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ADMISSION TO THE BAR, DISBARMENT AND DISQUALIFICATION OF LAWYERS IN JAPAN AND THE UNITED STATES—A COMPARATIVE STUDY

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It is the purpose of this paper to discuss and compare the procedure for admission to the bar and the grounds for disbarment and disqualification of lawyers in Japan and the United States.

ADMISSION TO THE BAR

To become a practicing lawyer in Japan one must pass a national bar examination, administered by the Judicial Examination Management Committee, whose three members represent, respectively, the bench, the ministry of justice, and the practicing bar, and complete a two-year judicial apprenticeship. There is no requirement that the candidate attend or graduate from a law school, although most of the successful candidates are in fact law school graduates, meaning graduation from a four-year course in a Japanese university’s law department, which is similar to an undergraduate major in law.

Contrast this system with the picture in the United States, where there is no national bar examination. Instead, each of the 50 states, the District of Columbia, and each federal district court have their own rules and requirements for admission to the bar. All but three states

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1 The difficulties of this requirement are graphically illustrated in an article by Judson S. Woodruff, The Japanese Lawyer, 35 Neb. L. Rev. 429 (1956).
2 Shikōshikenho (Judicial Examination Law) Law No. 140 (1949).
3 Judicial Examination Law, art. 12 (1949).
4 Judicial Examination Law, art. 13 (1949).
5 Saibansho Hō (The Court Law) Law No. 59 (1947), arts. 66, 67; Bengoshi Hō (Lawyers Law) Law No. 205 (1949), art. 4.
6 See, Woodruff, supra note 1. See also, Rabinowitz, The Historical Development of the Japanese Bar, 70 Harv. L. Rev. 61 (1956).
7 Efforts to promote such an examination have, so far, been completely unsuccessful. Clark, Bar Examinations: Should They Be Nationally Administered?, 36 A.B.A.J. 986 (1950); Uniform Bar Examination, 22 Bar Exam. 4 (1953); Nationally Administered Bar Examinations, 7 J. Legal Ed. 28 (1954).
9 Education required: High School (1)—Georgia; None (2)—North Dakota, Wyoming.
now require some general college education prior to beginning law study.10 Three years of full-time study, or its part-time equivalent, in a law school approved by the American Bar Association or by the state's supreme court is the normal and usual route by which candidates meet the "law study" requirement for admission to the bar. Eighteen states permit "law office study" in lieu of "law school study."11

A requirement of residence within the state for a period of time ranging from the date of application to as long as one year is quite common.12 The question of citizenship, as distinguished from residence, as a requisite of admission to the bar will be discussed in a paper presently under preparation by the authors of this article which will be published under the title "Alien Lawyers."

As in Japan, the vast majority of American applicants must take and pass a bar examination administered, however, under state supervision, except in four states which admit all those who graduate from approved law schools within the state (the diploma privilege),18 or under "emergency" or other rules concerning veterans or persons entering military service.14

Japan also has a group of exceptions to its general rule which requires all applicants to pass the national bar examination and serve a judicial apprenticeship before being admitted to the bar. Thus, those who satisfy the following requirements, regardless of the general rule, are entitled to become practicing lawyers:15

1. Those who have held the office of a Supreme Court Justice; or
2. Those who, after having qualified to become judicial apprentices,

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10 Two years (17)—Arkansas, California, Colorado, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, West Virginia; Three years (27)—Alabama, Alaska, Arizona, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oldahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin; Degree (4)—Delaware, Kansas, Ohio, Pennsylvania.


12 Only Connecticut, District of Columbia, Florida, Illinois, Louisiana, Michigan and Nebraska have no residence requirements. New Hampshire and North Dakota require that the person be a resident at time of admission.

13 Alabama, Montana, West Virginia and Wisconsin. For comment, see, Abolition of the Diploma Privilege, 4 U. Fla. L. Rev. 370 (1951), and Campbell, Certification by Accredited Law Schools, 23 Rocky Mt. L. Rev. 90 (1950).

14 For example, in Kansas, New York, Oklahoma, Texas.

15 Lawyers Law, art. 5.
have held the office of summary court judge, or prosecutor, or of several other offices listed in the statute, for a period, in each instance, of five years or more; or

3. Those who have held professorships or assistant professorships in law at certain designated universities or colleges prescribed in the statute for a period of five years or more.

In computing the time requirement, the applicant is permitted to count time served in two or more positions under either 2 or 3 interchangeably.

Returning to the American picture, each applicant must also satisfy the admitting authorities that he is a person of good moral character.16 Japan apparently has a similar requirement, although the approach is more specific. Thus, a person is disqualified to become a Japanese lawyer, even though he has fulfilled all of the requirements set forth above, if he comes under any of the following conditions:17

1. Those who have been sentenced to the punishment of confinement (without labor), or to a heavier penalty;18

2. Those who have been dismissed from office by the Impeachment Court;19

3. Lawyers expelled by disciplinary action within a three-year period, and certain other specified people under similar conditions as prescribed in the statute;20

4. Those who have been declared "incompetent" or "quasi-incompetent" by a court;21

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16 See Brand, supra note 8; Brenner, supra note 8, Chapter 6, Character Investigation, which was prepared by Will Shafroth, and includes an extensive bibliography on this subject; Kanner, Dual Character Investigation: At Time of Law School Registration and Prior to Admission to the Bar, 30 BAR EXAM. 60 (1961). See also 47 Iowa L. Rev. 507 (1962); and 20 U. Pitt. L. Rev. 841 (1959).

17 Lawyers Law, art. 6.

18 This means punishment of death, imprisonment (with labor) or confinement (without labor) for life or for any period (except the detention for the period of less than thirty days). See Keihō (Criminal Law), arts. 9, 10, 12, 13 and 16.

19 This applies only to those who have held judicial office.

20 According to the Lawyers Law, art. 6(3), lawyers expelled from a bar association, patent agents barred from their business, accountants or tax agents whose registration has been cancelled, or public servants who have been discharged from office, respectively, by disciplinary action, are disqualified for a period of three years from the day of the disciplinary action.

21 By the Civil Code, those who are in permanent condition of insanity may be declared by family court to be "incompetent" (kinchisan in Japanese) and placed under guardianship with the effect that all of their legal acts become voidable; and, those who are feeble-minded, deaf, dumb, blind or spendthrift may be declared by family court to be "quasi-incompetent" (jun-kinchisan in Japanese) and placed under curatorship with the effect that certain major legal acts done by them without approval by curators become voidable. Mimpō (Civil Code) arts. 7, 8, 9, 11 and 12. Kaji Shimpan Hō (Family Court Trial Law), Law No. 152 (1947), art. 9, A-1 and A-2.)
5. Bankrupts not rehabilitated.22

Japan, it will have been noted, requires all who are seeking admission under the general rule to complete a two-year apprenticeship after successfully completing the national bar examination. In contrast, only five states in the United States require the applicant to serve an apprenticeship during or following his regular course of legal education and before or after passing the state bar examination as a condition of admission to the bar.23

The next step in Japan is registration with the bar associations. Before the successful applicant, who has completed his apprenticeship, may begin the practice of law, he must be registered with the Japan Federation of Bar Associations.24 The registration book is kept in the office of the Federation in Tokyo. The request for registration is submitted by the applicant to the local bar association25 of which the requesting applicant hopes to become a member. If satisfactory to the local bar association, the registration is forwarded to the Federation by the local bar association. Therefore, the practicing lawyer must be a member of one of the local bar associations in order to practice law. Membership in these local bar associations is limited to practicing lawyers. Neither judges, nor prosecutors, nor law teachers may belong.26

Membership in a bar association, either local or statewide, as a prerequisite for practice is comparatively new in the United States.27 Pennsylvania is one of the very few states, if not the only one, which requires local approval by a county committee as a condition of practice.28 As of 1963, twenty-seven states, Puerto Rico and the Virgin Islands have approved local bar associations.29

22 Bankrupts rehabilitated under Hazan Hö (Bankruptcy Law) Law No. 71 (1922), arts. 366-21, 367 et seq., are restored from the disqualification to become practicing lawyers, patent-agents, accountants, tax-agents etc.
24 Lawyers Law, arts. 8, 9.
25 Local bar associations are established by Lawyers Law, art. 32, in each prefecture on the same pattern as the district courts structure, except in Hokkaido where, although it is but one prefecture, there are four district courts and four bar associations respectively, one for each district court. By Lawyers Law, art. 89 the three previously existing local bar associations in Tokyo were permitted to remain as bar associations, although there is but one district court.
26 American bar associations, national, state or local, draw no such distinction. However, some state-wide integrated bars do exempt, or exclude, judges, during their term of office. See, for example, RCW 2.48.021.
27 The first state to adopt an integrated bar act was North Dakota in 1921. See, N. Dak. Rev. Code tit. 27, Ch. 27-12 (1960).
Islands have a state-wide integrated bar to which all lawyers must belong in order to practice law in the state.\textsuperscript{29} In the other twenty-three states, no bar association affiliation, local, state or national, is required.

