were "disorderly, contemptuous or insolent behavior" while the court was sitting and in its view, which tended to interrupt the proceedings or disturb respect befitting the court,

tion, detailing first the common law power to punish for contempt,⁷⁹ and then holding that legislative enactment could not rescind that inherent power by limiting punishment for contempt to certain statutory derelictions "and no other."⁸⁰

The same contempt statute was before the court in 1909 in *Chicago, Burlington & Quincy Railway Co. v. Gildersleeve*,⁸¹ when the court again detailed at length the common law inherent power of the courts and struck down the punishment provisions of the statute.⁸² The decision was by a bare majority only, and a three-judge dissent by Judge Lamm typified the concern over inherent power. If unbridled, it could become sinister and thus destroy the separation of powers. As a result, the dissenters argued that the legislature had the power to control what otherwise might amount to arbitrary usage of the inherent power by the court.⁸³ They argued that legislatively regulating inherent power was not the same as destroying inherent power.⁸⁴ This dissent was thought so persuasive that it was

"breach of the peace" tending to disrupt the proceedings of the court, disobedience of court orders and process, and refusal to be sworn or to answer questions after being sworn. *See id.* The supreme court indicated the question presented:

If the Legislature had power to abridge or impair the power of this court to punish for contempt, then the defendant in this case could not be held liable. But if the Legislature had no such power, then the section of the statutes quoted is unconstitutional and not binding upon the court.

177 Mo. at 234, 76 S.W. at 88.

79. 177 Mo. at 218-28, 76 S.W. at 83-86.

80. *Id.* at 235, 76 S.W. at 88. "The law is well settled, both in England and America, that the Legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish for contempts." *Id.* The court did note authority for the proposition that the legislature could regulate the use of inherent power, *id.*, but then stated, "However, it is a contradiction of terms to say the power to punish is inherent, but that the Legislature may regulate the exercise." *Id.*

Shepherd did not hold the entire contempt statute unconstitutional. *See In re Clark*, 208 Mo. 121, 147-48, 106 S.W. 990, 997 (En Banc 1907).

81. 219 Mo. 170, 118 S.W. 86 (En Banc 1909).

82. *Id.* at 177-82, 184, 118 S.W. at 87-91, 91. In *Gildersleeve*, the appellant had been adjudged guilty of contempt by the circuit court and imprisoned for 15 days. *Id.* at 174-75, 118 S.W. at 87. The contempt statute limited punishment for contempt to a fine of \$50 or imprisonment for 10 days. RSMO ch. 14, § 1617 (1899). Thus, as stated by the court, "If this is a valid constitutional enactment, it is obvious that the judgment must be reversed." 219 Mo. at 176, 118 S.W. at 87.

83. 219 Mo. at 197, 118 S.W. at 95 (Lamm, J., dissenting). "I do not hesitate to say that the unregulated, arbitrary whimsical power to fine or imprison for contempt, a power that will not brook a mere temperate and reasonable control, is contrary to the genius of our institutions and the policy of our Constitution and statutes." *Id.*

84. *Id.* at 200-01, 118 S.W. at 95-96 (Lamm, J., dissenting). The rule would have been stated by the dissenters as follows: (1) the court does have inherent

unanswerable;⁸⁵ three years later, both *Shepherd* and *Gildersleeve* were overruled in *Ex parte Creasy*.⁸⁶

The uncertainty these cases created about the power of the courts over attorneys became readily apparent the year following *Creasy* in *State ex rel. Selleck v. Reynolds*.⁸⁷ Ellroy V. Selleck was charged in the St. Louis Court of Appeals by the St. Louis Bar Association with multiple counts of misconduct,⁸⁸ two of which were substantiated⁸⁹ by extensive evidence⁹⁰ before two court-appointed special commissioners. Under one charge, Selleck was found to have instructed another to "give false and perjured testimony," and that such testimony had been given.⁹¹ Under the other, the commissioners found that Selleck had converted a deceased client's notes and deeds of trust.⁹² Despite the absence of a criminal conviction for

power to punish for contempt and cannot be stripped of such power; (2) the legislature may regulate the power to punish for contempt in order to protect against an abuse of discretion; (3) the punishment statute is such a reasonable regulation; and (4) such regulation does not destroy the power of the court. *Id.* at 200-01, 118 S.W. at 96.

85. *Ex parte Creasy*, 243 Mo. 679, 708, 148 S.W. 914, 923 (En Banc 1912).

86. 243 Mo. 679, 708, 148 S.W. 914, 923 (En Banc 1912). *Creasy* was a habeas corpus proceeding brought by one adjudged guilty of contempt for willfully failing to cooperate with a grand jury. *Id.* at 684, 688, 148 S.W. at 915, 916. The punishment was a six month jail term. *Id.* at 681, 148 S.W. at 921. Judge Graves, writing for the court, stated, "To my mind the sooner some of the broad doctrine of both the *Shepherd* and *Gildersleeve* cases is overruled, the better it will be for the jurisprudence of the State." *Id.* at 708, 148 S.W. at 913. The court then adopted the dissenting opinion in *Gildersleeve*. *Id.*

87. 252 Mo. 369, 158 S.W. 671 (En Banc 1913).

88. *In re Selleck*, 168 Mo. App. 391, 391-95, 151 S.W. 743, 743-44 (St. L. 1912), *judgment quashed*, 252 Mo. 369, 158 S.W. 671 (En Banc 1913).

89. 168 Mo. App. at 392-97, 151 S.W. at 743-44.

90. *Id.* at 398-99, 151 S.W. at 745. The commissioners heard the matter for 18 days, listened to 85 witnesses, and compiled 4 volumes of record containing 1,843 pages, together with a further volume of documents. *Id.* at 392, 151 S.W. at 743.

91. *Id.* at 394-95, 151 S.W. at 744. Selleck had been an attorney for Bertha Henkel, who was employed by Charles Kotzaurek, the owner of two hat stores in St. Louis. Kotzaurek had numerous debts for rent and inventory. Through Henkel, Kotzaurek met Selleck and a scheme was devised to transfer, on paper, the business from Kotzaurek to Henkel. *Id.* at 395, 151 S.W. at 744. Implicit in the report of commissioners was that the scheme was intended to defraud creditors. Bertha Henkel was alleged to have been "directed and instructed" to give false testimony in litigation arising out of the purported sale. *Id.*

92. *Id.* at 395-97, 151 S.W. at 744-45. Selleck was found to have represented John Link, who had owned certain notes for debtors secured by deeds of trust. Following Link's death and before letters testamentary were issued to Link's widow, Selleck impersonated Link, entered Link's safety deposit box, and took the notes and deeds of trust, converting them to his own use and refusing to account to the estate for them. He later alleged that one note and the deed secur-

the action, the court of appeals found lawyer misconduct and disbarred Selleck.⁹³

Selleck appealed to the supreme court, which quashed the disbarment.⁹⁴ In a three judge plurality, Judge Graves compared the proceedings to disbar to the power to punish for contempt as outlined in *Shepherd*, *Gildersleeve*, and *Creasy*.⁹⁵ As a result, Judge Graves agreed that the legislature could control any inherent power the court might have over attorney discipline.⁹⁶ Because Selleck's actions, if true, would support an indictment for a criminal offense⁹⁷ and because there had been no indictment, the court of appeals under the disbarment statute had no power to disbar Selleck.⁹⁸

Three judges dissented. While concurring with Judge Graves that inherent power did exist and that the legislature could regulate it, Chief Justice Lamm found that any regulation that would prevent disciplinary action in this situation would be unreasonable.⁹⁹ Judge Woodson carried this dissent further, holding that legislative pronouncements in the disbarment area were only attempted codifications of the common law inherent power and that the legislative enactments could neither create any power

ing it had been transferred to him prior to Link's death. The commissioner found this allegation by Selleck to be false. *Id.* at 396-97, 151 S.W. at 744-45.

93. *Id.* at 398-99, 151 S.W. at 745.

94. 252 Mo. at 374, 158 S.W. at 671.

95. *Id.* at 379-80, 158 S.W. at 673. "Contempt and disbarment proceedings are kindred spirits. Both have in view the protection of the courts." *Id.* at 380, 158 S.W. at 673.

96. *Id.* at 380, 158 S.W. at 673. Judge Graves wrote, "The statutes of Missouri in disbarment proceedings, as in contempt proceedings, have recognized the right of the courts to act, but such statutes have placed limitations upon this inherent power, and the judgment in the instance case goes beyond the statutory limitations, and is therefore bad." *Id.* The statutes themselves were found to be reasonable. *Id.* at 382-83, 158 S.W. at 674. Judge Graves stated that preconviction disbarment "brands . . . [Selleck] as a felon, and this without a trial by jury." *Id.* at 384, 158 S.W. at 674-75. It was not, therefore, unreasonable for the legislature to prevent disbarment for indictable offenses until after a jury had spoken. *Id.* at 384, 158 S.W. at 675.

97. *Id.* at 381, 158 S.W. at 674.

98. *Id.* at 386, 158 S.W. at 675.

99. *Id.* at 408, 158 S.W. at 682 (Lamm, C.J., dissenting). Lamm agreed with *Gildersleeve* that the legislature's "power to regulate is not the power to destroy." *Id.* at 407, 158 S.W. at 682 (Lamm, C.J., dissenting). He wrote, however:

[T]hat a court has the inherent power to disbar an attorney and that the lawmaker can pass laws regulative of that power, which permits the court to disbar for light offenses whilst at the same time denying the power to disbar for dark and heavy offenses except on the condition precedent of conviction, is not to my mind reasonable.

Id. (Lamm, C.J., dissenting).

nor limit any inherent power held by the court.¹⁰⁰ The power existed, according to Judge Woodson, inherently and independent of any legislative enactments, as "essential to the administration of justice."¹⁰¹ Judge Walker joined the dissents of both Chief Justice Lamm and Judge Woodson.¹⁰² Judge Brown cast the swing vote. He rejected the inherent power argument and argued that the power of the court was nothing more than implied, and as implied power it could go no further than legislation permitted.¹⁰³

Following *Selleck*, all views on the issue of inherent power were present. The court stood six to one in favor of some inherent power in the court in disbarment matters. The scope of that power, however, was unclear: three judges agreed that the legislature could restrict the power in disbarment proceedings, one judge agreed that the legislature could restrict the power but that this restriction was unreasonable, one judge believed that the legislature had no power to restrict inherent power, one judge agreed with both of the latter two viewpoints, and one judge believed that there was no inherent power. What emerges from *Selleck*, albeit with dissent, is a determination by the court that the legislature, which represents the people, has the power to control the practice of law, a public profession.

The organized bar reacted immediately to the anti-consumer effect of *Selleck*, which was to "put it out of the power of our courts to disbar an attorney charged with an indictable offense, except upon the condition precedent of conviction,"¹⁰⁴ calling it an absurd situation.¹⁰⁵ The bar was beginning to assert an absence of public concern by the legislature, yet the task of reform was still to the legislature, which provided some relief on May 30, 1919, when thirteen sections of the revised statutes of 1909 were abolished in favor of new sections relating to the disciplining of

100. *Id.* at 406-07, 158 S.W. at 680 (Woodson, J., dissenting). In England, according to Judge Woodson, the courts "from time where the memory of man runneth not to the contrary, have entertained jurisdiction of disbarment proceedings, and have disbarred attorneys and counselors at law, without any statutory authority." *Id.* at 406, 158 S.W. at 680 (Woodson, J., dissenting).

101. *Id.* at 406, 158 S.W. at 680 (Woodson, J., dissenting). "[T]he statutes of the various States are merely regulative of that power, and are not the creation of it." *Id.* (Woodson, J., dissenting).

102. *Id.* at 407, 409, 158 S.W. at 681, 683 (Woodson, J., dissenting).

103. *Id.* at 387, 158 S.W. at 681 (Brown, J., concurring). According to Judge Brown, "[i]f courts have inherent powers, then their jurisdiction has no definite bounds. It is only one short step from the assertion of inherent power to the assumption of absolute power." *Id.* Judge Brown agreed that English courts had inherent power, stating that the legislative and executive branches had it as well and that it was this "inherent, arbitrary and often tyrannical power" that precipitated the American Revolution. *Id.*

104. 1914 MO. B. PROCEEDINGS 81-82. The committee recommended legislation correcting the problem. *Id.*

105. *Id.*

attorneys.¹⁰⁶

The statute's first change expanded the power to discipline to include not only the prior statutory grounds of criminal conviction and defalcation of client's money, but also guilt "of any malpractice, fraud, deceit or misdemeanor whatsoever in his professional capacity."¹⁰⁷ The addition of the word "whatsoever" could have indicated that the legislature intended to increase the power of the court in the *Selleck*-type case.

Another section of the statute went even further in expanding the power of the court. While retaining summary proceedings for charges based on conviction of a crime, the law provided for a trial when charges were brought for conduct other than a criminal conviction, even if "the attorney *be acquitted or discharged upon his [criminal] trial.*"¹⁰⁸

Following these legislative changes, the inherent power issue first arose in *In re Sizer*,¹⁰⁹ where the original charges were filed with the supreme court.¹¹⁰ Arguing that the state constitution gave the supreme court appellate jurisdiction only, the attorneys moved to dismiss the charges against them.¹¹¹ Chief Justice Woodson, although expressing his personal dislike for the proposition, found that inherent power conferred original jurisdiction on the court to supervise inferior courts and thus gave rise to the power to disbar in certain cases.¹¹² When *Sizer* was heard later on the

106. 1919 Mo. Laws 151.

107. *Id.* at 152, § 951. The same section also make it an offense to fail to disclose, on application for Missouri bar admission, removal or disbarment in another jurisdiction. *Id.*

108. *Id.* at 152-53, § 956 (emphasis added). Charges in disciplinary matters under the 1919 revisions had to be "in writing and verified." The charges could be filed by an attorney or by a judge. The supreme court, the courts of appeals, and the circuit courts were authorized to hear ethics matters. *See id.* at 152, § 952. When charges were filed, the court fixed a hearing date and ordered a copy of the charge served on the attorney-respondent. *Id.* §§ 953-954. If, on the return date, summons had been served on the respondent and respondent failed to appear, the hearing court was permitted to proceed ex parte. *Id.* § 955. The statute also permitted commissioners to hear the matter and report findings to the court. *See id.* at 953, § 957. Appeals from disbarment proceedings were made directly to the supreme court, by error, and the court was directed to hear speedily such matters "at the next term of said court unless continued for cause." *Id.* § 958. Finally, if a lawyer was suspended for more than one year, application for reinstatement had to be made to the court that originally heard the matter. *Id.* § 959.

109. 300 Mo. 369, 254 S.W. 82 (En Banc 1923).

110. *Id.* at 374, 254 S.W. at 82.

111. *Id.* The charges were filed against F.P. Sizer and H.A. Gardner. The substance of the motion was that the jurisdiction of the supreme court was limited to appellate jurisdiction, unless otherwise provided for in the constitution. *Id.* at 376, 254 S.W. at 83.

112. *Id.* at 377, 254 S.W. at 83. The argument was that the court had original jurisdiction to supervise inferior courts, with the legislature powerless to limit such power. *Id.*

merits, Chief Justice Graves noted that the 1919 statutory revisions apparently were designed to "cure the troubles suggested in Selleck's case."¹¹³

As can be seen from *Sizer*,¹¹⁴ even the most vigorous advocates of inherent power in *Selleck* were willing to accede to legislative control over the practice of law. Thus, *Sizer* stands only for the proposition that the supreme court has inherent original jurisdiction to hear disbarment cases, but not inherent power to increase beyond legislative pronouncement the types of conduct that would sustain a disbarment action. *Sizer*, however, did not foreclose the use of inherent power.

Events during succeeding years caused the court to re-examine its position on inherent power and on the need to exercise it to protect the public. To a large extent, those events were set in motion by the bar of Missouri. Consequently, it is necessary to review the role of the bar association in the creation of disciplinary rules for lawyers.

IV. THE INFLUENCE OF THE BAR ASSOCIATION

The Missouri Bar Association, a voluntary organization, was formed at a meeting in Kansas City on December 29, 1880, by passage of a constitution and bylaws.¹¹⁴ The initial constitution called for a standing committee on grievances,¹¹⁵ which later became the Committee on Ethics and Grievances.¹¹⁶ The role of the early grievance committee was undefined at least until 1907, when the committee recognized, although refused to ac-

113. *In re Sizer*, 306 Mo. 356, 369, 267 S.W. 922, 926 (En Banc 1924). The charges against *Sizer* and *Gardner* stemmed from their personal injury business and involved the use of paid agents to solicit personal injury claims as well as other alleged misdeeds in soliciting and representing personal injury clients. *Id.* at 366-68, 267 S.W. at 925. After discussing all of the charges, the court found an absence of proof and all charges were dismissed. *Id.* at 391, 267 S.W. at 934. *Gardner*, however, was later suspended for one year for paying agents to solicit personal injury cases. *See In re Gardner*, 232 Mo. App. 502, 119 S.W.2d 50 (Spr. 1938).

114. *See* 1881 MO. B. PROCEEDINGS 23-27. The constitution and bylaws of the association were printed at *id.* 60-66. The secretary reported that Missouri was not alone in organizing its bar as "throughout the United States, State Bar Associations . . . [were] being organized . . . in the interest of the profession and the public at large," and that considerable interest was being shown in the efforts of the Missouri bar. *Id.* at 27. Membership in the bar association was organized by circuits. *Id.* at 60-61. *See generally* Oliver, *The Story of the Missouri Bar, 1880-1965*, 32 J. MO. B. 378 (1976).

115. 1881 MO. B. PROCEEDINGS 24-25.

116. This change occurred sometime at or around the thirty-fifth annual meeting of the association, in 1917. The committee report that year was given as the "Report of Committee on Grievances." 1917 MO. B. PROCEEDINGS 86. The constitution of the association for that year, however, lists, for the first time, the committee as the "Committee on Grievances and Legal Ethics." *Id.* at 20.

cept, that part of its duties included investigating ethics matters.¹¹⁷ This is not to say that the bar did not recognize its role in ensuring competence of its members. Beginning in 1900, the bar attempted to induce legislative action, through its legal education committee, on a bill to redefine the requirements for admission to practice and to require that applications for admission be controlled by a board of bar examiners.¹¹⁸ The bar's efforts, finally successful in the 1905 legislative session,¹¹⁹ prompted the education committee to recommend to the 1906 bar association meeting the adoption of formal ethical guidelines for members of the association.¹²⁰

117. That the effectiveness of the committee was open to question can be seen from two of the committee's reports. The 1905 committee report begins as follows: "First, we do not . . . [know] what kind, or kinds, of Grievances this Committee should take cognizance of, and have been unable to find anyone who does know." 1905 MO. B. PROCEEDINGS 66. The committee reported that it asked the president of the association to define the committee's function and received the following reply from President John D. Lawson:

I really do not know exactly what the duties are of the Committee on Grievances, but the Constitution of the Association requires the President to appoint such a committee and that that committee shall present an annual report to the Association, so I have thrown the burden of the matter on you.

Id. at 68.

By 1907, it was clear that the committee was aware that its charge included investigations of violations of ethical obligations. *See* 1907 MO. B. PROCEEDINGS 36. In 1907, the committee met only by correspondence and found no grievances in any of the committees in the counties wherein the committee members resided. *Id.* at 35-36. It was the opinion of the group that any grievances which did occur were better handled by the local bar association than by the state bar. *Id.* at 35-36.

118. *See* 1900 MO. B. PROCEEDINGS 22. There were two objectives: the first was to bring the power of admission under the control of the supreme court, and the second was the appointment, by the court, of a commission to monitor admission. *Id.* The idea had first been proposed at the 1899 meeting. *Id.* at 20-21. It was in 1900 that the first legislation was introduced; the bill was never considered by the Missouri House, however. *Id.* at 22. The 1900 bar meeting appointed a committee to redraft the legislation for presentation to the next general assembly. *Id.* at 22, 27.

119. 1906 MO. B. PROCEEDINGS 27. *See also* 1905 Mo. Laws 48.

120. *See* 1906 MO. B. PROCEEDINGS 29. It was noted that the bar examiners tested applicants on legal ethics. *Compare id. with* 1905 Mo. Laws 48, § 6. Consequently, the bar examiners needed an ethics code and found one in Alabama. *See* 1906 MO. B. PROCEEDINGS 29. That code had been the first in the country, having been adopted on December 14, 1887. *See* 31 A.B.A. REP. 676 (1907). The Alabama code served as the basis for all other ethics codes then existing. *Id.* at 685. The principal drafter of the Alabama code was Judge Thomas G. Jones of Alabama. 33 A.B.A. REP. 567 (1908). The legal education committee recommended the adoption of this code for the Missouri bar, and the recommendation was accepted by the membership. 1906 MO. B. PROCEEDINGS 30, 42. The entire code is printed at *id.* at 31-41.

As a result, the Missouri Bar Association in 1906 became the eleventh state bar association in the nation to adopt a code of professional conduct for attorneys, a code identical to the nation's first formal ethics code, adopted in Alabama in 1887.¹²¹ That code remained in force for the bar association's members until 1914 when the bar adopted the Canons of Ethics, which had been adopted in 1908 by the American Bar Association.¹²²

It was not until thirteen years after the *Selleck* decision, however, in 1925, that the bar association made its first real efforts to institute formal regulation for members of the bar. The 1925 report of the Committee on Grievances and Legal Ethics stated:

In recent years a number of the states in the Union, by legislative enactment, have undertaken with a considerable degree of success to define what might be considered to be ethical or unethical practices by lawyers. In most instances these legislative enactments declare as illegal certain practices, and make such unethical practices grounds for disbarment.¹²³

As a result of this statement, the committee recommended the appointment of a special committee to study this legislation, recognizing that any recommendations for adoption of lawyer disciplinary regulations ought to be made to the Missouri legislature.¹²⁴ At the same time, however, the committee noted its dissatisfaction with the ability of the legislative process effectively to ensure ethical competence.

While the bar had been successful in having the 1905 statute adopted, the bar also recognized that its relationship with the legislature was poor. In assessing the chances for passage of any recommendations to be made by this special committee, the association stated:

121. See note 120 *supra*.

122. See 1913 MO. B. PROCEEDINGS 26-37. The recommendation was made to the bar by the Constitutional and Statutory Revision Committee. *Id.* at 26. The ABA had appointed its first committee to study a proposed code of ethics in 1905. See 31 A.B.A. REP. 63 (1907). By 1906, the committee reported that a code was both advisable and practical. See *id.* at 681, 684. At the 1907 meeting, the committee was directed to prepare a proposed code by May 1, 1908. See *id.* at 64. At this time the committee included a Missourian, Franklin Ferriss. See *id.* at 680. Ferriss was a member of the Missouri Bar Association. See 1907 MO. B. PROCEEDINGS 300. The debate on the committee's proposal at the 1908 meeting in Seattle was considerable. See 33 A.B.A. REP. 55-86 (1908). In the end, the 32 canons proposed by the committee were adopted as written, with one exception. The canon on contingent fees was rewritten by the membership. See *id.* at 55-86, 574-84. Franklin Ferriss was on the final committee. See *id.* at 573.

123. 1925 MO. B. PROCEEDINGS 54.

124. *Id.* The list of committees of the Missouri Bar Association for 1925-1926 recognizes that such a committee was adopted. See *id.* at viii.

The Legislature gave scant consideration to meritorious bills sponsored by the St. Louis Bar Association, intended to correct unethical practices among lawyers in Missouri. The legislative conscience seems hardly awakened to the need of remedial measures of this kind, and to the fact that the public generally is, or ought to be, profoundly interested in the elimination of unethical methods practiced by some lawyers.¹²⁵

The special committee reported back to the bar association at the 1926 annual meeting.¹²⁶ The committee noted that sixteen states already had prescribed by statute the conduct of lawyers. These statutes conformed "in the main" with the Canons of Ethics of the American Bar Association.¹²⁷ The conclusion of the committee was "that a code of professional ethics be enacted by the Legislature of the State of Missouri, embodying or based upon" the ABA Canons.¹²⁸ Mere enactment of the canons, however, was not sufficient to compel adherence to them. Thus, the committee further recommended that the canons "should be rigidly, impartially, fearlessly and vigorously upheld and supported by state bar associations and bench and bar alike."¹²⁹

By 1928, despite the urging of the bar, the legislature had done nothing. Frustration among the members of the bar association was growing. At the annual meeting, Boyle G. Clark, chairman of the bar's ethics and grievance committee, noted that the committee "has had complaint after complaint come before it. In view of the decisions of the Supreme Court of this state, we could do nothing."¹³⁰ Clark explained that the purpose of the prior special committee was to seek a solution to this inability to act, concluding, "nothing can be done unless we get some legislation."¹³¹

At this time, the ethics and grievance committee of the bar association also was uncertain whether its duties included investigating offenses only

125. *Id.* at 104.

126. *See* 1926 MO. B. PROCEEDINGS 27.

127. *See id.* at 28. The states which had so enacted legislation, according to the committee, were Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Wisconsin, and Washington. *Id.*

128. *Id.* at 30. The committee directed its attention not only to what it termed the "ambulance chaser," but also to "those who profess to live upon the higher planes of professional ethics." *Id.* at 29-30. These lawyers were those who sought "to advertise their prowess and achievements" through active participation in social, club, and civic activities. *Id.* at 30. The committee also condemned nonlawyer practice of law, such as situations where title companies reviewed their own and other companies' abstracts, and where trust companies prepared wills naming the trust company as executor. *Id.* at 29.

129. *Id.* at 30.

130. 1928 MO. B. PROCEEDINGS 89.

131. *Id.*

of members of the association,¹³² a group that was estimated in 1930 to include only about one quarter of the practicing lawyers in the state, or whether it was to investigate offenses by others as well.¹³³ The committee had investigated nonmembers as early as 1917. This role, however, was unofficial and thus, in 1930, in an effort to further protect the public, the committee was authorized to act in all cases of lawyer misconduct, regardless of the association membership of the offending lawyer.¹³⁴

The year 1930 also marked the beginning of a concerted effort to integrate the Missouri Bar Association.¹³⁵ Indeed, the 1930 meeting of the association authorized a committee to investigate fully the incorporation of the bar association.¹³⁶ The committee found that, although legal problems prevented incorporation, the legislature could create a corporate-like entity known as the State Bar of Missouri.¹³⁷ A bill to this effect was introduced, but was not enacted, in the 1931 legislature,¹³⁸ causing the bar to recommend concerted action in the 1933 legislative session.¹³⁹

132. See, e.g., 1929 MO. B. PROCEEDINGS 38 (committee believed it should investigate all complaints, regardless of association membership); 1930 MO. B. PROCEEDINGS 123 (committee adopted same policy, but recognized difficulties in such policy).

133. See *Reorganization of Missouri Bar Association*, 1 MO. B.J., Nov. 1930, at 3. At the time, there were approximately 6,500 lawyers in the state, about 1,700 of whom were association members. *Id.*

134. See 1930 MO. B. PROCEEDINGS 124. Prior to this time, the ethics and grievance committees had been investigating other nonassociation members of the bar, but on an ad hoc basis. See, e.g., 1917 MO. B. PROCEEDINGS 86. The committee members investigated as "citizen lawyers" rather than through any official sanction, *id.* at 87, although the association, in 1917, did allow the committee a budget of \$300 per year to do whatever was necessary to purge "the profession of practitioners engaged in unlawful or unethical methods." See *id.* at 89. See also note 132 *supra*.

135. See *Reorganization of Missouri Bar Association*, *supra* note 133. The president of the association, J.W. Jamison, prepared several revisions to the constitution of the bar association designed to reorganize the bar. *Id.* at 3-4.

136. 1930 MO. B. PROCEEDINGS 73-74.

137. 1931 *Report of Special Committee on the Incorporation of the Bar*, 3 MO. B.J., Jan. 1932, at 6.

138. *Id.* The reasons given by the committee for the failure of the bill were that the matter was too new and that other legislation was more urgent. See *id.*

139. *Id.* A bill already had been proposed. During this time, the bar remained active, both in internal reorganization and in ethical matters. A new constitution for the bar association designed to affiliate local bars into the Missouri bar was adopted in 1931. See *Affiliated Bar Plan Becomes Effective*, 2 MO. B.J., Dec. 1931, at 3. The new constitution encompassed proposals made by President Jamison in 1930. Compare *Constitution of Missouri Bar Association*, 2 MO. B.J., Dec. 1931, at 64 with *Reorganization of the Missouri Bar Association*, *supra* note 131.

In addition, President Jamison called a symposium to determine an "orderly and business-like plan for the handling of proper complaints against attorneys

Although incorporation was self-interest legislation for the still voluntary bar, the proposed bill was public-oriented. When the bar was fully integrated, the association could work effectively with the court in drafting rules of professional conduct and could aid the court in protecting the public by enforcing those rules.¹⁴⁰ As drafted by the association, a unified bar act was introduced in the Missouri House on January 18, 1933.¹⁴¹ Con-

and their methods." *A Symposium on Disbarment Proceedings*, 2 MO. B.J., June 1931, at 6. That symposium had, as one of its issues, whether courts had "inherent power [to discipline] based upon unworthy conduct entirely aside from the Statute." *Id.* For a composite of those discussions, see Lawson, Leahy & McReynolds, *Disbarment—A Legislative or Judicial Power. The Cannon Case*, 3 MO. B.J. 39 (1932). Those in the symposium found, in Missouri, only inherent power subject to legislative regulation. *Id.* at 46. This seemed illogical. "[E]ither the legislature has the authority to limit and define the conditions upon which lawyers can be disbarred, or they do not have the authority." *Id.* Thus, a resolution was adopted requesting the supreme court to adopt an ethics code and enforce it. *Id.* at 46-47.