Returning to the Japanese picture, local bar associations, as noted above, may refuse to forward the request for registration, and the Federation also may refuse to register the applicant in the registration book. If this happens, at either level, the applicant is unable to practice law until and unless he can obtain a reversal of the decision not to forward or not to register. The local bar association, on the recommendation of its qualifications committee, may refuse to forward the request for registration of those who:\textsuperscript{30}

1. may impair the good order or reputation of the bar association; or
2. are considered to be inadequate for the practice of law because of impaired mental or physical condition; or
3. filed the request more than three years after the date of expulsion from a bar association or other disciplinary action as prescribed in the statute where it is considered inappropriate to permit the applicant to practice law;\textsuperscript{31} or
4. were in full-time public service in the area of the local bar association within one year from the date of the request where it is considered especially inappropriate to permit them to practice law in the particular area.\textsuperscript{32}

Where the request to forward the registration is denied by a local bar association, the applicant may request the Federation to review the denial within thirty days from the date of notification. Also, if the local bar association simply fails to forward the request within three months, the failure to forward the request is deemed a denial, and the applicant may request the Federation for a review within the thirty-day period. The Federation, on review, on the recommendation of its qualifications committee, must either:

\textsuperscript{30} Lawyers Law, art. 12.
\textsuperscript{31} This corresponds to Lawyer's Law, art. 6(3). See note 20, supra.
\textsuperscript{32} This clause has created argument in that it apparently violates freedom of choice of occupation. However, no case has been found which has discussed this point.
1. order the local bar association to forward the request for registration, where the request is considered reasonable; or
2. dismiss the request for review, where the application is considered groundless.\textsuperscript{33}

Even though a request for registration has been forwarded by a local association, the Federation, on the recommendation of its qualifications committee, may refuse to register the applicant on the same grounds on which a local bar association may refuse to forward the request.\textsuperscript{34}

Since 1949, there have been only two cases in which either the request for review was dismissed by the Federation, or the Federation refused to register the applicant. These cases, neither of which has been officially reported, are as follows:

1. Mr. A, whose request for registration was refused by a local bar association, filed a request for review with the Federation. The facts indicated that Mr. A had been tried and found guilty of a crime. He was sentenced to prison for a term, but execution of sentence was suspended. See article 6, subsection 1 of the Lawyers Law. The time of the suspended sentence had passed before he applied for registration. The facts indicated, however, that Mr. A had a record of three previous convictions of forgery. Such violations of the Non-Lawyer Control Law, which is now included in the Lawyers Law, does not affect his qualifications under article 6 of the Lawyers Law. Still, on the basis of article 12, subsection 1 of the Lawyers Law,\textsuperscript{35} the local bar association refused to forward the request for registration. The Federation also dismissed the request for review on the same grounds in May, 1957.

2. Mr. B, who had been an assistant professor of law in a university for a period of more than five years as required by subsection 3 of article 5 of the Lawyers Law, filed a request for registration with a local bar association to be forwarded to the Federation. The request was forwarded by the local bar association. The Federation, in its investigation of the request, found that Mr. B had no teaching assignments at the university but had been doing only clerical work. The Federation refused to register the applicant.

So far as is known, neither of these cases was later brought before

\textsuperscript{33} Lawyers Law, art. 14.
\textsuperscript{34} Id., art. 15.
\textsuperscript{35} "Those who may impair the good order or reputation of the bar association."
a court. Also, it is presumed that there must have been many requests which were refused by local bar associations, and from which no request for review was made to the Federation, although no statistics are available.

Where the Federation has dismissed a request for a review of a refusal by the local bar association to forward a request for registration, or where a request for registration is refused by the Federation, the applicant may sue the Federation in the Tokyo Higher Court, within thirty days from the date of notification to that effect, on the ground that the conclusion by the Federation is either unlawful or unreasonable.\(^{36}\) So also, if the Federation fails to make a decision on a request for review within three months from the date of accepting the request for review, or fails to register the name of the applicant within three months after the request for registration has been forwarded by a local bar association to the Federation, the applicant may deem the failure to act as a refusal as of the end of the three-month period and he may sue the Federation, as above, within thirty days after the three-month period.\(^{37}\)

An example of the application of these rules is found in *T. K. v. The Attorney General*\(^{38}\) in which case the Tokyo Bar Association had refused to forward a request for registration on the ground that registration of the applicant would “impair the good order or reputation of the Bar Association.” The facts of the case disclose that Mr. T. K., who had been a member of the Tokyo Bar Association since November, 1922, had been expelled from that Bar Association in June, 1928 for failure to pay his membership dues. At about the same time, he was tried, convicted and sentenced by a trial court to one-year imprisonment on the charge of embezzlement. Sentence was suspended for a period of three years from April, 1929. At the end of the three-year period, his qualifications having been restored, Mr. T. K. became a member of the Yokohama Bar Association. In July, 1936, he was arrested by the police for another embezzlement and on other charges. Meanwhile, he was also expelled once again from the Yokohama Bar Association for failure to pay his membership dues. His name was deleted from the lawyers’ register. Later, he was sentenced to one

\(^{36}\) Lawyers Law, art. 16.

\(^{37}\) Ibid.

year and two months imprisonment by the Tokyo Appellate Court. He served his term. Due to the amnesty of October, 1945, his qualifications to become a practicing lawyer were restored. He thereupon filed a request with the Tokyo Bar Association to forward his registration as a lawyer in February, 1946. The Tokyo Bar Association refused his request on July 20, 1946. Mr. T. K. was notified of the denial in a notice dated July 25. The notice did not give any reason for the denial. Mr. T. K. filed a request for review with the Attorney General in accordance with the statute then in effect. This request was dismissed on June 3, 1947. The notification of dismissal did not state any grounds for a refusal. Mr. T. K. sued the Attorney General to get the said dismissal revoked. This was also denied in the Tokyo District Court and this decision was confirmed by the Tokyo Higher Court. The defendant, the Attorney General, made it clear during the trial that the reason for refusal by the Tokyo Bar Association and the reason for the dismissal of the request for review by the Attorney General were both on the basis that Mr. T. K. might impair the good order or reputation of the Bar Association, as prescribed in article 12 of the former Lawyers Law.

Mr. T. K. argued at the trial in the Tokyo District Court that:

1. article 12 of the Lawyers Law of 1933 is in violation of article 22 of the Constitution of Japan as a deprivation of the freedom of choice of occupation and is therefore unconstitutional;

2. the denial of the request for registration by both the Bar Association and the dismissal of the appeal by the Attorney General were unreasonable in that neither showed any ground for the decision made;

3. the amnesty restored to Mr. T. K. his qualifications to become a practicing lawyer and therefore he is entitled to the registration as of right.

The District Court concluded that:

1. Since the practice of law requires trust by society in the lawyer in general, the statute which sets forth the qualifications and conditions to become a practicing lawyer are within the “public welfare”
laws mentioned in article 22 of the Constitution. Therefore, article 12 of the Lawyers Law of 1933 does not violate either article 22 of the Constitution or the "equality under the law" clause of article 14 of the Constitution;

(2) The Lawyers Law does not require the notification of rejection of an application or of an appeal to set forth the grounds for refusal to forward a registration. The court pointed out that since Mr. T. K. was given a chance to make a statement on both occasions and since he did in fact file a written statement both in the procedures with respect to his request for registration and for review with the Bar Association and Attorney General, respectively, the denial without setting forth the grounds therefor is not in violation of the Constitution;

(3) The only effect of the amnesty is the restoration of qualification. It does not entitle Mr. T. K. to be registered because of the amnesty;

(4) Mr. T. K.'s behavior both before the time when his request was refused and during the period up to the close of the trial are matters to be taken into consideration by the court in reaching its conclusion. The court noted that in addition to the misconduct mentioned above, and during the trial of this case, Mr. T. K. was defending twelve separate criminal cases in the Tokyo District Court and in several Summary Courts. Consequently, the court found that it was quite reasonable to conclude that Mr. T. K. might "impair the good order or reputation of the Bar Association."

All of these conclusions of the District Court were sustained in the decision of the Tokyo Higher Court.

A somewhat similar case is that of U. M. v. Minister of Justice.41 Mr. U. M., as a qualified lawyer, on August 25, 1946, requested the Toyama Bar Association to forward his request for registration to the Japan Federation of Bar Associations. The local bar association refused to do so on April 2, 1946, and Mr. U. M. filed a request for review to the Minister of Justice according to the law then in effect. This request for review was dismissed on November 5, 1947. Neither the notification of the refusal to forward or the dismissal of the review

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41 Tokyo District Court, Oct. 23, 1956; The Administrative Case Report, Vol. 7, No. 10, Case No. 241. The title of Attorney General has been restored again to the Minister of Justice, though there is slight difference in original Japanese. See note 39 supra.
set forth the grounds upon which the decision was made. Suit was instituted and during the trial the following facts were revealed: the first hearing of the Toyama Bar Association to consider Mr. U. M. was scheduled for February 3, 1947. It had to be called off because of deep snow which prevented the members from attending the meeting. A second assembly was scheduled for March 10, 1947. However, the members who were supposed to have knowledge of Mr. U. M.'s good character and behavior did not appear. As a result, the matter was adjourned until the next meeting which was scheduled for April 2, 1947. Just before this date, on March 31, Mr. U. M. sent to the association a certified letter, stating that he wanted to be notified as to the reason for the delay, that he be given certified copies of all relevant records, and also that he might hold them responsible for and sue them for any damages created by the delay.

The court reached the same conclusions with respect to the constitutionality of article 12 and also held that the Lawyers Law did not require the notification to set forth the grounds for refusal to act. The court then stated that on the above facts as revealed during the trial, it could be presumed that Mr. U. M. was an uncompromising and fierce character and that he might well behave in such an extraordinary manner as to not be in harmony with other people because of his insistence on his own position, and that therefore it is unavoidable to conclude that Mr. U. M. might impair the good order or reputation of the bar association, which is a reason for denying his request under article 12 of the Lawyers Law of 1933.

Although the procedures differ somewhat, it is quite apparent that both the Japanese and the American applicant for admission to the bar undergo an extensive character investigation. Under both systems, the disappointed applicant is entitled to take his case to court. And, under both systems, bad character is a ground for denial of admission to practice law. Under American practice, it would be very unusual for the admitting authority to fail to set forth the reasons for its adverse decision, if based upon character deficiencies. Failure to do so would almost certainly result in an order by the appellate court remanding the matter for further consideration.\footnote{43}

\footnote{42 This is one kind of mail by which a copy of the letter certified by a mail clerk is delivered to the addressee as a registered mail. This is often used as a sort of ultimatum in various dealings.}

\footnote{43 See, Comment, \textit{Constitutional Law, Due Process, Denial of Admission to the Bar Based on Unwarranted Inferences of Bad Moral Character}, 56 \textit{Mich. L. Rev.} 415 (1958).}
CANCELLATION OF REGISTRATION—DISBARMENT

Let us now examine the question of cancellation of a lawyer's registration to practice law. Under Japanese law, registration may be cancelled on the lawyer's own request, or on his death. Resignation from the practice, or from membership in an integrated bar, is also permitted in the United States. However, some states extend this privilege only to attorneys who are in good standing, and not under disciplinary investigation. Japan is in accord on this point, as will be noted later.

The cancellation of the registration of a Japanese lawyer against his will, or disbarment in American terminology, is also provided for by the Lawyers Law.