140. See *Preliminary Report of Committee on Proposed Incorporation or Integration of the Missouri Bar*, 3 MO. B.J. 54 (1932). To fund the organization for discipline of the bar, the committee recommended that the legislature charge the members of the profession. *Id.*

At this time, nine states had adopted integrated bar organizations: Alabama, 1923; California, 1927; Idaho, 1923; Nevada, 1928; New Mexico, 1925; North Dakota, 1921; Oklahoma, 1929; South Dakota, 1931; Utah, 1931. Barker, *Progress in Bar Organizations*, 3 MO. B.J. 52, 53 (1932). Bills for bar integration had passed legislatures in Arizona and Wyoming in 1931, but were vetoed by the governors. *Id.* Unsuccessful bills had been introduced in Missouri, Ohio, and Texas. *Id.* Bills were to be introduced in 1932 in Kentucky, Mississippi, and Virginia, and bills were expected to be sought in 1933 in Minnesota, Oregon, and Washington. *Id.*

141. See *Bar Act Fails by Narrow Margin*, 4 MO. B.J. 35 (1933). The prepared act contained 33 sections. Sections 1-13 dealt with the title of the act, mechanics of the organization, membership, officers, and duties. See *Proposed Bill on Self-Government of the Bar*, 3 MO. B.J., Nov. 1932, Supplement, at 1-10. Section 14 authorized the supreme court to adopt rules of professional conduct. *Id.* at 10. Sections 15 and 16 created a local administrative committee in each circuit and provided for the duties of the committees, including the preliminary and investigative work for the State Board of Governors in disciplinary matters. *Id.* at 11-13. Sections 17-20 provided a procedure for disciplinary matters, including venue, notice and right to respond to charges, a procedure for discovery, subpoenas of witnesses, and powers of the board in disciplinary matters. *Id.* at 13-18. Sections 21, 22, and 25-28 were administrative. *Id.* at 18, 20-21. Section 23 provided for a mandatory yearly fee of \$5 per member, and section 24 provided for mandatory and automatic suspension from practice for failure to pay that fee. *Id.* at 18-20. Sections 29 and 30 related to the unauthorized practice of law, and section 31 gave the supreme court control over the bar. *Id.* at 21-22.

Some changes in these provisions were made by the Judiciary Committee. See *Synopsis of Committee Substitute Bill for State Bar of Missouri*, 4 MO. B.J. 35 (1933).

trary to the optimism of the bar, the bill failed.¹⁴² A similar bill in the Senate met the same fate.¹⁴³ The legislative move for bar integration and ethics rules was dead.¹⁴⁴

Undaunted, the bar association, in the same issue of the Missouri Bar Journal that mourned the death of the legislation, planted the seed of a new idea for public protection,¹⁴⁵ which was more fully explained in a May 1933 article:

If the courts have inherent power to deal with the erring lawyer, as an officer of the court; if the proceeding is not criminal; if the result is not punishment, but for the protection of the court and society; and if the method of inquiry is not technical, then it would seem to follow that the courts may proceed in such manner as to them seems best adapted to develop the facts.¹⁴⁶

142. See *Bar Act Fails by Narrow Margin*, *supra* note 141, at 35-37. The bill fell seven votes short of passage with an additional two supporters of the bill changing their votes to "no" at the last minute so they could later seek reconsideration. *Id.* at 37-38. On reconsideration, opposition, mainly from St. Louis, caused the bill to fail again. *Id.* at 38. An analysis of the vote showed the following:

	YES	NO	ABSENT	TOTAL
St. Louis City	1	13	5	19
Jackson County (Kansas City)	4	2	4	10
Buchanan County (St. Joseph)	2	1	0	3
Greene County (Springfield)	2	0	1	3
Jasper County (Joplin)	3	0	0	3
"Out State"	59	31	22	112
Total	71	47	32	150

Id. at 39. While 32 votes are recorded as absent, observers of the vote noted that "[n]ot more than a half dozen were actually absent," and that when the members were called to vote, "these 32 sat in their seats and did not answer the roll call." *Id.* at 38.

143. *Id.* at 38. The Senate bill was a duplicate of the House substitute bill and was introduced when opposition began to arise in the House. *Id.*

144. Publicity, both too much and too little, may have caused the vote to turn out as it did. According to the floor leader of the House, many lawyers in the state actually were opposed only to the original bar bill. To many of those, however, the committee substitute bill would have been acceptable. Those lawyers knew only about the original bill. The actual provisions of the substitute were not known outside the legislature. If the provisions of the substitute had been publicized, many of those opposed "would have supported the Substitute Act and would have written their representatives to that effect." Keating, *The Defeat of the Bar Bill*, 4 MO. B.J. 83, 83 (1933).

145. See *Bar Integration Through Supreme Court Rule*, 4 MO. B.J. 45 (1933). The article hypothesized that a supreme court could organize the bar as part of superintendent control over admission and discipline of the bar. See *id.*

146. Lawson, *Regulation of the Bar by the Supreme Court of Missouri*, 4 MO. B.J. 67, 68 (1933). The article referred to action by the Illinois Supreme

The stage was set for the development of court rules through inherent power.

V. ISSUE AND ANSWER JOINED

In *In re Richards*,¹⁴⁷ Paul Richards was charged in an original proceeding for disbarment in the supreme court with multiple counts of unethical conduct by both the St. Louis Bar Association and the Missouri Bar Association.¹⁴⁸ It was alleged that Richards had accepted a retainer of \$1,000 from Alexander Berg while Berg was held hostage by kidnapers.¹⁴⁹ At the time he accepted the retainer, Richards allegedly already had been retained by the kidnapers and informed that the kidnapers would force Berg to give Richards the retainer together with a promissory note for an additional \$50,000, which would be payable to Richards.¹⁵⁰ Richards was to collect on the note, which was in fact the ransom, for the kidnapers and would thereafter be entitled to retain \$10,000 from the \$50,000 for his efforts.¹⁵¹ Richards accepted the retainer through Berg's personal attorney.¹⁵² As alleged in the complaint against him, Richards then used his ostensible position as attorney for Berg to further the plans of his real clients, the kidnapers.¹⁵³ Although Richards never received any of the ransom and Berg was returned safely to his family,¹⁵⁴ Richards was

Court which had, on April 21, 1933, ruled that the grievance committees of both the Illinois and Chicago bar associations had investigative and limited disciplinary enforcement power. *See id.*; *Voluntary Bar Association of Illinois Secures Powers of An Incorporated Bar*, 4 MO. B.J. 69 (1933). The title is not quite accurate as the power was limited only to disciplinary matters.

147. 333 Mo. 907, 63 S.W.2d 672 (En Banc 1933).

148. *Id.* at 910, 63 S.W.2d at 672-73.

149. *Id.* at 918, 63 S.W.2d at 677. The retainer was for Richards to act as an intermediary between Berg and the kidnapers.

Alexander Berg was a St. Louis fur dealer. Shortly after leaving his business, Berg was accosted at gunpoint by Edward Barcume and Charles Heuer, who forced Berg's chauffeur to drive where they directed. *See State v. Peak*, 68 S.W.2d 701, 702 (Mo. 1934). Berg eventually was taken to an apartment in St. Louis and was forced by his captors to write several letters. Berg was directed to write to Morris Levinson, his personal attorney, to hire Richards for a retainer of \$1,000 to act as Berg's attorney for obtaining his release. Later, Berg was required to write a promissory note to Richards' order for \$50,000, which was the amount of ransom demanded. Richards ostensibly arranged Berg's release on the condition that Richards receive the \$50,000 the day following Berg's release. Payment was prevented, however, because attorney Levinson kept the police informed, and all of the participants, including Richards, were arrested shortly following Berg's release. *Id.*

150. 68 S.W.2d at 702. *See also* 333 Mo. at 918, 63 S.W.2d at 677.

151. 333 Mo. at 918, 63 S.W.2d at 677.

152. *Id.*

153. *Id.*

154. 68 S.W.2d at 702.

indicted for kidnapping, tried, and acquitted.¹⁵⁵

In responding to the ethics complaint against him, Richards first moved to dismiss the charge on jurisdictional grounds, and then alleged by answer that the court had no authority to hear the case because, in light of *Selleck*, the acquittal of the criminal charge resolved the ethics matter.¹⁵⁶ The bar associations vigorously prosecuted the matter because the conduct of Richards brought "reproach upon . . . [the] profession and . . . [alienated] the favorable opinion the public should entertain concerning it."¹⁵⁷

In *Richards*, the supreme court had an opportunity to re-examine many issues considered in *Selleck*.¹⁵⁸ The principal issues were the extent of the court's inherent power and whether that power permitted the court to discipline attorneys for the same transaction that already had resulted in a criminal acquittal.¹⁵⁹

The motion to dismiss was premised on the argument that the supreme court, both constitutionally and statutorily, possessed only appellate jurisdiction and thus had no power to hear this original matter. This motion caused the court to begin its discussion with the inherent power issue, noting that *Selleck* had granted *some* inherent power to the court, but that the extent of that power was unclear.¹⁶⁰ Next, the court cited the opinions of several scholars and decisions of more than twenty states, the federal courts, and the United States Supreme Court that supported a theory of inherent power in disciplinary matters.¹⁶¹ After noting several Missouri decisions that seemed to favor inherent power,¹⁶² the court stated the argument in opposition to inherent power:

[I]n the distribution of state governmental power, executive and judicial departments are invested by grant, whereas, by limitations placed on the legislative department, the people reserve certain power to themselves, so that all governmental power not thus expressly granted or reserved is vested in the Legislature. From this

155. 333 Mo. at 919, 63 S.W.2d at 678. It would be determined later that one reason for Richards' acquittal may have been the bribery of a juror in the criminal case by Richards' trial attorney, Verne Lacy. Lacy subsequently was disbarred, in part, because of his conduct. See *In re Lacy*, 234 Mo. App. 71, 74, 112 S.W.2d 594, 595 (St. L. 1937).

156. 333 Mo. at 910, 919, 63 S.W.2d at 673, 678.

157. 333 Mo. at 909 (argument in Brief for Complainants).

158. For a discussion of *Selleck* and the response of the bar and the legislature, see notes 87-108 and accompanying text *supra*.

159. *Richards* assumed that the facts underlying the indictment and the facts supporting the disciplinary information were the same. 333 Mo. at 920, 63 S.W.2d at 678.

160. *Id.* at 911, 63 S.W.2d at 673.

161. *Id.* at 912-14, 63 S.W.2d at 674-75.

162. *Id.* at 913-14, 63 S.W.2d at 674-75.

it is argued that, if the power to create and regulate a bar is not granted to the judicial department or reserved to the people by limitation on the legislative department, it is vested in the Legislature, and that, all judicial power being granted power, it is derivative and cannot be inherent.¹⁶³

In rejecting this argument, the court noted that the constitution vested all legislative power in the legislature and all judicial power in the constitutional courts of the state.¹⁶⁴ Thus, even absent express power, both the legislature and the courts had to have some inherent power to carry out "all objects naturally within the orbit of that department."¹⁶⁵ Under this rationale, the issues would turn on whether the power to disbar was within the orbit of things necessary to carry out the power of the judicial department.¹⁶⁶ Thus stated, the court easily answered the question by finding that the proper administration of justice "cannot long continue . . . without power to admit and disbar attorneys who from time immemorial have in a peculiar sense been regarded as . . . [the court's] officers."¹⁶⁷

This finding left unanswered only the issue of whether the inherent power to admit or disbar was constitutionally or statutorily limited,¹⁶⁸ an issue that had split the six justices who were in favor of the existence of inherent power in *Selleck*.¹⁶⁹ The principal argument in favor of this limitation on inherent power arose, said the court, because disbarment proceedings were thought adversarial, akin to traditional court proceedings.¹⁷⁰ Rejection of the argument came through a recitation of the line of cases holding exactly the reverse. These cases held that the proceedings were not adversarial and that the purpose was not punishment of the attorney but protection of the public. The court declared that nothing in the nature of the disbarment proceeding substantively limited the court.¹⁷¹ The court stated, "The vital fact is that such power, independent of express grant either constitutional or statutory, exists in the judicial branch of government, and therefore in courts which constitute the 'separate magistracy' to which the judicial power is expressly confided."¹⁷² Richards' motion to dismiss the complaint was denied.¹⁷³

In his answer, Richards had alleged that he could not be disciplined

163. *Id.* at 914, 63 S.W.2d at 675.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 915, 63 S.W.2d at 675.

168. *Id.*

169. See notes 95-103 and accompanying text *supra*.

170. 333 Mo. at 915, 63 S.W.2d at 675.

171. *Id.* at 915-16, 63 S.W.2d at 676.

172. *Id.* at 916, 63 S.W.2d at 676.

173. *Id.* at 917-18, 63 S.W.2d at 677.

for criminal acts without a criminal conviction.¹⁷⁴ The court recognized that *Selleck* had held that the findings of a criminal court were binding on the court hearing a disbarment proceeding, but it then stated, "The fallacy of this majority holding was clearly indicated in two dissenting opinions."¹⁷⁵ The court referred to the enactment of the 1919 statute, which permitted a disciplinary charge even after acquittal in a criminal matter. This statute, according to the court, "removed the excuse for [the] judicial aberration" of the *Selleck* majority.¹⁷⁶ Thus, even with an acquittal, an attorney could be charged in a disbarment proceeding with acts amounting to "a misdemeanor and malpractice in his professional capacity."¹⁷⁷ Richards' conduct fit this category; consequently, he was disbarred.¹⁷⁸

174. *Id.* at 919-20, 63 S.W.2d at 678. The respondent claimed that the complaint in effect charged him with a "criminal offense involving moral turpitude," conviction of which is the first reason for disbarment named in the statute, and that, having been acquitted on such a criminal charge based on the same acts, such acts may not be charged and moved as reasons for his disbarment.

Id. at 920, 63 S.W.2d at 678.

175. *Id.* at 921, 63 S.W.2d at 679.

176. *See id.* The court went further by indicating affirmatively that any statute which prevented disciplinary investigation following criminal acquittal would be unconstitutional as a legislative encroachment on the power of the judiciary. *Id.*

177. *Id.* at 920, 63 S.W.2d at 678.

178. *Id.* at 931, 63 S.W.2d at 684. Thus, the decision answered all of the questions posed by the bar earlier in 1933. The courts did have inherent power to discipline lawyers as court officers. The disciplinary proceeding was not conducted as a typical adversarial case, designed to punish the attorney, but rather as an inquiry designed to protect the public. *See* note 146 and accompanying text *supra*.