Thus, a local bar association may upon the recommendation of its qualifications committee request the Federation to cancel the registration of a lawyer where it has been revealed that the lawyer, in filing his request for registration, made false statements with respect to his mental or physical condition, or with respect to his prior expulsion from or other disciplinary action in connection with a previous bar association membership, or with respect to the holding of full-time public office within the past year in the area of the bar association. False statements in the application for admission filed by an American lawyer would, likewise, lead to disbarment. However, the Japanese restriction arising out of the holding of a political office in the physical area in which the lawyer wishes to practice is unknown in the United States.

Upon receiving notification of the request by the local bar association to the Federation that his registration be cancelled, the Japanese lawyer may file an objection with the Federation within thirty days. The Federation must either remand the request for cancellation to the local bar association or overrule the lawyer's objection and cancel his registration, according to whether the objection is reasonable or

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44 Lawyers Law, arts. 11, 17(3).
45 Lawyers Law, art. 17(4).
46 See, for example, ARIZ. REV. ST. § 32-214 (1956); ORE. REV. ST. § 9.1 (1953). Resignation from voluntary bar associations is, of course, permitted.
47 See, for example, Rules and Regulations of the State Bar of California, Art. 1, Sec. 2; KY. REV. STAT. Sec. 3.050; Washington, By-Laws of the Washington State Bar Association, Art. II, Sec. 2 and 3. See also, DRINKER, LEGAL ETHICS 48 (1953).
48 See text at note 64.
49 Lawyers Law, arts. 12, 13.
50 See, for example, RCW 2.48.220. "Grounds of disbarment or suspension... (7) Misrepresentation or concealment of a material fact made in his application for admission or in support thereof."
The lawyer is entitled to sue the Federation in case of a decision adverse to him, or where the Federation has failed to act, in the same manner as in the case of a refusal, or failure, to file an original registration. Unless he wins in court, his registration will be cancelled.

Turning from the local to the national level, the Federation is required to cancel the registration of a lawyer on its own initiative or upon receiving notification from the local associations whenever:

1. The lawyer, upon conviction, is sentenced to confinement (without labor) or a heavier penalty; or

2. Three years have not passed since the date of his expulsion from a local bar association or other disciplinary actions as prescribed by statute; or

3. The lawyer is declared "incompetent" or "quasi-incompetent" by the court; or

4. The lawyer is bankrupt, and not rehabilitated; or

5. An "Order to withdraw from membership of a bar association," or "Expulsion as disciplinary action" against the lawyer has become final.

In the case of Yamamoto v. Kume, the Osaka Higher Court was faced with the question as to the date of a lawyer's disqualification under the above statute. Mr. W, a practicing lawyer, filed an appeal on February 23, 1951, as attorney for Yamamoto, the defendant below. Later, the court's attention was called to the fact that Mr. W had been convicted of trespass, and sentenced to four months imprisonment with labor, with execution of the sentence suspended for a period of one year. This judgment became finally binding on June 13, 1950. As a result and on the basis of this conviction and punishment, Mr. W's registration as a practicing lawyer was later cancelled on July 7, 1951. On these facts, the court concluded that a lawyer loses his position as

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51 Lawyers Law, art. 14, paras. 2 and 4.
52 Id., art. 16.
53 Id., art. 17(3).
54 Id., arts. 17(1), 6(1).
55 Id., arts. 17(1), 6(3).
56 Id., arts. 17(1), 6(4).
57 Id., arts. 17(1), 6(5).
58 Id., art. 17(3).
a lawyer on the date of the act that constitutes his disqualification (the conviction and sentence on June 13, 1950) and not on the date of the subsequent cancellation of his registration (on July 7, 1951).

The American lawyer finds this decision very disturbing. American practice, so far as is known, has never sanctioned disbarment or suspension of a lawyer retroactively. If faced with this question, our courts would say, in effect, that even though his acts fall clearly within the statute, and even though the statute gives no discretion to the Federation, still the lawyer remains a practicing lawyer until his registration is finally cancelled.

In addition to those situations in which registration must be cancelled, the Japanese practicing lawyer may be disciplined if he:

1. violates the Lawyers Law; or

2. violates a regulation of a bar association of which he is a member, or of the Japan Federation of Bar Associations; or

3. impairs the good order or reputation of a bar association of which he is a member; or

4. otherwise misconducts himself in such a way as to impair his dignity in relation to his profession.

Such disciplinary action is taken by a bar association of which the lawyer is a member, on recommendation of its disciplinary committee, or by the Federation, on the recommendation of its disciplinary committee, where deemed appropriate.60 Disciplinary action may be instituted either by the bar association on its own motion, or on the motion of anyone who believes that there is ground for disciplinary action.61

A lawyer who has been subjected to discipline is entitled to review along the same lines as those discussed above when registration is refused.62

60 Lawyers Law, arts. 56, 60.
61 Lawyers Law, art. 58(2).
62 Lawyers Law, arts. 59, 62. Some examples of the decisions on disciplinary action taken by the Federation upon requests for review are as follows:

A. The original decision altered:

1. Original decision by a local association: One year suspension. Decision by the Federation: six months suspension. Fact: Failure to return client's money which had been deposited as security in a depository office and was later returned to the lawyer.

2. Original decision by a local association: i. no action: ii. Six months suspension. Decision by the Federation: (several cases combined) six months suspension. Facts: i. disseminated false written information at a stockholders' meeting with respect to a certain company.
The disciplinary action may result in:

1. reprimand; or
2. suspension of practice for a period of two years or less; or
3. an order to withdraw from membership in a local bar association; or
4. expulsion.

ii. submitted a false written allegation to the court to the effect that the opposing party forced his client to pay money.
iii. embezzlement of a typewriter.
iv. unlawful use of a blank power of attorney. (Forgery).

Remarks: an administrative suit is pending.

3. Original decision by a local association: two years suspension. Decision by the Federation: Two months suspension.
   Fact: Received money from a client to hire another lawyer; after other lawyer refused to take the case, the first lawyer failed to return the money to the client.

4. Original decision by a local association: Six months suspension. Decision by the Federation: Four months suspension.
   Fact: Demanded money from the opposing party in a civil case, sued the said party, and seized some of his property.

5. Original decision by a local association: Six months suspension. Decision by the Federation: No suspension warranted.
   Fact: i. After the dismissal of a civil suit, the lawyer assisted the client in filing a criminal complaint of fraud or misappropriation against the opposing party in the civil suit. ii. Made a defamatory statement about the opposing party and his lawyer in open court in the civil suit.
   Ground for Decision: i. The lawyer merely prepared a letter of complaint. ii. Though the statement was exaggerated, his conduct was not out of line with his duty and was permissible.

B. The original decision affirmed:

1. Original decision by a local association: Order to withdraw from membership.
   Facts: i. in the process of getting some seized property returned to the original owner (the client), knowing the procedure to be very simple, the lawyer received an excessive fee in the amount of 200,000 yen (approx. $550.00). ii. The lawyer bought the right of the opposing party in dispute while representing a client in a civil case (violation of art. 28, Lawyers Law). iii. Drunk and disorderly conduct.

2. Original decision by a local association: Six months suspension.
   Fact: Failed to return client's money which had been deposited as security in a depository office and later returned to the lawyer.
   Remarks: An administrative suit is pending.

3. Original decision of a local association: Five months suspension.
   Fact: Failed to return money to a client which had been received from the client as a part of bail money. Since the amount of money so received was insufficient for the bail, the defendant had not been released at that time. He was released later upon suspension of sentence. The lawyer alleged that the money was a fee for his defense activities, although he received a fee from the court in that case as court-appointed defense counsel.

C. Disciplinary action originated by the Federation:

Decision: Order to withdraw from membership in a bar association.
Facts: i. set up more than one law office outside the area of the bar association of which he was a member. (Violation of art. 20, Lawyers Law).
   ii. Engaged in several broker-like activities by participating in several real property auctions, in violation of art. 30, para. 3, Lawyers Law.
The last three actions have the effect of disqualification from practice either for the the period set under 2 above, or permanently under 3 and 4 unless the disqualification is later removed.\textsuperscript{63}

While a disciplinary action is pending, the lawyer is not entitled to request a cancellation of his registration, or to a change of membership to another local bar association.\textsuperscript{64}

A disciplinary action cannot be initiated in Japan after three years have elapsed from the date of the occurrence of the ground for action.\textsuperscript{65} American case law supports the contrary view that neither the statute of limitations nor laches bars disciplinary action, although the delay may be taken into consideration on the question of the discipline to be imposed.\textsuperscript{66}

The nature of a disciplinary action was before the Japanese court in \textit{State v. J. T.}.\textsuperscript{67} The lawyer was appealing his conviction for forging a power of attorney while practicing law and also for attempted fraud

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{DISCIPLINARY CASES} & \textbf{1959} & \textbf{1960} & \textbf{1961} \\
\hline
\textbf{Original Decision} & \textbf{No Action is to be taken} & 1 & 1 & 1 \\
& \textbf{Reprimand} & 2 & & \\
\textbf{Altered} & \textbf{Suspension of business} & 9 & & \\
& \textbf{Order to withdraw from membership} & 1 & & \\
& \textbf{Expulsion} & & & \\
& \textbf{Total} & 1 & 3 & 11 \\
\hline
\textbf{Original Decision} & \textbf{No Action is to be taken} & 4 & 6 & 14 \\
& \textbf{Reprimand} & 1 & & \\
\textbf{Altered} & \textbf{Suspension of business} & 1 & 2 & \\
& \textbf{Order to withdraw from membership} & 1 & & \\
& \textbf{Expulsion} & & & \\
& \textbf{Total} & 6 & 7 & 17 \\
\hline
\textbf{Withdrawal of request for review etc} & 3 & 3 & 2 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{63} No. 4 is considered to be more ignominious; as to the difference between no. 3 and no. 4, see Lawyers Law, art. 6(3).
\textsuperscript{64} Lawyers Law, art. 63.
\textsuperscript{65} Lawyers Law, art. 64.
\textsuperscript{66} \textit{In re} Bailey, 30 Ariz. 407, 248 Pac. 29 (1926); \textit{In re} Moeur, 82 Ariz. 185, 310 P.2d 508 (1957); State Bar Comm'n v. Sullivan, 35 Okla. 745, 131 Pac. 703 (1912); Wilhelm's Case, 269 Pa. 416, 112 Atl. 560 (1921); State v. Tarpley, 122 Ore. 479, 259 Pac. 783 (1927). But see: People v. Tanguary, 48 Colo. 122, 109 Pac. 260 (1910); and \textit{In re} Evans, 72 Okla. 215, 179 Pac. 922 (1919)—(A statute barring disbarment proceedings for conviction of a felony if not begun within one year had been repealed, but not until after the bar of the statute had attached.)
\textsuperscript{67} The Supreme Court, Second Petit Bench; July 2, 1954; \textit{SAIKO SAIBANSHO HANREISHU} (The Supreme Court Report) Vol. 8, No. 7 (1954) p. 1009.
LAWYERS' QUALIFICATIONS

and embezzlement. In his appeal to the Supreme Court, he contended that since he had been ordered to withdraw his membership from the Saga Bar Association in a disciplinary action by that association based on these facts, this later criminal punishment for the same acts constituted double jeopardy and was therefore unconstitutional. The Court rejected this argument on the ground that the disciplinary action prescribed by the Lawyers Law was, in its nature, not punishment for a crime.

Disciplinary procedures in the United States follow no set pattern. The statutes and the rules and regulations of state and federal courts and of integrated bars must be examined in each instance in order to ascertain the local practice.8

Under the Japanese practice above described the bar associations have the power to take disciplinary action, including disbarment, which action is final and binding unless reversed by a court on appeal. Although bar associations in states with an integrated bar may issue a reprimand,9 the universal practice in the United States places the power to disbar or suspend an attorney in the courts.10 Efforts by the legislature to place this power in a board or a bar association have been defeated by the courts.11

American case law is in accord with the holding in State v. J. T.,

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8 For a collection of statutes, rules and regulations on disciplinary procedures, see BRAND, BAR ASSOCIATIONS, ATTORNEYS AND JUDGES (1956) (Supp. 1959). For the report of the Survey of the Legal Profession on this problem, see PHILLIPS & MCCOY, CONDUCT OF JUDGES AND LAWYERS, (1952), particularly Chap. VI—Disciplinary Procedures, pp. 85-129; For an example of disciplinary procedures in a state with an integrated bar, see DEERING'S CALIF. CODE, Business and Professions, §§ 6040-6052, 6075-6118 and 6125-6131, and State Bar of Calif.—Rules of Procedure, Rules 8—59; or, Washington, RCW 2.48.060, and Rules for Discipline of Attorneys, Vol. O, RCW; For an excellent up-to-date discussion of the present picture in the United States in general see, Note 47 IOWA L. REV. 984 (1962), which contains numerous citations to cases, statutes, and rules, including the A.B.A. Model Rules; for the present picture in a state without an integrated bar, see, for example, GERTNER, LEGAL PROFESSION—DISBARMENT AND RESTATEMENT PROCEDURES IN OHIO—RULE XXVII—SUPREME COURT RULES OF PRACTICE, 18 OHIO ST. L.J. 139 (1957); For an excellent case on the federal approach, see THEARD v. UNITED STATES, 354 U.S. 278 (1957).

9 See for example, Washington, Rules for Discipline of Attorneys, Rule 8 D, RCW, Vol. O.

10 DRINKER, LEGAL ETHICS 34-35 (1953). See, e.g., Barton v. State Bar of California, 208 Cal. 677, 289 Pac. 818 (1930); In re Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932); In re Richards, 333 Mo. 907, 63 S.W.2d 672 (1933); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928); In re McBride, 164 Ohio St. 419, 132 N.E.2d 113 (1956); In re Robinson, 48 Wash. 153, 92 Pac. 929 (1907); and In re Sherman, 58 Wn.2d 1, 363 P.2d 390 (1961).

11 See, for example, Wash. Sess. Laws, 1917, ch. 115, p. 421. By sections 17 and 18 of this statute, a newly created state board of law examiners, composed of three members of the bar, was empowered to enforce all the laws and ethics relating to the duties of attorneys, to hear all complaints of immoral or unprofessional conduct, to subpoena witnesses, and to suspend or annul the license of a person to practice law. Section 19 gave a person whose license had been annulled or revoked a right to peti-
above discussed,\textsuperscript{72} that the purpose of a disciplinary action is not punishment, but rather an investigation into the fitness of an attorney to continue in the practice of law and to be held out to the public as worthy of that status.\textsuperscript{73} Thus, a disciplinary proceeding is a special proceeding, neither civil nor criminal, and is sui generis. It is incident to the inherent power of the court to control its officers and to preserve public confidence in high professional and ethical standards on the part of those engaged in the practice of law.\textsuperscript{74}

As noted, in Japan the Federation is required to cancel the registration of a lawyer whose conduct places him within the five grounds listed above.\textsuperscript{75} American courts are not "required" to take disciplinary action regardless of the facts in any particular case. This is a matter within the sound discretion of the courts, and must be exercised with extreme care and caution.\textsuperscript{76} Since the profession of the attorney is of great importance to him as an individual, the "privilege" of exercising it, once acquired, should not be lightly or capriciously taken away.\textsuperscript{77}

\textsuperscript{72} Text at note 67.

\textsuperscript{73} See, e.g., \textit{In re} Park, 45 Wn.2d 383, 274 P.2d 1006 (1954).

\textsuperscript{74} See, e.g., \textit{In re} Sherman, 58 Wn.2d 1, 363 P.2d 390 (1961). See also, \textit{Ex parte} Wall, 107 U.S. 265 at 288 (1883)—"The proceeding is in its nature civil, and collateral to any criminal prosecution by indictment."

\textsuperscript{75} Text, at notes 54 through 58.

\textsuperscript{76} See \textit{Ex parte} Secombe, 19 Howard 9, 13 (1856); \textit{In re} Ward, 54 Wn.2d 593, 600, 343 P.2d 255 (1959).

\textsuperscript{77} \textit{Ex parte} Burr, 9 Wheat. 528 (U.S. 1824); \textit{In re} Metzenbaum, 22 Wn.2d 75 at 79, 154 P.2d 602 at 604 (1954); \textit{In re} Little, 40 Wn.2d 421, 430, 244 P.2d 255 at 260 (1952). See also Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), which held that the privilege of practicing law was not a privilege or immunity of a citizen of the United States under the Fourteenth Amendment of the United States Constitution.
If an American court does conclude that disciplinary action is warranted, it may take action by way of disbarment, suspension, reprimand, reproval or censure. In 1956, the House of Delegates of the American Bar Association approved a draft of *Model Rules of Court for Disciplinary Proceedings*.

These rules have served as a model for and have been adopted with various changes in Hawaii, New Mexico, and Oklahoma. Of particular interest is the first paragraph of Rules 3.01 of the *Model Rules*, which reads as follows: "Discipline shall be: (a) permanent disbarment, (b) suspension for an indefinite period, subject only to termination as hereinafter provided, or (c) a public censure, or (d) a private censure."

The concept of "permanent disbarment" is relatively new. To date two states, New Mexico and Ohio, have adopted the A.B.A. *Model Rules* approach on this point. Present practice in most of the states of the United States provides for the reinstatement of disbarred attorneys, although the rules covering the time of application, the proof of rehabilitation required and the conditions vary considerably.

If the concept of permanent disbarment is adopted, then suspension for an indefinite period is logically necessary, for it replaces the former concept of disbarment with the possibility of reinstatement as provided for by most other rules. Both New Mexico and Ohio have been consist-

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78 For a factual study, see Philips & McCoy, supra note 68, at 93-118; and Smith, *Disbarments and Disciplinary Action: The Record for Five Years*, 47 A.B.A.J. 363-365 (1961). For statutes, rules and regulations, see Brand, supra note 8.


80 Supreme Court Rule 16, 43 Hawaii 439, 450-53 (1959).


83 Mr. Drinker advocates this approach, see Drinker, supra note 68 at 49-51. For the New Mexico rule, see supra note 81 and for the Ohio rule and a comment, see Ohio Supreme Court Rule XXVII, particularly sections (6) and (7), (effective Jan. 1, 1957), 29 Ohio Bar Ass'n Rep. 971 (1956); see also, Gertner, *Legal Profession—Disbarment and Reinstatement Procedure in Ohio—Rule XXVII—Supreme Court Rules of Practice*, 18 Ohio St. L.J. 139 (1957).

84 See Drinker, supra note 70, at 49-51 for text and case citations; for statutes and rules, see Brand, supra note 8. For a case example, see Petition of Shan, 24 Wn.2d 598, 166 P.2d 843 (1946), which resulted in readmission eight years after disbarment upon proof of rehabilitation. For an example of conditions which may be imposed, see Washington, Rules for Discipline of Attorneys, Rule 10. Reinstatement after disbarment, paragraph F, which adds the requirement that if the petition for reinstatement is granted, the petitioner must take and pass the attorney applicant's examination as prescribed by Rule 4 of the Rules for Admission to Practice. Paragraph G of this same rule provides that no petition for reinstatement shall be filed within a period of one year following disbarment or within a year after an adverse decision on a prior petition for reinstatement.
ent and have adopted this part of the *Model Rules* as well. The present practice in most of the states permits, and employs, the device of suspension for a definite period of time, ranging from a month to a year or more. Also, as in Japan, the censure, or reprimand, or reproach is employed, both under the *Model Rules* and in all states.

Contrary to the clear Japanese position, American jurisdictions are split on the question whether an attorney has the right to resign when threatened with or involved in a disciplinary action. The approach of the *Model Rules* to this problem, that "3.04. A lawyer who, pending investigation of misconduct or while charges of misconduct against him are pending, voluntarily surrenders his license to practice law in this state or elsewhere, shall not thereafter be admitted to practice law in this state," has been adopted in New Mexico.

It is now in order to compare the grounds for disciplinary action in Japan with those common to the American states. As pointed out by Mr. Drinker,

the cases dealing with the disbarment or other discipline of lawyers involve two distinct characteristics, although the distinction is not clearly recognized:

1. Cases in which the lawyer's conduct has shown him to be one who cannot properly be trusted to advise and act for clients;

2. Cases in which his conduct has been such that, to permit him to remain a member of the profession and to appear in court, would cast a serious reflection on the dignity of the court and on the reputation of the profession.