According to Judge Atwood, who wrote the decision in *Richards*, the opinion did not break any new legal ground. *See* Current Events, *Aftermath of Richards case decision in Missouri*, 20 A.B.A.J. 1 (1934). The history of the decision, however, belies Judge Atwood's analysis. The case was considered important by the American Bar Association. *See* Editorial, *An Important Recent Decision*, 19 A.B.A.J. 711 (1933). In Missouri, Professor Wheaton said that the decision "required courage, and demonstrated that in this state sits a Supreme Court of ability and fearlessness." Wheaton, *Courts and the Rule-Making Powers*, 1 MO. L. REV. 261, 261 (1936). The decision was noted and commented on in both the St. Louis Law Review and the Kansas City Law Review. *See* Langknecht, *Judicial Regulation of the Legal Profession*, 3 K.C. L. REV. 54 (1935); *Attorneys—Disbarment—Authority of Court*, 19 ST. LOUIS L. REV. 146 (1934). In addition, the decision often has been cited as support for the assertion of inherent power in the areas of discipline, admission, and bar integration through court rule. *See, e.g., In re Machey*, 416 P.2d 823, 837 (Alaska 1964); *Petition of Fla. State Bar Ass'n*, 134 Fla. 851, 862, 186 So. 280, 285 (1938); *In re Kaufman*, 69 Idaho 297, 314, 206 P.2d 528, 538 (1949); *State ex rel. Boynton v. Perkins*, 138

The reaction of the Missouri Bar Association to *Richards* was immediate. It appeared that the court had assumed a power theretofore left to the legislature, the power to determine the type of conduct justifying discipline. Although decided on October 16, 1933, the *Richards* opinion was substantially excerpted in the October 1933 issue of the Missouri Bar Journal.¹⁷⁹

On November 4, 1933, the Executive Committee of the bar association adopted a resolution, in light of the opinion, requesting the supreme court "to appoint a commission . . . with power to investigate the means of regulating professional matters."¹⁸⁰ In adopting this resolution, the bar referred to full regulation of the profession because the opinion in *Richards* implied that inherent power was a blanket grant over the full panoply of attorney activity. The court agreed with the bar association ten days later and on November 14, 1933, ordered the appointment of a commission of lawyers to "make a thorough investigation and study of the subject of regulation of the practice of law, particularly with a view of ascertaining its most practical and effective scope and administration in this state."¹⁸¹

The commission filed its results with the court after May 12, 1934.¹⁸²

Kan. 899, 905, 28 P.2d 765, 768 (1934); Commonwealth *ex rel.* Ward v. Harrington, 266 Ky. 41, 51, 98 S.W.2d 53, 58 (1936); *Ex parte* Steckler, 179 La. 410, 422, 154 So. 41, 45 (1934); Collins v. Godfrey, 324 Mass. 574, 577, 87 N.E.2d 838, 840 (1949); *In re* Disbarment of Tracy, 197 Minn. 35, 44, 266 N.W. 88, 92 (1936); *In re* Unification of Mont. Bar Ass'n, 107 Mont. 559, 561, 87 P.2d 172, 172 (1939); *In re* Hansen, 101 Mont. 490, 501, 54 P.2d 882, 887 (1936); *In re* Integration of State Bar Ass'n, 133 Neb. 283, 285, 275 N.W. 265, 266 (1937); *In re* McBride, 164 Ohio St. 419, 422-23, 132 N.E.2d 113, 115 (1956); *In re* Bozarth, 178 Okla. 427, 429, 63 P.2d 726, 729 (1936); Integration of Bar Case, 244 Wis. 8, 40, 11 N.W.2d 604, 619 (1943).

179. *Supreme Court Proclaims Its Power Over Bar*, 4 MO. B.J. 157 (1933).

180. *Resolution Requesting Appointment of Commission*, 4 MO. B.J. 180 (1933).

181. *Order of Supreme Court Establishing Commission*, 4 MO. B.J. 181 (1933). The order resulted from an informal meeting after the adoption of the resolution requesting the commission between the bar's executive committee and the members of the court. See *Move for Judicial Regulation of Law Practice*, 4 MO. B.J. 180, 180-81, 184 (1933).

The appointment of the commission, on the heels of *Richards*, was lauded as "[a] new day for the legal profession of Missouri." *Gaining Momentum*, 4 MO. B.J. 210 (1933). The commission divided itself into subcommittees to study information available from other states, regulatory procedure, the status of Missouri law, the canons of ethics, admission to practice, eligibility to practice, and extension of commission work into general practice and procedure. See *Commission on Regulation of Law Practice Goes to Work*, 4 MO. B.J. 213 (1933). The commission's chairman was Henry Caufield, a former governor.

182. See *Work of Supreme Court Commission Near End*, 5 MO. B.J. 56 (1934).

The court adopted the recommendations with little change on June 18, 1934, only eight months after the *Richards* decision.¹⁸³ The rules for admission to the bar were taken in part from the statute, with additions designed to upgrade the requirements for admission to the bar.¹⁸⁴

The rules relating to discipline were new to Missouri, but they have survived largely intact to the present. The court first adopted Canons 1 through 48 of the Canons of Ethics of the American Bar Association.¹⁸⁵ To enforce the standards of the canons, the court created a bar committee in

183. See *Supreme Court Adopts Commission's Report*, 5 MO. B.J. 83 (1934). The rules were made effective as of November 1, 1934. See *New Supreme Court Rules*, 5 MO. B.J. 99 (1934).

184. The new rule for admission was designated Supreme Court Rule 38. Mo. Sup. Ct. R. 38 (1934), *reprinted in* 351 Mo. at xxii-xxiv (1943).

Both the statute and the rule provided for admission only to those over the age of 21 with good moral character. RSMO ch. 78, § 11696 (1929); Mo. Sup. Ct. R. 38(1)(a) (1934). The rule required citizenship in the United States and residency in Missouri for three months, but the statute only required residency. *Compare id. with* RSMO ch. 78, § 11696 (1929). Application to take the bar examination had to be filed under both the rule and the statute, but the rule extended the time for filing from 10 days before the examination to 90 days before the examination and required two affidavits from lawyers attesting to the moral qualifications of the applicant. *Compare* Mo. Sup. Ct. R. 38(1)(b) (1934) *with* RSMO ch. 78, § 11701 (1929). The rule increased the application fee from \$10 to \$25. Mo. Sup. Ct. R. 38(1)(b) (1934). The rule prevented an applicant from taking the examination until the board of bar examiners had studied the character and fitness of the applicant and the application had been approved by the court. *Id.* 38(1)(c). Educational requirements were increased under the rule from a general education at least meeting graduation from an elementary school to graduation from high school or the equivalent and at least three years of legal study either in law school or with a practitioner, the latter method being available only where the student had preregistered with the court. *Compare id.* 38(1)(d)-(f) *with* RSMO ch. 78, § 11696 (1929).

The bar examination, under both the rule and the statute, was to be given in Jefferson City or such other location as permitted and the results were to be certified to the supreme court. *Id.* §§ 11699, 11702; Mo. Sup. Ct. R. 38(1)(g) (1934). Provisions for failure were changed, as the rule restricted the right to take the exam after a second failure. *Compare id.* 38(1)(h) *with* RSMO ch. 78, § 11702 (1929). Under the statute, the bar examiners were required to test the applicants' knowledge of specified subjects, while under the rule, the board had discretion as to subjects examined, subject to court approval. *Compare* Mo. Sup. Ct. R. 38(1)(g) (1934) *with* RSMO ch. 78, § 11700 (1929). The rule expanded the requirements to be met by an out-of-state lawyer seeking to be licensed in Missouri. *Compare* Mo. Sup. Ct. R. 38(1)(i) (1934) *with* RSMO ch. 78, § 11703 (1929).

185. Mo. Sup. Ct. R. 35 (1934), *reprinted in* 351 Mo. at vii-xv (1943). The canons were adopted as "the measure of the conduct and responsibility of the members of the bar of this Court and of all lawyers who practice in the State of Missouri." *Id.*

each judicial circuit,¹⁸⁶ gave them full subpoena power, and authorized them to hear the testimony of witnesses.¹⁸⁷ A standard form was adopted for informations.¹⁸⁸ Provision was made for answer by the accused attorney as well as for appointment of counsel for an indigent attorney.¹⁸⁹ All of these provisions are still in existence.¹⁹⁰

There also were provisions for investigation of complaints, for the filing of complaints with any member of the committee, for a committee investigation to determine the preliminary merit of a complaint, and for the filing of an information, if there was merit, either in the local circuit court or, with permission, in the supreme court.¹⁹¹ Prior to the filing of an information, the respondent was notified of the charges and of an opportunity to be heard.¹⁹² Trial of the matter was held in the circuit court, without a jury, similar "to proceedings for extraordinary legal proceedings."¹⁹³ Ap-

186. Mo. Sup. Ct. R. 36 (1934), *reprinted in* 351 Mo. at xv-xx (1943) (hereinafter referred to as Rule 36). Each committee was to consist of four lawyers appointed by the supreme court who would serve staggered terms. *Id.* 36(1).

187. Mo. Sup. Ct. R. 36(4) (1934). Application for subpoena was to be made by the committee chairman. The power included both duces tecum subpoena power and declimus deposition power. The power to take testimony included power to have the witnesses sworn. Failure to respond to a subpoena was to be reported to the court. *Id.*

188. *Id.* 36(5). The information could allege multiple acts of misconduct in separate counts. *Id.*

189. *Id.* 36(6)-(8).

190. See MO. SUP. CT. R. 5.10-.18 (hereinafter referred to as Rule 5). Rule 36(1) was substantially the same as Rule 5.10. Rule 36(4) is now encompassed by Rule 5.14. Today, however, the respondent may request subpoenas as well. Rule 36(5) was identical in substance to Rule 5.15. Rule 36(6) was substantially the same as Rule 5.16, except that the time for an answer was expanded to 30 days. The court is still permitted to proceed without answer, as in Rule 36(8), after the expiration of the 30 day period, under Rule 5.18. Rule 36(7) was substantially the same as current Rule 5.17.

191. Mo. Sup. Ct. R. 36(3) (1934). Today, a similar, slightly expanded investigative process exists. The bar committee may investigate, "with or without formal complaint," any allegation of unethical conduct. If no unethical conduct is found, the matter is dismissed. If conduct is found not to warrant a formal hearing, a written admonishment may be administered to the offending attorney. MO. SUP. CT. R. 5.12. If formal proceedings are required, notice is served on the respondent. *Id.* 5.13. Proceedings before the committees are kept confidential. *Id.* 5.24. Records of all investigations are kept and filed. *Id.* 5.12.

192. Mo. Sup. Ct. R. 36(3) (1934). The same is true today. See MO. SUP. CT. R. 5.12-.13. The right to notice of the full charges in a disciplinary proceeding became a matter of constitutional due process in *In re Ruffalo*, 390 U.S. 544 (1968).

193. Mo. Sup. Ct. R. 36(8) (1934). Today, the local committee tries the matter. MO. SUP. CT. R. 5.13. The trial, today, is pre-information rather than post-information as was true in the original rules. Compare Mo. Sup. Ct. R. 36(6), (8) (1934) with MO. SUP. CT. R. 5.13.

peals were to the supreme court.¹⁹⁴

The bar committees were given another important function: representing the full bar in investigation and prosecution of allegations of unauthorized practice of law.¹⁹⁵ This is still a function of the bar committees today.¹⁹⁶ To fund the created disciplinary process, the court adopted a rule assessing each member of the bar an annual fee of five dollars, payment of which was a prerequisite to practicing law.¹⁹⁷ Finally, the rules created a judicial council designed "to make a continuous study of the organization and rules of practice and procedure of the judicial system and its various parts" as well as to make recommendations for statutory change to the legislature.¹⁹⁸

The rules later were termed the "Missouri Compromise," because the court provided for regulation of the bar but not for integration of it.¹⁹⁹ The new rules, however, did attract nationwide attention²⁰⁰ as a result of their innovative nature. While the Supreme Court of Illinois in 1933 had adopted a rule conferring all disciplinary jurisdiction on two grievance committees,²⁰¹ thus providing precedent for the Missouri rule, the Missouri provisions for funding the disciplinary system, for the bar committees' responsibility for preventing unauthorized practice, and for the creation of the judicial council, "went further . . . than had been done theretofore."²⁰²

The adoption of these rules through the vehicle of inherent power met the need of protecting both the profession and the consuming public, a need previously unmet by the legislature. The traditional method for adopting bar regulation, however, was through the legislature. Consequently, the decision in *Richards* and the subsequent court rules were only the first step in the process of vesting full power in the supreme court.

194. Mo. Sup. Ct. R. 36(11) (1934). Today, following a trial by the circuit bar committee, if the committee finds probable cause that ethical violations have occurred, the information is filed in the supreme court. MO. SUP. CT. R. 5.13(h). The court hears the matter directly or through a master, *id.* 5.18, after service of the information on the respondent and a 30 day period for answer has elapsed, *id.* 5.16.

195. Mo. Sup. Ct. R. 36(12) (1934).

196. MO. SUP. CT. R. 5.25.

197. Mo. Sup. Ct. R. 37(1) (1934), *reprinted in* 351 Mo. at xx (1943). The office of general chairman of bar committees was created to administer that fund. Mo. Sup. Ct. R. 37(5) (1934). That position exists today, with the general chairman acting in a supervisory capacity over the various circuit bar committees. MO. SUP. CT. R. 5.01.

198. *See* Mo. Sup. Ct. R. 39(2) (1934).

199. Hemker, *The Integrated Bar of Missouri and the Missouri Court Plan*, 5 J. MO. B. 144, 145 (1949).

200. *See* Barrett, *An End and a Beginning*, 5 MO. B.J. 131, 131 (1934).

201. *See* note 146 *supra*.

202. *Missouri Bar Studies Original Organization Plan*, 6 MO. B.J. 58 (1935).

VI. CONFIRMING THE POWER

Like many innovations, the new court rules were challenged. The first challenge came in December 1935 in *In re Sparrow*,²⁰³ which questioned whether the rules created substantive law or merely codified procedure. Sparrow was charged with misconduct occurring prior to the new rules,²⁰⁴ but he was disciplined under the new rules.²⁰⁵ Sparrow challenged the disciplinary procedure on the theory that the procedure violated his due process rights,²⁰⁶ an argument the court found to have little merit.

Initially, the court said that the respondent misperceived the nature of discipline²⁰⁷ because he incorrectly equated it with a criminal prosecution.²⁰⁸ The proceeding was not designed to punish, but rather to protect the court.²⁰⁹ With respect to due process, the court said that the states could control the procedure employed in their courts and found that the rules were procedural.²¹⁰ Additionally, the new rules attempted to increase rather than to restrict due process by providing increased investigative procedures.²¹¹ As a result, the rules were "designed to lessen the likelihood of unfounded charges being brought in courts against an attorney at law, to his probable humiliation and injury."²¹²

203. 338 Mo. 203, 90 S.W.2d 401 (En Banc 1935).

204. *Id.* at 205, 90 S.W.2d at 403. The new rules became effective on November 1, 1934. *Order of Supreme Court Adopting Additional Rules*, 5 MO. B.J. 154 (1934). The misconduct was alleged to have taken place beginning in 1933. 338 Mo. at 204, 90 S.W.2d at 402. Proceedings were not started in the Springfield Court of Appeals, however, until September 3, 1935 (after the new rules became effective). *Id.*

205. 338 Mo. at 204, 90 S.W.2d at 402.

206. *Id.* at 207, 90 S.W.2d at 404. It was alleged that Rule 36(3) permitted the committee

with or without notice to the suspected party, to investigate in a summary and informal manner any matter of professional misconduct, and upon the testimony taken therein, to find "the accused guilty of the misconduct charged"; that such procedure does not give the accused such notice and opportunity to be heard, and to be confronted with the witnesses against him, as constitutes due process and, therefore, deprives respondent of his reputation, professional standing, and property, contrary to . . . [the due process clause of U.S. CONST. amend. XIV].

Id. at 206, 90 S.W.2d at 403.

207. 338 Mo. at 207, 90 S.W.2d at 404.

208. *Id.*

209. *Id.*

210. *Id.* at 206-07, 90 S.W.2d at 403-04. The new rules were said to have no effect on the substantive rights of a lawyer. Rather, they were "mere regulatory and procedural." *Id.* at 207, 90 S.W.2d at 404.

211. *Id.* These rules were designed to protect the lawyer by permitting the committee to be satisfied as to the existence of the merits of a complaint before the filing of an information. *See id.*

212. *Id.* The rules did provide an opportunity to be heard at the committee

Sparrow thus represents an attempt by the court to solidify its decision to regulate the practice of lawyers based on its inherent power through court-made disciplinary rules. Mere regulation of lawyers, however, was not the only objective of the bar. The regulation of the practice of law, or the appearance thereof, by nonlawyers also was necessary for the protection of the public.

In *Clark v. Austin*,²¹³ contempt charges were filed against three laymen²¹⁴ alleged to have engaged in the unauthorized practice of law through paid representation of persons before the Public Service Commission.²¹⁵ The issue presented was whether, by exercising inherent power through rules directed primarily at attorneys, the court could regulate the conduct of nonlawyers.²¹⁶

In the court's principal opinion, the *Richards* holding was first reiterated: "[T]he power to define and regulate the practice of law is, in its exercise, judicial and not legislative."²¹⁷ Thus, even though the practice of law was defined by statute, that definition could not interfere with the independent right of the court to define and regulate that practice.²¹⁸ The court reasoned that the constitutional vesting of judicial power in the courts, which created the inherent power, enabled the court to "determine the educational and moral qualifications of applicants for admission to the bar."²¹⁹ Because the practice of law is not confined to mere representative appearance in a court proceeding, regulation of the profession extended to

hearing before an information was filed, as well as at the hearing after the information was filed. See Mo. Sup. Ct. R. 36(3), (8) (1934). Consequently "due process of law . . . [is] plainly and adequately safeguarded." 338 Mo. at 207, 90 S.W.2d at 404. The court also rejected an ex post facto argument. *Id.* at 208, 90 S.W.2d at 404.

213. 340 Mo. 467, 101 S.W.2d 977 (En Banc 1937).

214. 340 Mo. at 473-74, 101 S.W.2d at 979. The action arose under the post-*Richards* Rule 36(12). It is interesting to note that Frank E. Atwood appeared of counsel for the informants. 340 Mo. at 472, 101 S.W.2d at 979. Atwood's term on the supreme court expired on December 31, 1934. See STATE OF MISSOURI OFFICIAL MANUAL 1933-1934, at 121. On September 19, 1934, Atwood was elected president of the Missouri Bar Association. *Proceedings of the Fifty-Fourth Annual Meeting, Missouri Bar Association*, 5 MO. B.J. 161, 243 (1934).

215. 340 Mo. at 477, 101 S.W.2d at 982. It was alleged and admitted by respondents, none of whom were licensed attorneys, that in such hearings they drafted pleadings and documents, advised as to strategy, and questioned witnesses in the actual hearings. *Id.*

216. *Id.* at 490, 101 S.W.2d at 983. One of the respondents alleged that the statute on the subject permitted the court to license attorneys only "in the courts of record of this state," and thus, because commission hearings were not courts, the supreme court had no power. *Id.*

217. *Id.* at 474, 101 S.W.2d at 980.

218. *Id.*

219. *Id.* at 477, 101 S.W.2d at 981-82.

“the practice of law outside court proceedings”²²⁰ and rendered the practice of law by a layman a contempt “because the wrong doer has affronted this court by usurping a privilege solely within the power of this court to grant.”²²¹ The reasoning appeared to be that denial of the power to punish the unauthorized practice as a contempt would destroy the inherent power to regulate the practice of law.

In what was labeled a concurring opinion,²²² Chief Justice Ellison argued that the court’s principal opinion overruled *Richards* by holding that the court’s “power to define and regulate the practice of law is *exclusive*” and that the legislature could not enter any field touched by the exercise of inherent power.²²³ The court’s assertion of exclusive power, he argued, would be disastrous.²²⁴ Because the *Sparrow* court had equated the disciplinary rules with procedural court rules,²²⁵ Chief Justice Ellison argued that the principal opinion in *Austin* meant that the legislature had no power over procedural law, thus effectively declaring unconstitutional Missouri’s recently enacted codes of civil and criminal procedure.²²⁶ Constitutional separation of powers could not be so complete as to prevent gray areas between them.²²⁷ As a result, “[e]ach of the three departments normally exercises powers which are not strictly within its province.”²²⁸ Recognizing that both admission to practice and regulation of professional conduct are primarily judicial functions does not prevent the legislature,

220. *Id.* at 481, 101 S.W.2d at 984. This rationale was based on two theories. First, “[w]hether or not one is engaged in the practice of law depends upon the character of acts he performs and not the place where he performs them.” *Id.* at 480, 101 S.W.2d at 983 (emphasis added). Thus, the legislature had no power to bind the court by defining such acts contrary to the court’s definitions. *See id.* Second, “[a] person may never appear in court and yet be engaged in the practice of law.” *Id.* at 481, 101 S.W.2d at 984. Implicit in this statement is the theory that if the court had no power to regulate conduct by an attorney who never appeared in court, the profession would be bifurcated, with trial lawyers subject to discipline by the court and office lawyers subject to discipline by the legislature.

221. *Id.* (quoting *People ex rel. Ill. State Bar Ass’n v. Peoples Stock Yards State Bank*, 344 Ill. 462, 473, 176 N.W. 901, 906 (1931)).

222. Although all of the judges of the court concurred in the result reached in the foregoing analysis, five of the judges joined in a separate concurrence. *See* 340 Mo. at 482, 101 S.W.2d at 985 (Ellison, C.J., concurring). This opinion, by Chief Justice Ellison, has been recognized by at least one author as the majority opinion. Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 477 (1937). The principal opinion, however, also has been referred to as the decision of “[o]ur Supreme Court.” *Automobile Club v. Hoffmeister*, 338 S.W.2d 348, 355 (Mo. App., St. L. 1960).

223. 340 Mo. at 483, 101 S.W.2d at 986 (Ellison, C.J., concurring).

224. *See also* Williams, *supra* note 222, at 482, 484.

225. 338 Mo. 203, 207, 90 S.W.2d 401, 404 (En Banc 1935).

226. 340 Mo. at 484, 101 S.W.2d at 986 (Ellison, C.J., concurring).

227. *Id.* at 486, 101 S.W.2d at 987 (Ellison, C.J., concurring).

228. *Id.* (Ellison, C.J., concurring).

under its police power, from adopting reasonable laws in aid of this purpose.²²⁹ Thus, “[i]f the courts were lax and slothful in regulating the practice of law,” the legislature should be permitted to act.²³⁰

The two opinions in *Austin* represent the dichotomy of views on inherent power. Under one view, the power of the court to control the practice of law was almost absolute. Under the other, the power, though primarily judicial, was shared like other procedural matters with the legislature. Both sides agreed, however, that the court’s ability to regulate the legal profession extended beyond traditional court-related activities. The impact of the reasoning in *Austin* on licensed attorneys and the public became clear in 1938 in the following case.

B. R. Williams was licensed to practice law in Missouri in 1909.²³¹ He was elected and served as probate judge from 1915 to 1927 and was elected and served as sheriff from 1933 to 1937.²³² He practiced law from his admission to the bar until his election as sheriff, and allegedly thereafter.²³³ In August 1936, Williams was charged in the Kansas City Court of Appeals with professional misconduct as a lawyer for acts related solely to his positions as probate judge and sheriff.²³⁴ It was alleged that this nonlawyer conduct required discipline.²³⁵ The court of appeals, however, was unwilling to extend the disciplinary power this far, finding support in *Richards* for the idea “that the power to disbar should be exercised within certain reasonable statutory regulations.”²³⁶ The statute permitted disbarment, in the absence of a criminal conviction, only for actions committed in the “professional capacity.”²³⁷ Thus, since the charges in the instant matter arose in a nonprofessional capacity, as judge and sheriff, and because there was no criminal conviction, Williams could not be disciplined.²³⁸

229. *Id.* at 486-96, 101 S.W.2d at 990-94 (Ellison, C.J., concurring).

230. *Id.* at 496, 101 S.W.2d at 994 (Ellison, C.J., concurring).

231. *In re Williams*, 113 S.W.2d 353, 356 (Mo. App., K.C.), *opinion quashed sub nom.* *State ex rel. Clark v. Shain*, 343 Mo. 542, 122 S.W.2d 882 (En Banc 1938).

232. 113 S.W.2d at 356.

233. *Id.*

234. *Id.* at 355-56. For the specific acts, see *In re Williams*, 233 Mo. App. 1174, 1179-83, 128 S.W.2d 1098, 1100-04 (K.C. 1939).

235. The changes covered a period of 15 years. See 113 S.W.2d at 356. Some of the acts charged would be considered crimes. See *id.* The commission appointed by the court of appeals agreed with the bar committee, finding misconduct and recommending disbarment. See *State ex rel. Clark v. Shain*, 343 Mo. 542, 544, 122 S.W.2d 882, 883 (En Banc 1938).

236. 113 S.W.2d at 359. The court of appeals found *Richards* to be “wholly within the purview of the statutes governing the procedure of the court in the exercise of its power to disbar.” *Id.* at 363 (emphasis added).

237. *Id.* at 360 (quoting RSMO ch. 78, § 11707 (1929)).

238. 113 S.W.2d at 363-67.

On motion for rehearing, the court found no conflict in its opinion with either the opinion in *Richards* or the decision in *Austin*, particularly the latter because the principal opinion did not appear controlling. The court found no conflict with the new court rules because, as noted in *Sparrow*, those rules were procedural rather than substantive.²³⁹ The bar could not accept such a result and consequently took the matter directly to the supreme court to quash the court of appeals opinion.²⁴⁰ In *State ex rel. Clark v. Shain*,²⁴¹ the supreme court eliminated any questions that might have existed following the two opinions in *Austin* and issued its strongest opinion to date on its inherent disciplinary power.

The supreme court found that the lower court had admitted the legislature's lack of power to restrict or limit the grounds for disbarment, but nevertheless it found that the current statute was a reasonable regulation.²⁴² According to the supreme court, the court of appeals found "that both the jurisdiction of the court to disbar and the exercise of said jurisdiction is limited by statute."²⁴³ The supreme court refused to accept this reasoning: "Undoubtedly the legislative department, under the police power, 'has a voice' in making rules with reference to disbarment. . . . But the courts are not compelled to proceed under said rules."²⁴⁴ The supreme court also noticed that the court of appeals had indicated the proceeding to disbar was based on the provisions of the statute.²⁴⁵ In a one sentence confirmation of its power, the supreme court said, "[The disciplinary proceeding] was instituted by the bar committees and is 'based on' the rules of

239. *Id.* at 370-73 (motion for rehearing). The court of appeals viewed *Richards* as permitting legislative enactment in the field of disbarment as long as the legislature did not destroy the inherent power of the court. *Id.* at 371. This is attributed to the concurring opinion of Chief Justice Ellison in *Clark*, which was said to be consistent with *Richards*. See 113 S.W.2d at 370. The "main" opinion in *Clark* was viewed as overruling *Richards*. See *id.* Thus, viewed by the court, the legislature did have certain power to regulate disbarment, as long as its exercise thereof was reasonable. See *id.* at 372. The rules of the supreme court, therefore, were only mechanical.

240. See *State ex rel. Clark v. Shain*, 343 Mo. 542, 544, 122 S.W.2d 882, 883 (En Banc 1938).

241. 343 Mo. 542, 122 S.W.2d 882 (En Banc 1938).

242. See *id.* at 546, 122 S.W.2d at 884.

243. *Id.* at 545, 122 S.W.2d at 883.

244. *Id.* at 546, 122 S.W.2d at 884 (citation omitted). The court attempted to lay to rest any allegation of a conflict between the court and the legislature. *Id.* The opinion recognized the police power jurisdiction of the legislature to enact legislation relating to disbarment. *Id.* at 545, 122 S.W.2d at 884. To the extent, however, that *Clark* required the use of such statutes by the courts, *Clark* was wrong. *Id.* at 546, 122 S.W.2d at 884. "The correct rule is that the courts may utilize said regulations. If they do so, then said regulations are in aid of our jurisdiction to disbar and not a limitation on said jurisdiction." *Id.*

245. *Id.* at 545, 122 S.W.2d at 883.

this court."²⁴⁶ The opinion below was quashed.²⁴⁷ Clearly, inherent power existed to discipline a lawyer for conduct outside the profession.²⁴⁸

Although the bar had convinced the court to assert inherent power over the conduct of attorneys and over the unauthorized practice of law, two areas remained where the statute still controlled. One area was summary disbarment for conviction of a crime of "moral turpitude." In 1940, the court readopted the definition of moral turpitude that existed prior to the new court rules.²⁴⁹ This statutory disbarment process remained until superseded by court rule in 1973.²⁵⁰

The growth of the other area resulted from increased activity of the courts in disciplinary matters during this period. As a result, the process of reinstatement following suspension or disbarment also needed procedural definition. When promulgated, the court rules contained no procedure for a suspended or disbarred attorney to apply for reinstatement.²⁵¹ A statute, however, provided:

[A]ny attorney or counselor at law removed from practice or suspended for a longer term than one year, on application to the supreme court or in the court in which the judgment of removal or suspension was first rendered, may be reinstated as such attorney or counselor at law, in the discretion of the court.²⁵²

The court was left the responsibility of interpreting the statute consistently with the procedure defined by its new rules. Thus, when an attorney had been disbarred, the court ruled that any application for reinstatement was actually an application for readmission. Despite the statute, therefore, the application had to be made to the supreme court, which alone had the power to admit, rather than to the court that had heard the disbarment proceeding.²⁵³ To do otherwise would have permitted the lower Missouri

246. *Id.* at 545, 122 S.W.2d at 884.

247. *Id.* at 547, 122 S.W.2d at 884.

248. On remand, Williams was suspended for two years. *See In re Williams*, 233 Mo. App. 1174, 1192, 128 S.W.2d 1098, 1108 (K.C. 1939).

249. *See In re McNeese*, 346 Mo. 425, 142 S.W.2d 33 (En Banc 1940). The prior definition was in *In re Wallace*, 323 Mo. 203, 206, 19 S.W.2d 625, 625 (En Banc 1929).

250. MO. SUP. CT. R. 5.20.

251. *See State ex rel. Chubb v. Sartorius*, 351 Mo. 1227, 1233, 175 S.W.2d 783, 786 (En Banc 1943).

252. RSMO ch. 39, § 13336 (1939).

253. *See In re H____S____*, 236 Mo. App. 1296, 1300, 165 S.W.2d 300, 301 (St. L. 1942). It was found that the respondent had sought to obtain from a police officer confidential police accident reports for use by the respondent in personal injury cases. The respondent had agreed to pay the officer \$5 per week for the information. *See In re H____S____*, 229 Mo. App. 44, 45, 48, 69 S.W.2d 325, 325, 328 (St. L. 1934). Following disbarment, the respondent's conduct had been "exemplary and above reproach." 236 Mo. App. at 1300, 165 S.W.2d at 301.

courts to license attorneys.²⁵⁴ The process of reinstatement also needed to involve the bar committees, which were charged by the court with protecting the public. Thus, when a court had suspended an attorney, any application for reinstatement of that attorney had to be heard on notice to the circuit bar committee that originally prosecuted the action.²⁵⁵ Perhaps reflecting Chief Justice Ellison's view of legislative deference, the reinstatement statute today is still the only enactment, legislative or judicial, on the subject.