The grounds for disciplinary action in America are quite generally

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85 See, *supra* notes 81, 83.
86 See, *e.g.*, *In re* Roberts, 45 Wn.2d 317, 274 P.2d 343 (1954) (thirty day suspension for violation of Canons of Professional Ethics, Canons 7—Professional Colleagues and Conflicts of Opinion, and 27—Advertising, Direct or Indirect); and *In re* Hutchinson, 178 Wash. 112, 33 P.2d 1119 (1934) (one year suspension for refusal to account for money collected for client until disbarment proceedings were brought).
87 See, *e.g.*, *In re* Molthan, 52 Wn.2d 560, 327 P.2d 427 (1958), censured and reprimanded for failing to file federal income tax return, although he notified tax authorities of his intention not to pay an income tax because he thought that he had been relegated to "second class" citizenship by virtue of his denomination as a security risk.
88 *Text*, at note 64.
89 See text and statutes at notes 46 and 47. See also, DRINKER, *supra* note 70, at 48. For an excellent recent casenote, see *Legal Profession—Resignation from the Bar* P.2d 890 (1952), with the By-Laws of the Washington State Bar Association, art. II, §§ 2–3, which permit a lawyer to change from active to an inactive status only "if in good standing." Is "resignation" a different matter entirely? Resignation held ineffectual to preclude disbarment without consent of court, *In re* King, 165 Oreg. 103, 105 P.2d 870 (1940).
90 See note 81, N. Mex. 21-2-1 (3), Rule 3.04.
91 DRINKER, *supra* note 70, at 42-43.
spelled out in statute or rule. For example, the Washington Rule is as follows:

RULE 1 Grounds. An attorney at law may be censured, reprimanded, suspended, or disbarred for any of the following causes, hereinafter sometimes referred to as violations of the rules of professional conduct:

A. The commission of any act involving moral turpitude, dishonesty, or corruption, whether the same be committed in the course of his relations as an attorney, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action. Upon such conviction, however, the judgment and sentence shall be conclusive evidence, at any ensuing disciplinary hearing, of the guilt of the respondent attorney of the crime described in the indictment or information, the statute upon which it is based, and the judgment and sentence. A disciplinary hearing as provided in Rule 7 of these rules shall be had to determine only whether moral turpitude was in fact an element of the crime committed by the respondent attorney.

B. Wilful disobedience or violation of a court order directing him to do or cease doing an act connected with his practice of law, which he ought in good faith to do or forbear.

C. Violation of his oath or duties as an attorney.

D. Corruptly or, without authority, wilfully appearing as an attorney for a party to an action or proceeding.

E. Lending his name to be used as attorney by another person who is not an attorney authorized to practice law in the state of Washington.

F. Misrepresentation or concealment of a material fact made in his application for admission or reinstatement or in support thereof.

G. Suspension or disbarment by competent authority in any state, federal or foreign jurisdiction.

H. Practicing law with or in cooperation with a disbarred or suspended attorney, or maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred or suspended attorney, or permitting a disbarred or suspended attorney to use his name for the practice of law, or practicing law for

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92 See, BRAND, supra note 8. An excellent note, citing statutes, rules and cases, entitled The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 COLUM. L. REV. 1039 (1952), uses the following headings: 1. Professional MisconductInterfering with the Administration of Justice, pp. 1040-1043; 2. Professional Misconduct Not Directly Interfering with the Administration of Justice, pp. 1044-1048; NonProfessional Misconduct, pp. 1048-1051; and 4. Other Grounds for Disbarment, pp. 1051-1052.

93 Rules for Discipline of Attorneys, RCW Vol. 0, Rules of the Washington Supreme Court. See also, Washington State Bar Act, RCW 2.48.220.
or on behalf of a disbarred or suspended attorney, or practicing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred or suspended attorney, or with any person not authorized to practice law.

I. Gross incompetency in the practice of law.

J. Violation of the canons of ethics of the profession adopted by the supreme court of the state of Washington.

K. Membership in any party or organization knowing that it has for its purpose and object the overthrow of the United States government by force or violence.

L. Wilful violation of Rule 2G or wilful disregard of the subpoena or notice of the local administrative committee, hearing panel, or board of governors of the Washington state bar association.

M. A course of conduct demonstrating unfitness to practice law.

In comparing United States practice, we refer back to the grounds upon which the Federation must cancel the registration of a lawyer,94

1. There is a split of authority among the states as to whether a lawyer who has been convicted of any crime, as distinguished from a crime involving moral turpitude, should be disciplined on the basis of the act and the conviction.95

2. The cancellation of registration because insufficient time has elapsed since the lawyer's expulsion from a local bar association is not pertinent to the American scene, because membership in local bar associations is purely voluntary and expulsion from that group, as such, would not have any effect on the attorney's privilege to practice law (with the possible exception of Pennsylvania). The related problem of the readmission of a disbarred lawyer under American practice will be discussed later.

3. The problem of the lawyer's mental competency has not received the attention in the United States which it deserves, although a few states and a few courts have dealt with parts of it along the same lines as does the Japanese provision. A suggestion for over-all treatment, based on a study of the present practice in the United States, appeared recently in the American Bar Association Journal under the title, "The Lawyer's Mental Health and Discipline."96 Interested parties are referred to that study.

94 See text, at notes 54-58 respectively.
95 For a collection of statutes and cases, see 52 COLUM. L. REV. at 1048-1051 (1962).
96 Stevens, 46 A.B.A.J. 140 (1962). In this article, Professor Stevens has collected and discussed the statutes and cases bearing on the problem and has drafted a model rule, which he believes will permit adequate consideration of various aspects of the
4. So far as can be ascertained, no American lawyer has been disciplined solely because he has gone through bankruptcy. So long as he has not misused clients' funds or defrauded his creditors or the like, it would seem that he has the same right as any other person to make use of the bankruptcy laws with respect to his personal obligations.

5. The fifth ground, i.e., an order to withdraw from the association membership, as the second above, is not pertinent, because of the differences in organization of the bar in America from that in Japan, except insofar as disbarment for conduct in one state might lead to disbarment in another state in which the attorney is also admitted to practice, or with respect to the effect of disbarment in a state on disciplinary action by a federal court.

The four additional grounds for permissive discipline of Japanese lawyers (violation of the Lawyers Law; or of a bar association regulation; or impairment of the reputation of a bar association; or personal misconduct), are quite comparable to the grounds for discipline in American jurisdictions discussed above, except that violation of a regulation of a bar association would result in disciplinary action only in states with integrated bars. It will be noted that the language of these Japanese rules is general—"violates the Lawyers Law," "violates a regulation of a bar association," "impairs the good order or reputation of a bar association," and "otherwise misconducts himself in such a way as to impair his dignity in relation to his profession." This leaves the disciplinary authority with wide latitude as to the conduct which will be construed to warrant disciplinary action, and yet permits specific requirements to be spelled out in other articles of the Lawyers Law and in the bar association regulations. American jurisdictions employ the same approach. Witness the Washington Rule set forth above. In addition, the vast majority of the states have adopted, or at least turn to, the Canons of Professional Ethics as a guide to proper professional conduct. Although the Federation has a set of ethical

problem whenever and as they arise. See also, In re Sherman, 58 Wn.2d 1, 363 P.2d 390 (1961).

97 See, e.g., the Washington Rules, 1 G, set forth in the text above following note 93; S. DAK. CODE § 32.1211; RCW 2.48.220 (8); and, In re Van Bever, 55 Ariz. 368, 373, 101 P.2d 790, 792 (1940).


99 See text, just before note 60.

100 See text at, and notes, 91, 92, and 93.

101 For an excellent short history of the development of the Canons of Professional Ethics, see DRINKER, supra note 70, at 23-26.
canons, these canons are not a part of the rules or regulations for disciplinary purposes. A few states, as for example Washington, make a violation of the Canons a specific ground for disciplinary action.\textsuperscript{102}

**DISQUALIFICATION—GROUNDS**

Attention is next directed to those situations in which the practicing lawyer is barred from handling a particular case for a particular client. Such disqualification arises under Japanese law where the lawyer: \textsuperscript{103}

1. has supported the opposing party after conferences with him, or has agreed to handle the matter for the opposing party about this case to such a degree or in such a manner as to warrant the inference that the conference was based on confidence in the lawyer by the opposing party; or

2. is requested by the opponent of a client in a pending matter to represent the opponent in a different matter whether related or unrelated, except where the present client gives his approval to the handling of the matter; or

3. has participated in his capacity as a public official; or

4. has acted as arbitrator in an arbitration proceeding.\textsuperscript{104}

The American approach to this possibility of disqualification of the lawyer to handle a particular matter for a particular client is spelled out in the Canons of Professional Ethics,\textsuperscript{105} Canon:

6. **ADVERSE INFLUENCES AND CONFLICTING INTERESTS.**

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

\textsuperscript{102} Rule I-J, Rules for Discipline of Attorneys, RCW Vol. 0, Rules of Washington Supreme Court. Other states, with a similar provision are, Arizona, Ariz. Code Ann. Sec. 32-201; Louisiana, Act of Incorporation of La. State Bar Association, art. 13, § 4; North Carolina, N.C. Gen. Stat. Ann. § 84-28; and South Dakota, S.D. Code § 32.1209(5). See also, RCW 2.48.220(11), 2.48.230, and Rules of Court, Canons of Professional Ethics, RCW, Vol. 0. As to the force and effect of the Canons in states which have no specific provision, see Drinker, supra note 70, at 26-30. Typical Washington cases in which a lawyer has been disciplined for violation of a particular canon are: In re Robert, 45 Wn.2d 317, 274 P.2d 343 (1954) (involving a violation of Canons 7 and 27); and In re Ballow, 48 Wn.2d 539, 295 P.2d 316 (1956), (involving a violation of Canon 29).

\textsuperscript{103} The Lawyers Law, art. 25.

\textsuperscript{104} Civil Procedure Law, art. 786 et seq.

\textsuperscript{105} See, supra note 101. For an excellent discussion of the application of Canons 6, 37 and 36, see Drinker, supra note 70, at 103-18, 131-39, and 130-31, respectively. See also, American Bar Ass'n, "OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES" (1957) interpreting these Canons: Canon 6, at 3-7, Canon 37, at 36-38; Canon 36, at 35-36. All opinions are set forth in full in numerical order, following the annotation by Canon.
It is unprofessional to represent conflicting interests, except by ex-
press consent of all concerned given after a full disclosure of the facts.
Within the meaning of this canon, a lawyer represents conflicting
interests when, in behalf of one client, it is his duty to contend for that
which duty to another client requires him to oppose.
The obligation to represent the client with undivided fidelity and not
to divulge his secrets or confidences forbids also the subsequent accept-
ance of retainers or employment from others in matters adversely
affecting any interest of the client with respect to which confidence
has been reposed.

37. CONFIDENCES OF A CLIENT.

It is the duty of a lawyer to preserve his client's confidences. This
duty outlasts the lawyer's employment, and extends as well to his em-
ployees; and neither of them should accept employment which involves
or may involve the disclosure or use of these confidences, either for the
private advantage of the lawyer or his employees or to the disadvan-
tage of the client, without his knowledge and consent, and even though
there are other available sources of such information. A lawyer should
not continue employment when he discovers that this obligation pre-
vents the performance of his full duty to his former or to his new
client.

If a lawyer is accused by his client, he is not precluded from dis-
closing the truth in respect to the accusation. The announced intention
of a client to commit a crime is not included within the confidences
which he is bound to respect. He may properly make such disclosures
as may be necessary to prevent the act or protect those against whom
it is threatened.

36. RETIREMENT FROM JUDICIAL POSITION
OR PUBLIC EMPLOYMENT.

A lawyer should not accept employment as an advocate in any
matter upon the merits of which he has previously acted in a judicial
capacity.

A lawyer, having once held public office or having been in the public
employ, should not after his retirement accept employment in con-
nection with any matter which he has investigated or passed upon
while in such office or employ.

In the following examples, the Japanese courts held that the lawyer,
in handling the particular case, had violated the Lawyers Law:

1. \( Z \) loaned money to \( Y \). Later, \( Z \) allegedly transferred the claim
to \( X \). \( X \) sues \( Y \) for payment. \( X \) employs Mr. T. S., a lawyer, to
represent him in this case. \( Z \), alleging that the transfer of the credit
had been cancelled, intervenes in this suit against both \( X \) and \( Y \). \( Z \) in
this intervention is represented by Mr. T. S., the attorney above mentioned. The court held that Mr. T. S.'s representation was unlawful.\textsuperscript{106}

2. \(Y\) rented land from \(X\). A dispute arose between \(X\) and \(Y\) because of \(Y\)'s delay in paying his rent. At \(X\)'s request, Mr. S. S., a practicing lawyer, discussed the matter with \(Y\) and brought it to a settlement, under the terms of which the settlement was to be achieved by compromise procedures during trial.\textsuperscript{107} At the request of \(Y\), Mr. S. S. selected another lawyer, Mr. M. O., to represent \(Y\) in the compromise procedure. Later, in a new suit, by \(Y\) against \(X\), involving objections to creditor's rights,\textsuperscript{108} the court declared that Mr. S. S.'s activity in selecting Mr. \(Y\)'s attorney was a violation of the Lawyers Law.\textsuperscript{109}

3. \(X\) borrowed money from \(Y\). A dispute arose between the parties and was settled by arbitration. Mr. R. A., a practicing lawyer, represented \(Y\) at the arbitration proceeding. Later, \(X\) asked Mr. R. A. to relax some of the conditions of payment. Mr. R. A. agreed to do so on the condition that the matter be settled by compromise procedures during trial. At the request of \(X\), Mr. R. A. chose a practicing lawyer, Mr. M. S., to represent \(X\) in the compromise procedure. The case was settled at the compromise proceeding. Later, \(X\) sued \(Y\) alleging that the compromise was null and void. The court said that the choosing of Mr. M. S. by Mr. R. A. was a violation of the Lawyers Law.\textsuperscript{110}

The above three cases are examples of violations of article 14 of the Lawyers Law of 1893 in that the lawyer was held to have been representing both sides of the controversy. American cases might reach the same decision on the basis of a conflict of interests.\textsuperscript{111}

\textsuperscript{106}Fuchigami v. Izumaru, Supreme Court (June 18, 1932) \textit{11 Dai Shin In Minji Hanrei Shu} (A Collection of Civil Great Court of Judicature Cases) [hereinafter cited \textit{Dai-Han Minshu}] 1176 (1932).

\textsuperscript{107}Civil Procedure Law, arts. 136, 144, 203, 560.

\textsuperscript{108}Civil Procedure Law, arts. 545, 560, 562.

\textsuperscript{109}Muraoka v. Namiki, Supreme Court (Dec. 22, 1934) \textit{13 Dai-Han Minshu} 2231. See also, Kumazaki v. Yoshizawa, Supreme Court (August 12, 1939) \textit{18 Dai-Han Minshu} 903.

\textsuperscript{110}Momose v. Sakatani, Supreme Court (Dec. 19, 1938) \textit{17 Dai-Han Minshu} 2482.

\textsuperscript{111}The mere selection of an attorney for the opposite party, at his request, even though the attorney selected was neither a partner nor an associate of the selecting lawyer (see note 135), might create a conflict of interest situation under the Canons. See DRINKER, "Designating Lawyers for the Other Side," \textit{supra} note 70, at 128-29. The vast majority of American lawyers would avoid this problem by refusing to suggest the name of an attorney. The opposing party would be referred to the local bar association, or to his neighbors or business acquaintances, or, more recently, to the Lawyer Referral Service established by the bar association. See, Marden, \textit{Lawyer Referral Services: They are Important to Lawyers and the Public}, 43 A.B.A.J. 517 (1957).
4. X sued Y for the return of rice seed or damages. X won below and a practicing lawyer, Mr. I. K., filed an appeal for Y. The attorney, Mr. I. K., had been one of the attorneys for X during the trial of the case in the lower court, and X's power of attorney to Mr. I. K. was still on record. The appellate court concluded that Mr. I. K.'s representation of Y on appeal was a violation of the Lawyers Law even though participation of Mr. I. K. in behalf of X was limited to a single appearance before the lower court on one day of a law trial and solely for the purpose of asking an adjournment of the trial, because it was believed that X's regular attorney would be unable to be in court on that day. The facts show that X's regular attorney actually appeared in court on that day with the result that Mr. I. K. did not take any action on X's behalf.\footnote{Sato v. Sato, Supreme Court (Dec. 16, 1938) 17 DAI-HAN MINShU 2457.}


5. Where the lawyer, Mr. S. K., represented Y in a compromise procedure during a trial for the payment of damages, he is barred from representing X, the opposing party in that case, in a subsequent procedure involving execution based on the compromise. The court said that this was so even though all that Mr. S. K. had done in the original compromise procedure was to introduce the conditions before the court which had already been agreed to by the parties and before the compromise.\footnote{Shibata v. Nogaki, Nagoya Higher Court (Nov. 24, 1951) 4 KOTO SABA SHO MINJI HANREI SHU (A Collection of Civil High Court Cases) [hereafter cited KO-HAN MINShU] 401.}

6. A violation of the Lawyers Law results where a lawyer, Mr. C. T., the attorney for X, chooses another lawyer, Mr. E. A., to represent Y, and the case (payment of debt) was settled during the compromise procedure.\footnote{Yamanouchi v. Tokai Shoji Co., Nagoya Higher Court (Dec. 24, 1954) 7 KO-HAN MINShU 1127.}

7. A violation of the Lawyers Law results where a lawyer, Mr. K. T., originally representing a creditor, X, in a dispute over the payment of a debt later represents the debtor, Y, in the preparation of documents by a public notary for the settlement, even though the
contents of the documents are identical with the settlement agreement reached prior to the making of the documents, and to the satisfaction of both parties.\textsuperscript{116}

8. A dispute arose between $X$ and $Y$ concerning the use of land owned by $X$. The dispute was settled out of court, but in order to make certain, both parties agreed to make the agreement a compromise by court order. Being requested to do so by $Y$, $X$ chose a lawyer, Mr. T. K., as attorney of $Y$. The compromise was duly made between the parties by the court. Later, $Y$ sued $X$, denying the effect of the compromise and alleging that he had not given a power of attorney to Mr. T. K. In this new suit, Mr. T. K. represented $X$. $Y$ argued, on the appeal to the supreme court, that the representation of $X$ by Mr. T. K. constituted a violation of the Lawyers Law. The supreme court so held.\textsuperscript{117}

9. $X$ was tried for defrauding $Y$ of one million one hundred thousand yen. In this, a criminal case, $X$ asked a practicing lawyer, Mr. Y. Y., to defend him and paid Mr. Y. Y. a fee of fifteen thousand yen. (It seems that $X$ asked Mr. Y. Y. for an opinion about his case and asked Mr. Y. Y. to defend him and paid fifty thousand yen. On the following day, $X$ withdrew his request that Mr. Y. Y. defend him and received thirty-five thousand yen in return, leaving fifteen thousand yen with Mr. Y. Y. for the opinion given to $X$). Later, $Y$ sued $X$ for damages resulting from $X$’s alleged fraud and $Y$ was represented in this case by Mr. Y. Y. $X$ argued that Mr. Y. Y. was barred from this case. The court agreed.\textsuperscript{118}

10. $X$, a labor union, sued $Y$, its members, for the payment of membership dues. Lawyers, Messrs. H. I. and K. O., represented $X$. Later, $X$ transferred the claim to $Z$, a labor bank, and $Z$ intervened in the suit against both $X$ and $Y$. Messrs. H. I. and K. O. represented $Z$ in this intervention. $X$ later withdrew from the suit. The court concluded that the representation by the two lawyers of $Z$ was a violation of the Lawyers Law.\textsuperscript{119}


\textsuperscript{117} Ochiai v. Ito, Supreme Court (Dec. 16, 1955) 9 SAIKO SAIBANSEHO MINJI HANREISHU (A Collection of Civil Supreme Court Cases) [hereafter cited SAI-HAN MINSHU] 2013.

\textsuperscript{118} Yoshida v. Sasaki, Tokyo District Court (May 15, 1957) 8 KAKYU MINSHU 965.

\textsuperscript{119} Aota v. Fukuoka Prefecture Labor Bank, Fukuoka Higher Court (July 18, 1957) 10 Ko-HAN MINSHU 299.
11. A dispute between $X$ and $Y$ concerning the payment of a debt was settled out of court. At the request of $X$, a lawyer, Mr. K. T., represented $X$ in talking the matter over with $Y$ in reaching the settlement. However, in the procedure of preparing the documents by the public notary for this settlement Mr. K. T. represented $Y$. In a later suit between $X$ and $Y$, the supreme court held that the representation was a violation of the Lawyers Law.