A centralizing process was evident during this period. Under the court's view of inherent power, promulgating rules was a duty of the court, under its interpretation of the constitutional function of the judicial branch. These rules applied to both professional and nonprofessional activities of lawyers, practice by nonlawyers, and the reinstatement process. This control could, in part, be attributed to the notion that disciplinary rules were not substantive but rather procedural as noted in *Sparrow*, and were designed "to determine whether . . . [the] entire course of [a lawyer's] conduct shows unfitness to remain a member of the Bar."²⁵⁶

All of these revisions were accomplished by the court inherently, *i.e.*, without constitutional or statutory mandate. In the 1944 constitution, the court was given the power to adopt rules of practice and procedure. The issue then became whether the grant of such a power should be used by the court to further its efforts to regulate attorney conduct.

VII. RULEMAKING AND ITS AFTERMATH

The Missouri Constitution of 1875 provided that the people would decide at the general election of November 1942 whether a constitutional convention should be held.²⁵⁷ That vote was held, a convention was called, delegates were selected, and the constitutional convention convened on September 21, 1943.²⁵⁸ The bar association became actively involved in

254. 236 Mo. App. at 1303, 165 S.W.2d at 303. There was another reason. Having moved to Illinois, the respondent no longer qualified under the residency requirements of the statutes. *Id.* at 1304, 165 S.W.2d at 304.

255. See *State ex rel. Chubb v. Sartorius*, 351 Mo. at 1234, 175 S.W.2d at 787. The court had jurisdiction to hear the matter, under the statute, but the supreme court rules were interpreted to require notice to the bar committee and the taking of evidence on the issue.

256. *Leimer v. Hulse*, 352 Mo. 458, 463, 178 S.W.2d 335, 339, *cert. denied*, 323 U.S. 744 (1944).

257. In 1920, through the initiative process, the voters had approved a constitutional amendment that required a vote in August 1921 and at the general election every 20 years thereafter as to whether a constitutional convention should be convened. M. FAUST, *CONSTITUTION MAKING IN MISSOURI: THE CONVENTION OF 1943-1944*, at 7 (1971).

258. For a complete discussion of the pre-vote campaign, an analysis of the election, and the pre-convention procedure, see *id.* at 7-20.

the convention process. Indeed, forty-one of the eighty-three delegates to the convention were lawyers, far more than any other occupation.²⁵⁹

In April 1943, the president of the Missouri Bar Association appointed a special committee to "make recommendations to the forthcoming Constitutional Convention concerning the articles relating to the judiciary."²⁶⁰ The committee was instructed to work with a committee of judges appointed for the same purpose under the chair of Chief Justice Ellison.²⁶¹ Their joint report contained a proposal for the constitutional establishment of a judicial council in Missouri, the Administrative Council, composed of Missouri judges from various levels.²⁶² The council would have the power "to establish rules of practice, procedure and evidence for all the courts to be effective when approved by the supreme court."²⁶³ Perhaps reflecting the views of Chief Justice Ellison, as enunciated in *Austin*,²⁶⁴ the power was limited: any of the council's rules could be repealed or amended by the General Assembly.²⁶⁵

Despite initial rejection by the Committee on the Judicial Department of the Constitutional Convention,²⁶⁶ the bar proposal for rulemaking

259. *Id.* at 15. Also present were "seven farmers, six newspaper publishers and editors, five insurance agents, four college professors, three realtors, two labor officials, two salesmen, two housewives, a banker, a manufacturer, a civil engineer, a contractor, a title abstractor and a funeral director." *Id.* Sixty-nine of the delegates were born in Missouri, and at least 30 were or had been active in party politics. *Id.*

260. Liberman, *Preliminary Report of Special Committee to Consider Articles of the New Constitution Relating to the Judiciary*, 14 MO. B.J. 156, 156 (1943).

261. *Id.*

262. *Report of Committee to Cooperate with Judiciary Committee of the Supreme Court in Doing Research and Making Recommendation to Coming Constitution Convention Concerning Organization, Jurisdiction and Powers of the Judiciary*, 14 MO. B.J. 217, 218 (1943) (hereinafter referred to as *Report of Committee*). There were to be 15 judges on the council, including the chief justice, two other supreme court judges, three court of appeals judges, six circuit court judges, and three probate judges. *Proposal No. 21 in the 1943 Constitutional Convention of Missouri*, 14 MO. B.J. 284, 286 (1943) (hereinafter referred to as *Proposal No. 21*).

263. See *Report of Committee, supra* note 262, at 218. The full text of the proposed section can be found in *Proposal No. 21, supra* note 262, at 286-87.

264. 340 Mo. 467, 482, 101 S.W.2d 977, 985 (1937) (Ellison, C.J., concurring). See also notes 223-30 and accompanying text *supra*.

265. *Report of Committee, supra* note 262, at 218. The repeal by the legislature would require a special law limited to that purpose. *Proposal No. 21, supra* note 262, at 287.

266. The judicial article was reported to the convention on March 10, 1944, with no provision for rulemaking. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF MISSOURI, 1943-44, March 10, 1944, at 21 (hereinafter referred to as

power was added to the new constitution, but in a compromised form: the supreme court, not a judicial council, would have the rulemaking power, except that the court could not enact rules that affected substantive rights, evidence, jury trials, and appeals. Additionally, the legislature would be permitted to repeal any rule adopted.²⁶⁷ This legislative veto power

JOURNAL). One member of the committee, former Governor Guy Park, signed the report "with reservations because the Supreme Court was not given the rule-making power." *Id.* at 34.

267. Governor Park offered the compromise, as an amendment, during consideration of the judicial article. JOURNAL, *supra* note 266, June 7, 1944, at 3. The amendment further provided that no rule could be effective until six months after enactment and publication by the court. M. FAUST, *supra* note 257, at 109; JOURNAL, *supra*, June 7, 1944, at 3. Despite some attempt to defeat the amendment, it was approved by the full convention. M. FAUST, *supra*, at 109; JOURNAL, *supra*, June 7, 1944, at 5. The full judicial article was approved on September 19, 1944. JOURNAL, *supra*, Sept. 19, 1944, at 29-30. The entire constitution was approved and sent to the people on September 28, 1944. JOURNAL, *supra*, Sept. 28, 1944, at 81-82. Voting was light on the day of the constitution ratification election; only one-third of the number who voted in the 1944 presidential election voted. Sixty-three percent of the voters agreed to the new document. M. FAUST, *supra*, at 169.

By coincidence, the issue of bar integration arose again at the same time as the new constitution. The issues of ethics rules and bar integration were joined by the bar association in 1932. Following *Richards* and the new rule amendments which created the disciplinary procedure, bar integration did not occur. By the 1938 meeting of the Missouri bar, there was no desire to retain the Committee on Incorporation of the Bar and, consequently, it was voted out of existence. *Report, Committee on Incorporation of the Bar of Missouri*, 9 MO. B.J. 190 (1938). By 1942, however, bar integration was again an issue. A petition was presented to the supreme court requesting the court to appoint a commission to study full bar integration based on the court's inherent power as announced in *Richards*. See *Executive Committee Asks Supreme Court for Appointment of a Commission to Study Integration of Missouri Bar*, 13 MO. B.J. 13, 18, 20 (1942). That petition was denied. *Supreme Court Denies Petition on Bar Integration*, 13 MO. B.J. 25 (1942). A committee was charged at the 1942 bar meeting to develop a system for full integration. *Report of Special Committee to Make Survey and Report on Appellate Courts*, 14 MO. B.J. 253, 264 (1943). That committee recommended integration of the bar by court rule. *Id.* Another petition for the creation of a committee was presented to the supreme court on November 2, 1943. *President's Message*, 14 MO. B.J. 299 (1943). On December 6, 1943, the petition was granted and a committee appointed. *Supreme Court Appoints Honorable Jesse W. Barrett to Head Committee to Inquire Into Integration of the Bar*, 14 MO. B.J. 303 (1943).

A public hearing on bar integration was held at Jefferson City on January 22, 1944, at which time a vote by Missouri lawyers on the subject was ordered. The vote approved the promulgation of rules. On September 30, 1944, two days after the constitutional convention had approved the new proposed constitution, the Board of Governors of the fully integrated Missouri bar took office. *President's Message on the Organization of the Missouri Bar*, 1 J. MO. B. 3 (1945).

created a problem for the court. If the power to regulate the conduct of attorneys were premised on the rulemaking power, then the court would recognize its right to act in such matters. The legislative veto, however, allowed the legislature to limit the court's power to discipline, a philosophy reminiscent of the *Selleck* rationale.²⁶⁸

The problem centered on whether rules for attorney conduct were procedural. It was complicated by the relatively new concept of procedural rulemaking power in the courts. Prior to the constitution of 1944, there was considerable debate about whether the court possessed any inherent power to adopt practice and procedure rules.²⁶⁹ To permit such an assertion of inherent power was at that time to reverse the common law that left matters of procedure to the legislature.²⁷⁰ It was agreed that the courts needed rules and the courts thus, in the absence of legislation, had inherent power to adopt practice and procedure rules.²⁷¹ Once the legislature acted, however, any attempt by the court to act would be sinister, assuming power beyond that granted by the constitution.

Unfortunately, decisions such as *Sparrow* appeared to place discipline squarely within this dilemma by equating disciplinary rules with traditional ideas of practice and procedure.²⁷² This equation would legitimize the concerns raised by Chief Justice Ellison in *Austin*. If disciplinary rules were but rules of practice, unrestrained action by the court inconsistent with legislative mandate would be impermissible.²⁷³ For the Missouri lawyer, this issue was resolved in 1948 in *In re Conner*.²⁷⁴

268. See note 96 and accompanying text *supra*.

269. See Williams, *supra* note 16, at 482-86. For additional information on this issue, see W. BARRON & A. HOLTZOFF, 1 FEDERAL PRACTICE AND PROCEDURE § 2 (1950); F. JAMES, CIVIL PROCEDURE §§ 1.3-.7 (1965); Tolman, *Historical Beginnings of Procedural Reform Movement in This Country—Principles to Be Observed in Making Rules*, 22 A.B.A.J. 783 (1936); Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures*, 22 A.B.A.J. 772 (1936); Wheaton, *Procedural Improvements and the Rule-Making Power of Our Courts*, 22 A.B.A.J. 642 (1936).

Indeed, at the time, there was some question as to the constitutionality of any statute that granted a rulemaking power which allowed a rule to supersede a statute. See Williams, *supra*, at 506-09.

270. See Williams, *supra* note 16, at 486. See generally *id.* at 486-94.

271. This is the view expressed by Judge Brown in *Selleck*. See 252 Mo. at 387, 158 S.W. at 681 (Brown, J., concurring). See also note 103 and accompanying text *supra*.

272. See note 210 *supra*.

273. See notes 225 & 226 and accompanying text *supra*.

274. 357 Mo. 270, 207 S.W.2d 492 (En Banc 1948). Prior to 1948, the Missouri legislature adopted a new code of civil procedure for the state. See 1943 Mo. Laws 353. As a result, the court renumbered the court rules to accommodate them to the new civil procedure code. Thus, by January 1, 1945, former Rule 35, the Canons of Ethics, became Rule 4; former Rule 36, the disciplinary procedure,

In April 1946, after a preliminary investigation, an information was filed in the Circuit Court of the City of St. Louis, Missouri, against Harold D. Conner.²⁷⁵ Following his admission that he had converted estate moneys to his own use,²⁷⁶ the circuit court found Conner guilty of unethical conduct and suspended him for ninety days.²⁷⁷ After its exceptions were denied by the circuit court, the bar committee appealed to the supreme court asserting that the facts of the case warranted disbarment.²⁷⁸ At the time of the appeal, the court rule permitted the bar committee to seek review of a lower court ethics determination in the supreme court.²⁷⁹ The statute, on the other hand, only permitted the defendant to appeal.²⁸⁰

The matter thus presented the following issue: if the rulemaking power of the 1944 constitution prevented a rule that changed the right of appeal and the statute did not give the bar committee the right of appeal, could a court rule grant that right?²⁸¹ If the inherent power of the court in attorney discipline matters was based on rulemaking ability, the court could not alter rights of appeal; therefore, a court rule could not grant the bar committee a right of appeal.

In *Conner*,²⁸² however, the court did not base its decision on the rulemaking power. Although acknowledging this power, the court recognized the other constitutional powers it possessed as head of the judicial department and supervisor of the lower courts.²⁸³ Those powers created an "inherent judicial power to regulate non-procedural matters ancillary to the administration of justice."²⁸⁴ The court adopted a regulatory definition of inherent power and said that, although not specifically granted, the power is essential to the proper administration of the judicial branch of government.²⁸⁵ Such inherent power "is immune from destruction or

became Rule 5; former Rule 37, the cost of discipline, became Rule 6; former Rule 38, the admissions rules, became Rule 8; and former Rule 39, the judicial council, became Rule 10. Former Rule 40, adopted earlier in 1944 and providing for the integration of the Missouri bar, became Rule 7. See Summers, *History of Rules of the Supreme Court*, V.A.M.R., Rules 1-40, at ix-x (1960).

275. See 357 Mo. at 276, 207 S.W.2d at 493.

276. *Id.* at 283-84, 207 S.W.2d at 499.

277. *Id.* at 277, 207 S.W.2d at 494.

278. *Id.*

279. Mo. Sup. Ct. R. 5.11 (1943), reprinted in 352 Mo. at xxvii. See also 357 Mo. at 277, 207 S.W.2d at 494.

280. RSMO ch. 93, § 13335 (1939). This statute is identical to the current statute, RSMO § 484.260 (1978).

281. See generally 357 Mo. at 277, 207 S.W.2d at 494.

282. 357 Mo. 270, 207 S.W.2d 482 (En Banc 1948). The matter originally had been heard by one of the divisions of the court, but was transferred to the full court when the issue was raised sua sponte as to whether the court had jurisdiction over such an appeal. *Id.* at 277, 207 S.W.2d at 494.

283. *Id.* at 277, 207 S.W.2d at 494.

284. *Id.* at 280, 207 S.W.2d at 496 (quoting Williams, *supra* note 16, at 474).

285. See also note 17 *supra*.

frustration by the legislature."²⁸⁶ In the court's view, regulation of attorney conduct "is within the Supreme Court's exclusive final cognizance."²⁸⁷ As a result, the judiciary could adopt any appropriate method for reviewing such matters,²⁸⁸ methods that would be exempt from interference by the legislature.²⁸⁹ To do otherwise could prevent the supreme court from exercising its exclusive jurisdiction to review decisions of lower courts in disciplinary matters.²⁹⁰ Consequently, the supreme court could hear a request for review from a bar committee, almost on a *de novo* basis. In *Conner*, that full review of the record was conducted, and Conner was disbarred.²⁹¹

Two results emerged from the decision in *Conner*. First, the supreme court settled on the regulatory definition of inherent power. The second result is clear only in hindsight. The period from *Richards* in 1934 to *Conner* in 1948 was a period of flux for the court as it tried to solidify the powers of discipline and to design workable rules to effecuate those powers. While there were later attacks on the procedural rules adopted by the court, *Conner* was the last serious challenge to the inherent power of the court.²⁹² As a result, the court could devote its time to refining the system that it developed.

VIII. THE PROCESS OF REFINEMENT

While *Conner* stabilized the disciplinary process and later rulemaking in the area of lawyer regulation demonstrated that inherent power over lawyer discipline was not based on the constitutional rulemaking power,²⁹³

286. Williams, *supra* note 16, at 474.

287. 357 Mo. at 280, 207 S.W.2d at 496 (emphasis added).

288. *Id.* at 281, 207 S.W.2d at 497. Such rules are, of course, subject to the requirements of due process. *Id.* at 278, 207 S.W.2d at 495. The procedures adopted in the various states often are different and do not conform to local civil procedure rules. *Id.* at 281, 207 S.W.2d at 496-97.

289. *Id.* at 281, 207 S.W.2d at 497.

290. *Id.* at 281-82, 207 S.W.2d at 497.

291. *Id.* at 283-84, 286, 207 S.W.2d at 499, 500.

292. See, e.g., *In re Mills*, 539 S.W.2d 447, 450 (Mo. En Banc 1976), where the court paid scant attention to allegations that the disciplinary process denied constitutional confrontation or due process rights.

293. See, e.g., MO. SUP. CT. R. 4. The preface to the rule indicates that the order repealing former Rule 4, the Canons of Ethics, to make room for the Code of Professional Responsibility, was adopted on November 6, 1970, to be effective January 1, 1971, less than two months later. See also 16 J. MO. B. 346 (1960) (order of July 11, 1960, adopting new Rule 7.03, effective October 1, 1960); 17 J. MO. B. 303 (1961) (order of June 12, 1961, adopting new Rule 7.16, effective July 1, 1961); 17 J. MO. B. 363 (1961) (order of July 10, 1961, adopting new Rule 8.12, effective September 1, 1961); 18 J. MO. B. 131 (1962) (order of March 6, 1961, adopting new Rule 5.01, effective April 1, 1962); 32 J. MO. B. 562 (1976) (order of November 1, 1976, revising Rules 5 and 6, effective November 1, 1976; no publication until after rules already in force). But see 24 J. MO. B. 409 (1968)

Conner did not mark the end of efforts to improve the process. The existing rules had several deficiencies. In succeeding years, these deficiencies were addressed by both the courts and the bar.

One of the difficulties in the disciplinary process is the creation of standards to be enforced. The 1908 ABA Canons, adopted in Missouri in 1934 following *Richards*, contained "serious problems of style, coverage, and ambiguity."²⁹⁴ While the canons contained moral precepts of "inspiration and prohibition,"²⁹⁵ they were not specific "in definition of violation."²⁹⁶ For example, Canon 20 provided general inspirational guidance regarding trial publicity.²⁹⁷ When Canon 20 was coupled with Canon 5, which permitted the assertion "by all fair and honorable means . . . [of] every defense that the law of the land permits,"²⁹⁸ one could argue that the canons permitted trying a sensational case in the newspaper. The events following the assassination of President John F. Kennedy in Dallas in 1963 exposed these problems. The 1964 ABA President-Elect Lewis F. Powell, Jr. said:

The recent events in Dallas, familiar to all of us, have stimulated a new and intense interest in the Canons, particularly those designed to prevent prejudicial publicity and to ensure fair trial. But the need for a critical examination is far broader than may be indicated by those events in Dallas.

Many aspects of the practice of law have changed drastically since 1908. An American Bar Foundation Study Committee has said that these changes make unreliable many of the assumptions upon which the Canons were originally based. As remarkably flexible and useful as the Canons have proved to be, they need to be re-examined as guidelines for the practicing lawyer. They also should be reexamined particularly in view of the increased recognition of the public responsibility of our profession.²⁹⁹

(order of September 12, 1968, amending Rule 6.01, effective January 1, 1969); 25 J. MO. B. 378 (1969) (order of June 26, 1969, amending Rule 8, effective February 1, 1970). The orders adopting both of the latter two rules indicated that the orders were promulgated under the rulemaking power of the constitution. If this were true, the order of September 12, 1968, plainly was ineffective as it was published only four months before its effective date. In light of prior rules, as well as *Conner*, it would seem that the use of such language was a mere oversight, albeit a dangerous one, by the court.

294. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUNDATION RESEARCH J. 953, 954.

295. R. WISE, LEGAL ETHICS 6 (2d ed. 1970).

296. *Id.* The canons were not written "in language which would afford practical sanctions for violations." *Id.* at 7. As ABA President-Elect Lewis F. Powell, Jr. would make clear in referring to a study of Missouri lawyers, public respect for the profession varies directly with the public's perception of the enforcement of the Canons of Ethics. 89 A.B.A. REP. 382 (1964).

297. ABA CANONS OF PROFESSIONAL ETHICS No. 20.

298. *Id.* No. 5.

299. 89 A.B.A. REP. 381 (1964).

As a result of the need for change, the ABA approved the appointment of a Special Committee on Evaluation of Ethical Standards,³⁰⁰ a committee that recommended to the ABA House of Delegates in 1969 the adoption of the Code of Professional Responsibility.³⁰¹ The Code contained the 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."³⁰² The Code was not designed to be "a static document."³⁰³ Indeed, as noted by the chairman of the ABA special committee, "it must be amended from time to time to keep abreast of the development of our law and society."³⁰⁴ The Code was adopted by the ABA³⁰⁵ and thereafter promulgated by the Missouri Supreme Court by amendment to Missouri Supreme Court Rule 4, effective January 1, 1971.³⁰⁶ The adoption of the new Code recognized "that the bar has the privilege of disciplining itself to a greater extent than any other profession or calling."³⁰⁷ It provided standards for protecting the public that "were the highest, self-proclaimed and self-enforced."³⁰⁸

Following adoption of the rules, the bar encountered the next hurdle: enforcement. Although the enforcement process was responsible for many advancements in lawyer discipline and thus in public protection, there was "a tendency on the part of many grievance committees and courts to manifest a spirit of marked leniency in grievance cases."³⁰⁹ As a result of this leniency, the Board of Governors recommended and the ABA House of Delegates approved in 1967 the appointment of a Special Committee on Evaluation of Disciplinary Enforcement, called the Clark Commission, after its chairman, the Honorable Tom C. Clark, to study problems with the enforcement of disciplinary standards through the states.³¹⁰ Missouri was represented actively on that committee by Fred B. Hulse, who was general chairman of the bar committees.³¹¹

The preliminary draft of the special committee's report was released in

300. *Id.* at 383.

301. 94 A.B.A. REP. 389 (1969). The full code recommended by the committee appears at *id.* at 728-96.

302. *See* R. WISE, *supra* note 295, at 8. The code was designed to carry "forward the sound principles in the old canons," while at the same time creating rules on which discipline could be founded. *Id.*

303. 94 A.B.A. REP. 389 (1969).

304. *Id.*

305. *Id.* at 392.

306. *See* note 293 *supra*.

307. 89 A.B.A. REP. 382 (1964).

308. *Id.*

309. *Id.*

310. *See* 92 A.B.A. REP. 134 (1967) (report of ABA Board of Governors recommending the appointment of a committee); *id.* at 125-26 (adoption of recommendations by the ABA House of Delegates).

311. *See* 95 A.B.A. REP. 40 (1970) (names of committee members).

1970 and raised several issues for the Missouri system of lawyer discipline. As has been noted, following the post-*Richards* rules, there still existed statutory disbarment for conviction of a crime of moral turpitude.³¹² The statute, still in existence today, provides discipline following conviction "for any criminal offense involving moral turpitude."³¹³ The Clark Commission found two problems with discipline after conviction of a crime. Initially, it thought that the disciplinary hearing could amount to a retrial of the criminal case,³¹⁴ a problem that already had been resolved in Missouri in *In re Lurkins*,³¹⁵ when the supreme court stated that the disciplinary process could not be used to retry the criminal case.³¹⁶

The second problem that the Clark Commission found, however, was relevant to Missouri. Many states, including Missouri, had no provision for the suspension of an attorney during the period following conviction while appeal was pending.³¹⁷ Such omissions would permit an attorney to argue that although he had been convicted in the trial court, the conviction was not final until the pending appeal was decided and thus no discipline could be imposed during the interim period. The commission found that disabling the disciplinary process pending appeal reduces public confidence in the profession.³¹⁸ In drafting a rule responsive to the Clark Commission's criticism, the Missouri court had to walk a tightrope between the rights of the attorney and the protection of the public. Thus, in Missouri, an order is served on the convicted attorney to show cause why suspension should not be ordered pending the final disposition of any disciplinary action.³¹⁹ Mere pendency of post-trial motions or appeals could not stay suspension.³²⁰ On the conclusion of the appeal, if the conviction is affirmed, the attorney can be disciplined by the court without further testimony on the issue of guilt.³²¹ If, however, the conviction is reversed,

312. See note 249 and accompanying text *supra*.

313. RSMO § 484.240 (1978). The remedy is summary in that no trial is necessary. *Id.*

314. See *Report of the Special Committee on Evaluation of Disciplinary Enforcement*, 95 A.B.A. REP. 783, 927 (1970) (hereinafter referred to as *Clark Commission Report*). The recommendations of the committee were approved by the ABA House of Delegates. 95 A.B.A. REP. 539 (1970).

315. 374 S.W.2d 67 (Mo. En Banc 1964).

316. *Id.* at 68. Respondent had been convicted of failing to file a federal income tax return and apparently sought "to introduce evidence of circumstances surrounding the conviction." *Id.* at 67-68. Respondent was unsuccessful, although the court did allow such evidence to mitigate the extent of discipline to be imposed. *Id.* at 68.

317. *Clark Commission Report, supra* note 314, at 918.

318. *Id.* at 920. The failure to suspend pending appeal was considered one of the key reasons for public disdain of the bar. *Id.*

319. MO. SUP. CT. R. 5.20.

320. *Id.*

321. *Id.*

the suspension can be lifted, but as discussed in *Richards*, the criminal reversal would not bar a disciplinary proceeding arising out of the same conduct.³²²

The Clark Commission Report also criticized provisions relating to attorneys who become mentally ill or unable to practice because of drug or alcohol abuse.³²³ Indicating that the scope of the disciplinary power should encompass the "disabled attorney" as well as the "malefactor," the Clark Commission succinctly stated the basis for concern for the attorney disabled by illness: "The hardship of taking away an attorney's livelihood because of a condition beyond his control simply cannot justify the continued exposure of the public to the danger represented by an attorney's disability."³²⁴

The Missouri courts also have recognized that lawyers are human beings with human frailties. Even prior to the Clark Commission, the court had considered, in determining the discipline to be imposed in a given case, medical conditions, such as stroke³²⁵ or diabetes,³²⁶ which may have impaired the judgment of an attorney and led to unprofessional conduct. Today the court recognizes that the practice of law involves stress that may cloud judgment, impair memory, or otherwise prevent an attorney from conducting "business and professional affairs in a clear, logical fashion."³²⁷ Such a condition, however, cannot permit an attorney to continue to practice law.³²⁸ To meet such contingencies, the court has developed a rule dealing with the attorney who has been declared incompetent or allegedly is mentally or physically incapacitated, *e.g.*, by the use of drugs or intoxicants.³²⁹ The rule provides for the suspension of the attorney to protect the public, yet it permits reinstatement when the con-

322. *Id.*

323. See *Clark Commission Report*, *supra* note 314, at 906. Even though the attorney might have been incapable of practicing law because of mental illness or drug or alcohol abuse, if there was no violation of any of the canons, no action could be taken. *Id.*

324. *Id.* at 908.

325. See, *e.g.*, *In re Lurkins*, 374 S.W.2d 67, 69 (Mo. En Banc 1964).

326. See, *e.g.*, *In re O'Brien*, 478 S.W.2d 310, 311 (Mo. En Banc 1972).

327. *In re Houtchens*, 555 S.W.2d 24, 26 (Mo. En Banc 1977). In *Houtchens*, the evidence suggested "the presence of psychotemporal epilepsy reflected in periodic states of amnesia, confusion and disorientation." *Id.* When coupled with alcohol abuse, they produced "more frequent periods of irrational conduct." *Id.*

328. Compare *id.* at 26-27 (until recovered, respondent must be suspended so public is protected) with *Clark Commission Report*, *supra* note 314, at 907 (even absent ethical violation, lawyer suffering mental illness should be suspended).

329. MO. SUP. CT. R. 5.22. On a judicial determination of incompetence, suspension is automatic. *Id.* 5.22 (a). In cases of alleged incapacity, the circuit bar committee investigates in a manner similar to that of a traditional ethics investigation. *Id.* 5.22(b). If other complaints are made against the attorney, they may be stayed pending recovery from the illness causing suspension. *Id.* 5.22(c).

dition has been remedied sufficiently.³³⁰ This procedure offers "protection of the public as well as the profession,"³³¹ while at the same time offers the attorney the opportunity to "recover from . . . health related problems."³³²

The Clark Commission recognized that furtherance of a client's interests often leads the attorney across state boundaries.³³³ A lawyer's practice, therefore, may go beyond the state that first granted admission.³³⁴ As a result, courts, including the Missouri courts, have had to adapt their system of bar regulation to include the disciplining of lawyers based on disciplinary proceedings in another jurisdiction.

The Missouri courts recognized this problem prior to the Clark Commission Report, and although there were no rules or statutes governing foreign discipline, the Missouri Supreme Court in *In re Veach*,³³⁵ through the use of inherent power, recognized Illinois discipline of a Missouri-admitted attorney.³³⁶ Noting that Illinois had the same canons of ethics as Missouri,³³⁷ the court found nothing in the foreign proceedings to prevent Missouri from granting comity to the Illinois decree.³³⁸ As a result, Veach was suspended in Missouri for his actions in Illinois, for a period equal to the suspension in Illinois.³³⁹

330. *Id.* 5.22(d). Request must be made by the attorney for reinstatement and the application therefore must authorize the court to review all relevant medical records. *Id.* The court also may have an independent expert examine the attorney. *Id.*

331. 555 S.W.2d at 27.

332. *Id.*

333. *Clark Commission Report, supra* note 314, at 915. At the time of the report, there was no mechanism whereby one jurisdiction advised another of disciplinary action. *Id.* at 912. Yet, instances of attorneys admitted in multiple jurisdictions were commonplace. *Id.* at 915.

334. *See generally* Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1272 (1980). Schwartz argues that this trend is leading toward "the formation of a national bar." *Id.* at 1271. This trend can be seen in bar admission as well, as at least one court has done away with the traditional residency requirement for admission to the state's bar. *See* *Gordon v. Committee on Character & Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

335. 287 S.W.2d 753 (Mo. En Banc 1956).

336. *Id.* at 758 ("The mere lack of a specific rule of this court providing for summary action in such cases is wholly immaterial. This court has the inherent power to discipline those persons enrolled as members of the Bar of Missouri.").

337. *Id.* at 759. Consequently, the Illinois violations also would be Missouri violations. *See id.*

338. *Id.* The court noted that "respondent appeared and contested the Illinois proceeding." *Id.* The court did grant itself some future leeway, however, by recognizing that future cases could arise whereby "recognizing the finality of the foreign adjudication, we may not see fit to give it effect in Missouri." *Id.* at 759.