The cases set forth in paragraphs 5 through 11, above, are examples of violations of subsection (1), article 25 of the present Lawyers Law. With the possible exception of the fact situation of paragraph 10, above, American courts would probably reach the same conclusion. All of these examples involve the question of representation of both sides of a controversy and thus present what American courts would call a conflict of interests problem.

12. The lawyer, Mr. Y. S., represented $X$, the appellant, in the original trial before the Nagoya Appellate Court. Mr. Y. S. had been a member of the court which had tried this same case previously. Mr. Y. S. as a judge had given judgment in absentia in that case. Later, as attorney for $X$, he appeared before the court on several occasions and obtained an interlocutory judgment for $X$. He then withdrew. The final judgment by the Nagoya Appellate Court was based upon this interlocutory judgment. The court held that this activity was a violation of the Lawyers Law. This case is an example of a violation of subsection (2), article 14 of the Lawyers Law of 1893.

13. $Y$ had been living in $X$'s house. $X$ sued $Y$ to evict him. A lawyer, Mr. G. M., represented $X$ in this action. However, during the arbitration procedure at a summary court preceding this trial, Mr. G. M. had been the judge in the case. The court declared that it was a violation of the Lawyers Law for Mr. G. M. to represent $X$ in this case.

14. $Y$ rented land owned by $X$. A dispute arose as to the termination date of the lease and $X$ sued $Y$ for evacuation of the land. The dispute was settled at one point by arbitration during the trial to the extent that the property was rented for two additional years. Mr. G. I. was the judge in that arbitration procedure. Later, $Y$ sued $X$, alleging

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121 See cases cited, supra note 113.
122 Mizutani v. Tate, Supreme Court (Jan. 29, 1906) 12 DAI SHIN IN MINJI HANKETSU ROKU (Record of Great Court of Judicature Civil Judgments) 51.
123 Kitada v. Hakuta, Osaka Higher Court (April 1, 1950) 1 KAKYU MINSHU 463.
that the arbitration was null because the lease should have been renewed for twenty more years automatically by law. In this case, Mr. G. I., as a practicing lawyer, represented X. Again, the case was settled by compromise during the trial by an agreement to extend the lease for five additional years. Sometime later Y sued the successors of X, X having died, alleging that the compromise was null because it was against the Land Lease Law. In this case, the court declared that representation of X by Mr. G. I. in the reconciliation case was contrary to the Lawyers Law.\textsuperscript{124}

The cases set forth in paragraphs 13 and 14 are examples of the violation of subsection (3) of article 24 of the Lawyers Law of 1933. (Compare art. 25 of the present Lawyers Law.) The fact patterns of paragraphs 12, 13 and 14 are examples of situations in which a former official later represented one of the parties in the same case which had been before him earlier in his official capacity. American authorities would reach the same result as did the Japanese courts in these instances. Such conduct falls clearly within Canon 36 set forth above.\textsuperscript{125}

In contrast with the above, several Japanese decisions have found no violation of the Lawyers Law:

1. X owned land which Y rented for a short period. After that period had passed, X sued Y to evacuate the land. In this trial, a practicing lawyer, Mr. T. A., represented X. Y alleged that he had once conferred with Mr. T. A. concerning this case and that therefore Mr. T. A. should not be permitted to represent X, the opposing party. It appeared that during the trial and while this dispute was pending mediation by police authorities, Y, while on the way back to his home from the police office, happened to notice the law office of Mr. T. A. Although Y had never met Mr. T. A. before, he entered the office and asked Mr. T. A. for his opinion on the case. Mr. T. A. gave him a very optimistic opinion and agreed when asked to take Y's case, if it came before the court, to do so. The court concluded that under the circumstances of this case, and in view of the extent of the conversation, the behavior of Mr. T. A. did not come under subsection (1) article 24 of the Lawyers Law of 1933, which is the same as subsection (1) article 25 of the present Lawyers Law.\textsuperscript{126} This decision appears to

\textsuperscript{124} Echigo v. Kuma, Nagoya Higher Court (Dec. 5, 1956) 7 KAKYU MINSHU 3562.
\textsuperscript{125} See, e.g., DRINKER, supra note 70, at 130-131.
\textsuperscript{126} Miyakawa v. Aoyagi, Tokyo Higher Court (Mar. 31, 1951) 2 KAKYU MINSHU 455.
be contrary to both the spirit and language of A.B.A. Canon 6, above set forth. American courts would probably find a conflict of interests on these facts.\textsuperscript{127}

2. $X$ sued $Y$ to evacuate a building owned by $X$ and rented to $Y$. A practicing lawyer, Mr. T. M., represented $X$ in this law suit. During this same period, Mr. T. M. had also acted as a consultant for $Y$ and had received some consultation fees from $Y$. The court in 1951 concluded that since the proof showed that Mr. T. M. had talked the matter over with $Y$ on behalf of $X$, his behavior did not amount to a violation of the Lawyers Law even though he was a consultant to $Y$ before and at the same time.\textsuperscript{128} Why was not this conduct a violation of article 25 of the Lawyers Law under paragraph 3 as set forth above in the text following footnote 103. Is it because the court found consent on the part of $Y$? If so, American courts would probably reach the same conclusion under the consent provision of Canon 6 as set forth above.

3. $Z$ is indebted to $X$ by virtue of dealings concernings fertilizers. A dispute arose between the parties which was settled by compromise by the court. Prior to the time of the compromise procedure, $Z$ asked $X$ to choose an attorney for him, giving $X$ a blank power of attorney. $X$ asked Mr. T. I., his own attorney in this case, to choose an attorney for $Z$. Mr. T. I. choose Mr. B. S. as the attorney for $Z$. Compromise was duly made by these two attorneys representing the two parties. Later, $Z$ sued $X$ objecting to rights of $X$ as creditor and insisting that the choosing of Mr. B. S. was a violation of the Lawyers Law of 1933. The court rejected this argument on the ground that since the conditions in the compromise were in accordance with the conditions of the settlement already made out of court there could be no violation.\textsuperscript{129} If the attorney chosen by Mr. T. I. in the above example was not associated with Mr. T. I., American courts would probably reach the same decision as did the Japanese court in this case.\textsuperscript{130}

4. $X$ rented his building to $Y$. $X$ later cancelled the lease and sued $Y$ to force him to evacuate the building. While the case was pending trial, $Z$ bought the building from $X$ and intervened in the

\textsuperscript{127} In accord with Miyakawa, see, e.g., Klein v. Matthews, 99 Utah 398, 106 P.2d 773 (1940); but see, cases cited supra note 113.

\textsuperscript{128} Ginza Land Co. v. Tokyo Hirota-Gumi Co., Tokyo District Court (Aug. 24, 1951) 2 KAKYU MINSHU 1027.

\textsuperscript{129} Nojiri v. Akamatsu, Tokyo District Court (Dec. 26, 1953) 4 KAKYU MINSHU 2004. This case seems somewhat to contradict other precedents.

\textsuperscript{130} See supra note 111.
action against Y. X withdrew from the suit at the time of the intervention by Z. A practicing lawyer, Mr. T. M., who was representing X also represented Z at the intervention. Y argued that this was a violation of the Lawyers Law. The court rejected this argument on the ground that since X withdrew from the suit, there was no conflict of interests between X and Z. An American court would reach the same conclusion and for the same reason.

What is the effect on the rights of the parties of the disqualification of the lawyer in cases in which the attorney has represented both parties, or is in a conflict of interests situation? Does it, for example, have any effect on the work of the lawyer or on the outcome of the suit, compromise or arbitration, or on the effectiveness of public notary documents which were made as a result of the representation? The Lawyers Law makes no reference whatsoever to the effect of disqualification on the acts performed by the lawyer. Japanese cases on this point appear to be in conflict. By way of generalization, it might be said that the tendency of the courts is to find the action of a disqualified lawyer to be void in cases in which the disqualification resulted from expulsion from a bar association or where there was a conflict of interests situation. However, even though the acts based upon such

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132 Fuchigami v. Izumaru, supra note 106, in which the court held that the intervention, since not made by a lawful representation, must be dismissed as unlawful. Murakata v. Namiki, supra note 109, in which the court held the authorization given to Mr. N. O. to represent Y in the compromise procedure void, and remanded the case. Kumazaki v. Yoshizawa, supra note 109, in which the court held that the selection of Mr. A. T. for Y was a violation of the Lawyers Law and the compromise by those attorneys was void. Therefore, execution based on the compromise is not permissible. The case was remanded.
Sato v. Sato, supra note 112, in which the court held that on the facts of this case, see text above, the appeal has no more effect than an appeal made by an attorney without authorization and that the defect was such that it could not be cured by retroactive approval. Therefore, the appeal was unlawful and void and was properly dismissed by the appellate court.
Shibata v. Nogaki, supra note 114, in which case the court pointed out that an attorney having once accepted a case from one party, even after the case is completed, cannot represent the opposing party in a matter involving the same dispute, even though the duties in the original case were without discretion and merely perfunctory—as the carrying out of the terms of a settled obligation. Consequently, the acts were void. Yamanouchi v. Tokai Shoji Co., supra note 115, in which the court held the compromise void and remanded the case.
Ataki Industrial Co. v. Ito Washigoro Co., supra note 116, in which the court held that, since the public notary document was void on the facts, execution based upon the documents was not permissible.
Yoshida v. Sasaki, supra note 118, in which the court pointed out that once a lawyer is entrusted by one party in a dispute with that party's side of the case, there is a possibility that this information might be used to his disadvantage if the lawyer were permitted to represent the opposing party; also, the purpose of the Lawyers Law is
improper conduct are simply voidable if objected to by the other party, these acts cannot be avoided by the party for whom the disqualified lawyer acted if such party approves, at a later time, the act or acts done, or they are approved by a newly appointed competent attorney for the party. Some of the more recent cases even conclude that if the opposing party in the case fails to object during the proceedings to the representation of his opponent by a disqualified lawyer, the act or acts have full effect and no objection on the grounds of disqualification can be raised later. It is quite clear that upon the timely motion of a former client, American courts have the power to disqualify an attorney who is repre-