339. *Id.* at 760.

To enforce the practice of granting comity to another state's disciplinary actions, the court later, in *In re Coleman*,³⁴⁰ compelled Missouri attorneys to advise the Missouri courts of disciplinary actions taken against them in other states.³⁴¹ The granting of comity to foreign state disciplinary actions, however, did not indicate that Missouri would automatically adopt the discipline imposed in the foreign state. Thus, in *Coleman*, over one dissent, the court only suspended an attorney who had been disbarred in Oregon.³⁴²

Following *Coleman* and as a result of the Clark Commission Report, the court expanded its rules to provide for reciprocal discipline of attorneys disciplined in other states.³⁴³ The supreme court would compel the appearance of an attorney disciplined in another state for the purpose of determining why the foreign state's determination of misconduct "should not be conclusive of said misconduct for the purpose of discipline by this Court."³⁴⁴ Under the rule, as later interpreted, Missouri recognizes the finding of misconduct in the foreign jurisdiction, yet retains the right to review independently the evidence and determinations of fact made by the court in the foreign jurisdiction. This is exactly what occurred in a case where an attorney had been suspended for a period of at least two years in Ohio.³⁴⁵ The most serious of the charges against the attorney involved the application to his own legal fee, without consent, of \$480 held by the attorney in trust for child support payments for his client.³⁴⁶ Following the Ohio hearing, the attorney found a tape recording that he claimed would establish the consent of the client to the application of the money in the manner used.³⁴⁷ Although the Ohio courts refused to hear this evidence because it was not discovered until after the hearing,³⁴⁸ the Missouri court, in hearing the matter for reciprocal discipline, agreed that an evidentiary hearing was necessary to determine the effect of this evidence on the discipline imposed:³⁴⁹ "Missouri makes its own independent judg-

340. 492 S.W.2d 750 (Mo. En Banc 1973).

341. *Id.* at 752. The concern was protection of the public. By failing to advise the proper authorities of discipline in Oregon, respondent "was creating a false impression with the public, the courts and the bar." *Id.*

342. *Id.* Respondent was disbarred after mishandling trust funds. The Missouri court permitted mitigation of the discipline imposed by considering the death of respondent's daughter and respondent's divorce leading to his "not 'thinking straight'" at the time of the ethical transgression. *Id.*

343. MO. SUP. CT. R. 5.19.

344. *Id.*

345. See *In re Weiner*, 547 S.W.2d 459, 460-61 (Mo. En Banc 1977).

346. *In re Weiner*, 530 S.W.2d 222, 225 (Mo. En Banc 1975).

347. 547 S.W.2d at 459-60.

348. See 530 S.W.2d at 225.

349. *Id.* The court appointed a master for the purpose of hearing the evidence. *Id.*

ment as to the fitness of the members of its bar.”³⁵⁰ Following the evidentiary hearing, the supreme court imposed no discipline, in part because the attorney already had been serving the Ohio suspension and had not been practicing in Missouri for a period of almost two and one-half years.³⁵¹

One of the most critical problems in lawyer discipline noticed by the Clark Commission was the fragmented nature of the disciplinary structure in the various stages.³⁵² The lack of a centralized disciplinary structure “[complicated] the already difficult task of administering effective professional discipline,” as well as created in the minds of the public a sense that local judges imposed lenient discipline on local attorneys.³⁵³ As early as 1881, in *State ex rel. Jones v. Laughlin*,³⁵⁴ the Missouri courts recognized the problems of allowing courts with no power to admit the power to disbar.³⁵⁵ Yet, despite such a warning, this situation existed in Missouri, with resulting problems. Following the 1905 legislative session and the adoption of laws urged by the bar association, only the supreme court had the power to admit persons to practice law. Nonetheless, even after the post-*Richards* court rules, the circuit courts were charged with the responsibility of initially trying discipline cases.³⁵⁶ It was this practice that caused decisions which equated the disciplinary process with traditional civil process, thereby creating procedural difficulties. It was not an efficient way to protect the public.

As noted by the Clark Commission, the disciplinary jurisdiction should be “centralized . . . under the ultimate control of the highest court of the state.”³⁵⁷ In other words, circuit bar committees would not just prosecute ethics violations in the local courts; they would hear the cases and make recommendations to the supreme court.³⁵⁸ The supreme court alone would determine all discipline. This very rule was part of a major revision

350. *Id.* at 224.

351. 547 S.W.2d at 461. This seems to follow both *Veach* and MO. SUP. CT. R. 5.19. The adjudication of an ethical violation is final, yet the discipline to be imposed for that violation is left to the court's discretion.

352. *Clark Commission Report, supra* note 314, at 820.

353. *Id.* The Clark Commission indicated that under Canon 9 of the Code of Professional Responsibility, lawyers were obligated to avoid even “the appearance of impropriety,” and as a result, the disciplinary structure should do the same. *Id.* at 820-21.

354. 73 Mo. 443 (1881).

355. *See id.* at 449-50. *See also* note 69 *supra*.

356. *See* Mo. Sup. Ct. R. 36(8) (1934).

357. *Clark Commission Report, supra* note 314, at 820.

358. *See* MO. SUP. CT. R. 5.10, .12, .13, .15, .16, .18. Prior to this revision, trial was held in the circuit court, with that court determining the facts and pronouncing discipline on an adjudication of unethical conduct. *See* Mo. Sup. Ct. R. 5.10-.11 (1972).

of the disciplinary process adopted by the supreme court in 1973. It represented the final chapter to date in the development of the state's disciplinary system.

The 1973 rules accomplished several things. First, they dealt effectively with the Clark Commission's criticisms, such as the mental illness issue, reciprocity, and suspension for criminal conviction, as well as other minor issues.³⁵⁹ Second, they revamped the disciplinary process by making original hearings triable before the circuit bar committee, with ultimate disposition by the supreme court, a centralized process. Third, by readopting many of the provisions of the existing rules, they showed that Missouri already was in the forefront of those states providing effective public protection through the active use of the disciplinary system.³⁶⁰

IX. CONCLUSION: THE FUTURE AS SEEN FROM THE PAST

As noted by ABA President-Elect David R. Brink at the 1981 ABA midyear meeting, the most important issue facing the organized bar for the 1980s is competence.³⁶¹ At a conference of lawyers and others at that same meeting, three methods of ensuring competence were discussed.³⁶² Two of those methods had begun to take shape in Missouri even before the meeting.

The first method involved specialization. Even prior to the advertising decision by the United States Supreme Court in *Bates v. State Bar*,³⁶³ the Missouri bar began a study aimed at "assuring informed and reliable decision making by enabling the public and the non-specialist lawyer to locate

359. The Clark Commission Report indicated that there should be an informal process whereby an attorney could be reprimanded privately for action that would not be considered acceptable but that was not so serious as to warrant an investigation or hearing. *Clark Commission Report, supra* note 314, at 888. The commission made clear, however, that any attorney so admonished should have the opportunity to request formal proceedings so a full hearing on the merits could be conducted. *Id.* This rule was adopted in Missouri. *See* MO. SUP. CT. R. 5.12.

360. Many of the Clark Commission Report recommendations had been part of the original post-*Richards* rules. *Compare Clark Commission Report, supra* note 314, at 815 (inadequate financing); *id.* at 856 (no investigation without formal complaint); *id.* at 873 (no permanent record of complaints); *id.* at 882 (no subpoena power); *id.* at 902 (inadequate service by mail); *id.* at 932 (jury trial permitted) *with* Mo. Sup. Ct. R. 37 (1934) (providing funds); *id.* 36(3) (permitting investigation without formal complaint); *id.* 36(20) (records of formal matters filed with court); *id.* 36(4) (granting subpoena power); *id.* 36(8) (service by mail); *id.* 36(10) (no jury trial).

361. Lawscope, *Enhancing Lawyer Competence*, 67 A.B.A.J. 265 (1981).

362. *Id.* The three methods mentioned were "initial training of new lawyers, peer review programs and specialization." *Id.*

363. 433 U.S. 350 (1977).

an attorney dealing with specialized legal problems."³⁶⁴ The result was a plan for the voluntary specialization of Missouri lawyers, which was presented to the supreme court in September 1977.³⁶⁵ The plan provided for a Board of Legal Specialization, which makes recommendations for the creation of specialties in the practice of law in areas in which "the public interest would be served."³⁶⁶ Any lawyer so specialized would be required to maintain continuing legal education in the specialty field and could have the specialty designation revoked on a failure to meet the ideals expressed by the plan.³⁶⁷

The second area was peer review. Peer review systems are designed to point out a lawyer's shortcomings as reviewed by others, without the stigma of a disciplinary proceeding.³⁶⁸ Indeed, peer review, if successful, would obviate the need for some disciplinary cases. Again, the Missouri bar is actively involved. In 1979, it proposed a system for peer review of appellate cases.³⁶⁹ If a reviewed attorney's work is found to be unsatisfactory, the attorney may be asked to complete continuing educational programs to ensure future competence.³⁷⁰ The rules make clear that any shortcomings noted cannot trigger disciplinary action later, consequently protecting the reputation of a lawyer who is trying, albeit without success.³⁷¹

Perhaps Missouri needs new rules for professional conduct. The major complaint against many lawyers is a lack of meaningful communication between lawyer and client.³⁷² Thus, it may well be that Model Rule 1.3, dealing with promptness and diligence, and Model Rule 1.4, dealing with communications,³⁷³ are necessary to provide rules to enforce these common sense obligations of the legal profession. It also may be necessary to recognize, as the Kutak Commission did, that a lawyer fills many roles, and to structure rules accordingly.

364. Missouri Bar, Plan for Voluntary Specialization of the Missouri Bar 1 (unpublished study, approved July 23, 1977).

365. Letter from Robert O. Hetlage, President, Missouri Bar Association, to J.P. Morgan, Chief Justice, Missouri Supreme Court (Sept. 19, 1977).

366. Missouri Bar, *supra* note 364, at 2, 6. The board would include a member of the judiciary, a faculty member of a Missouri law school, a member of the Continuing Legal Education Committee of the Missouri Bar Association, a young lawyer, and three practicing Missouri lawyers. *Id.* at 2.

367. *Id.* at 7-9.

368. Any hint of discipline could ruin the career of a lawyer. *See* Lawscope, *supra* note 361, at 266.

369. *See* Missouri Bar, Proposed Rule for Appellate Practice Review Commission 1 (unpublished).

370. *Id.* at 2-3.

371. *Id.* at 3.

372. Marks & Cathcart, *supra* note 1, at 210.

373. The expansion of rules into a definition of "competence" was one of the factors that created the need for the conference on competence. *See* Lawscope, *supra* note 361, at 265-66.

On the other hand, wholesale change may not be necessary. The organized bar does need to react to the criticism of it, particularly that arising from Watergate, and what that episode represents. In fact, the profession has acted. Richard Nixon, John Mitchell, John Ehrlichman, John Dean, Richard Kleindienst, Charles Colson, Egil "Bud" Krogh, Jr., Donald Segretti, and other Watergate figures all have been dealt with through the current system.³⁷⁴ These proceedings evidence that the system of lawyer discipline works and is likely to continue to work with but slight amendment.³⁷⁵ As noted by the chairman of the committee that drafted the Code of Professional Responsibility, the document is not static.³⁷⁶ Changing times and changing circumstances will create the need to amend and revise current rules. To eliminate the existing Code, however, merely for the sake of change or as proof that the bar still can police itself overlooks the historical success of the existing system and the diligence of the bar and the courts in creating and enforcing it.

The Missouri Supreme Court said in a recent decision on lawyer discipline, *In re Lowther*,³⁷⁷ "The primary purpose of the Code of Professional Responsibility is protection of the public . . ." ³⁷⁸ Through the use of inherent power, beginning as early as 1834, the Missouri Supreme Court, in concerted action with the organized bar of the state, has fulfilled vigorously that obligation. Even when the legislature refused to respond to public need, the organized lawyers of this state continued to press for rules designed to regulate the profession. Today, as new problems arise, both

374. See *In re Mitchell*, 434 U.S. 917 (1977); *In re Ehrlichman*, 434 U.S. 917 (1977); *In re Dean*, 421 U.S. 984 (1975); *In re Colson*, 412 A.2d 1160 (D.C. 1979); *District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C. 1975); *Segretti v. State Bar*, 15 Cal. 3d 878, 544 P.2d 919, 126 Cal. Rptr. 793 (1976); *In re Nixon*, 53 A.D.2d 178, 385 N.Y.S.2d 305 (1976); *In re Krogh*, 85 Wash. 2d 462, 536 P.2d 578 (1975).

The National Organization of Bar Counsel, an organization of attorneys for state bar associations, prepared a special report relating to the disciplining of 29 attorneys involved in Watergate. See *N.O.B.C. Reports on Results of Watergate-Related Charges against Twenty-nine Lawyers*, 62 A.B.A.J. 1337 (1976).

375. This is also the position taken by the National Organization of Bar Counsel (N.O.B.C.). See NATIONAL ORGANIZATION OF BAR COUNSEL, REPORT AND RECOMMENDATIONS ON STUDY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 1 (1980). The N.O.B.C. notes that almost one-half of today's attorneys have learned the current code and that those charged with enforcing discipline have become comfortable with its workings. *Id.* at 2-3. As a result, "the present Code need not be abandoned but can be amended to produce clear and enforceable standards of professional conduct which will continue to benefit the profession." Letter from Allen B. Zeffoss, President, N.O.B.C., to Robert J. Kutak (Sept. 22, 1980).

376. See note 303 and accompanying text *supra*.

377. 611 S.W.2d 1 (Mo. En Banc 1981).

378. *Id.* at 2.

the bar and the court are actively involved. When the legal system has been attacked, it has adapted. Perhaps today's highly visible bar again needs to adapt in its efforts at public relations. The Clark Commission noted, "The route to encouraging public confidence in the disciplinary process lies in acknowledging the existence of attorney misconduct and showing the public the steps taken against it."³⁷⁹

To abandon the entire system by needlessly scrapping the Code, however, would adapt hard-won gains out of existence. If the past is a good predictor of the future, the organized bar and the courts of this state will continue to guard zealously the rights of the public to fully competent legal services.

379. See *Clark Commission Report, supra* note 314, at 939. The very purpose of licensing, according to Marks and Cathcart, is accountability. Marks & Cathcart, *supra* note 1, at 233. It was this spirit that caused the Missouri bar actively to seek a new statute on bar admission in the early years of the twentieth century. See notes 118-20 and accompanying text *supra*. Yet the process of discipline remained a secret, apparently to protect "the lawyer involved against adverse publicity which might result from groundless charges." Marks & Cathcart, *supra*, at 233. The Clark Commission met that issue by encouraging indirect publicity, including such activities as having disciplinary board members address school classes and hold continuing legal education courses on the subject. See *Clark Commission Report, supra*, at 942. At least one state, Michigan, opens its disciplinary proceedings to the public. See Marks & Cathcart, *supra*, at 233. If the bar has a public relations problem, the answer is not a new code, but rather a campaign to disseminate public information about the success of the existing code.