to prevent distrust of lawyers from arising in the people because of such conduct by lawyers; consequently, the suit was dismissed. Ataka Industrial Co. v. Ito Washigoro Co., supra note 120, in which the court held that the lawyer could not perform his function under the circumstances of this case even with the consent of his client. Therefore, the public notary document was void. Yamamoto v. Kume, supra note 59, where the court concluded that since the appointee later chose an attorney, Mr. K. F., and since Mr. K. F. has been acting on his behalf, this has the effect of a retroactive approval of the acts done by the disqualified Mr. W by both appointee and his new lawyer, with the result that the appeal becomes lawful and effective. Momose v. Sakatani, supra note 110, in which the appellate court reversed the lower court for taking the position that a violation of this kind, where the attorney for one party selected the attorney for the other party, always makes the subsequent compromise void and for holding that a compromise could not be made valid by a later retroactive approval by the party, in this case, Y. Ochiai v. Ito, supra note 117, in which the court held that where a lawyer in a legal proceeding violates the Lawyers Law, the opposing party is entitled to make an objection. If the opposing party fails to object, the act becomes completely effective and cannot be attacked later by an objection. The court said that subsection (1) of the Lawyers Law was enacted for the maintenance of the dignity of lawyers and the protection of the interests of parties; that it was not necessary to consider all acts in violation of the Lawyers Law void, since this might give an unexpected advantage to a party who relied on his lawyer and might result in an abuse of the purpose of the statute, and seriously affect the system of representation by lawyers. Consequently, the court held that since Y had made no objection to the representation of X by Mr. T. K. throughout the trial and even on the first appeal, the acts of Mr. T. K. were valid. Justice Mr. Hachiro Fujita dissented for the following reasons: Mr. T. K. had no part in the formation of the conditions of the compromise; the court below found that Y authorized Mr. T. K. to represent him in the compromise procedure; Y argued in this case to the contrary, and on this ground alleges that the compromise is void; in such a situation, even if Mr. T. K. represents X, there is no violation, since under such circumstances, the words "supported while being conferred with" or "accepted the request" in art. 25 (1) of the Lawyers Law are not applicable. Aota v. Fukuoka Prefecture Labor Bank, supra note 119, in which the court held that although the representation of Z by Messrs. H. I. and K. O. was a violation of the Lawyers Law, the results of the representation were not automatically void. Unless the opposing party objects to the representation, the results become effective and the opponent will not be allowed to insist that the acts were a nullity because of the violation of the Lawyers Law. The court pointed out that the opposing party raised no objection during the trial to the violation resulting from the representation of Z by these lawyers and that therefore the results are binding; that had the opposing party objected during the trial, their acts would have been declared void; and that, in addition, since both of these lawyers resigned and were replaced by a newly chosen attorney who had approved retroactively the activities performed by them, the defects are cured.
senting an interest adverse to that of the former client,\textsuperscript{135} and that failure of the lower court to disqualify the attorney, where there is a conflict of interests, constitutes reversible error.\textsuperscript{136} It is also quite clear that the present client may obtain relief where he has been prejudiced by the acts of his attorney arising out of a conflict of interests situation not fully disclosed to the present client.\textsuperscript{137}

In the first of the three Japanese cases discussed above in which a former judicial officer later acted as attorney in the same matter in which he had acted in a judicial capacity, the court ruled that the final judgment based upon the interlocutory judgment was unlawful and that, therefore, the case must be remanded for new trial.\textsuperscript{138} In the second and third cases, the court sustained the results of the lawyer's services in spite of the illegality of his conduct.\textsuperscript{139}

Canon 36 above set forth is in complete accord with the Japanese position as to the impropriety of such conduct. A former judicial officer "should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity."\textsuperscript{140} If he does so and the opposing party objects in a timely manner, it would be improper for the court to permit him to continue in the case.\textsuperscript{141}

In the criminal field, there are apparently no Japanese cases on the question herein under review; nor is there any clause in the Criminal Procedure Law\textsuperscript{142} referring to the effect of choosing a disqualified

\textsuperscript{135} Boyd v. Second Judicial District Court, Washoe County, 51 Nev. 264, 274 Pac. 7 (1929). See also, Sheffield v. State Bar of California, 22 Cal.2d 627, 140 P.2d 376 (1943). As to the extent of the disqualification of lawyers because of conflicts of interest, see 26 Rocky Mt. L. Rev. 195 (1954); 3 U.C.L.A. L. Rev. 105 (1955); 19 U. Prrr. L. Rev. 653 (1958).

\textsuperscript{136} Weidekind v. Tuolumne County Water Co., 74 Cal. 386, 19 Pac. 173 (1887); see also, Klein v. Matthews, 99 Utah 398, 106 P.2d 773 (1940).


\textsuperscript{138} Mizutani v. Tate, supra note 122. It should be noted that this case was tried under the old Civil Procedure Law, before its complete amendment in 1926.

\textsuperscript{139} Kitada v. Kakuta, supra note 123, in which the judgment below was upheld because X not only had another, and duly authorized attorney, Mr. K. S., during the last part of the appeal below, but he also made statements (unsworn) to the court, which amount to, said the court, a retroactive approval of the defective representation; Echigo v. Kuma, supra note 124, in which the court pointed out that while what Mr. G. I. had done by representing X was a violation of the Lawyers Law, the results of his labors were not automatically void, but rather, became fully effective upon the failure of the opposing party to object in a timely manner. Consequently, said the court, the opposing party is not permitted to argue this point on a later occasion.

\textsuperscript{140} Canon 36; and see DRIKER, supra note 70, at 130-31.

\textsuperscript{141} Harris v. Young, 215 Ill. App. 489 (1919); Shew v. Prince, 119 W.Va. 524, 194 S.E. 345 (1937).

\textsuperscript{142} Keiji Soshō Hō (Code of Criminal Procedure), Law No. 131 (1948). As to the appointment of defense counsel, see Criminal Procedure Law, arts. 30—38.
lawyer as defense counsel for an accused or to the disqualification of a lawyer who has been appointed as defense counsel.

Where presence of defense counsel at the trial level in Japan is compulsory as in the case of crimes punishable by death, life imprisonment or a minimum of three years of confinement, \(^{143}\) lack of qualified defense counsel can be raised on appeal. Where the court has discretion as to the appointment of counsel for defendant upon the consideration that it is necessary, \(^{144}\) disqualification of counsel may be attacked on appeal. However, in any case it must be done before the case becomes finally binding, \(^{145}\) and it cannot be done by "re-opening of case," \(^{146}\) since this is not one of the grounds listed, even though the defendant first learned of the disqualification after the case became finally binding. In the case of a compulsory defense, a remedy might be available by what is called "extra-ordinary appeal," \(^{147}\) although it is not certain whether this remedy may always be resorted to.

A violation of article 25 of the Lawyers Law may arise in criminal cases by virtue of which a lawyer may be barred from defending certain defendants. Thus, a lawyer who represents plaintiff \(X\) in a tort case may be unable to defend \(Y\) in a criminal case, such as negligent homicide, arising out of the same set of facts. \(^{148}\) So also; a judge or prosecutor will be barred from defending the accused in a case in which he participated before quitting his official position. \(^{149}\) However, there has been but little discussion in Japan as to the effect of a violation of the Lawyers Law in criminal cases. So, the matter is still uncertain. The fact that the state is a party in these cases will, no doubt, be a factor which will be taken into consideration in deciding the effects of such a violation.

In cases involving criminal appeals in Japan the fact that defense counsel turns out to be disqualified will be more serious than at the trial level, since those who make arguments for defendants in the appellate courts must be qualified lawyers, \(^{150}\) while at the trial level even non-lawyers may defend an accused with the permission of the

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143 Criminal Procedure Law, art. 289.
144 Criminal Procedure Law, art. 37.
145 This means either that ways of appeal have been exhausted, waived, or that the party fails to appeal within the prescribed period.
146 Criminal Procedure Law, arts. 435 et seq.
147 Criminal Procedure Law, arts. 454 et seq.
148 See infra note 154, for the contrary American position on this fact situation.
149 In most of those cases there is almost no possibility that the rights of defendant are infringed.
150 Criminal Procedure Law, arts. 387, 388, 391.
court. However, where a defendant has two or more defense counsel, so long as at least one of them is a qualified lawyer, disqualification of the other or others would not be fatal.

On the American scene, Canon 36, above set forth, applies to both judges and public prosecutors who retire to private life. The same rules, discussed above, would apply whether the case they undertook as a lawyer were civil or criminal.

American law does not compel the defendant to be represented by counsel in criminal cases. It does, however, give the defendant a right to counsel of his own choosing, or, if he is indigent, a right to have counsel appointed by the court at public expense. Canons 4 and 5 of the Canons of Professional Ethics deal with the obligations of a lawyer assigned to defend an indigent prisoner, and the obligations of those engaged in the defense or prosecution of those accused of a crime.

If the state wishes to disqualify the defendant's lawyer in a criminal case on the ground of conflict of interests, or some other adequate ground for disqualification, the state would have to raise the issue during the trial or it would be waived. On the other hand, the defendant who contends that he has not been given a fair trial because of a conflict of interests on the part of his lawyer or the defendant who discovers that his court appointed counsel was not authorized to practice law because of, for example, non-payment of his bar dues, may raise the issue on appeal, or, probably, even later if the defect first comes to his attention after the time for appeal has expired.

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In conclusion, while there are slight differences, the similarity of the Japanese and American approach to the admission and discipline of

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151 Criminal Procedure Law, art. 31, cf. art. 289.
153 See, in general, DRINKER, supra note 70, at 62-63, 118-20, 142-45, 148.
154 For an interesting case in which the state supreme court reversed the lower court for sustaining the state's objection to the employment by the defendant of the counsel of his choice on conflict of interests grounds where defendant's attorney was a city attorney, see State v. Garaygordobil, 89 Ariz. 161, 359 P.2d 753 (1961). Under the doctrine of this decision, the state could not object to the fact that the defendant in the criminal case employed as his attorney, an attorney who represented the plaintiff in a tort action arising out of the same group of operative facts, for the court held that "the only ones entitled to object to such representation on the ground of conflicting interests is [sic] one who holds the relation of client to an attorney who undertakes to represent conflicting interests." 359 P.2d at 755.
attorneys is quite apparent. We submit that this basic similarity in what our respective societies expect of the attorney is significant. Since the contacts between the people of Japan and of the United States have become so numerous, and their need for reliance upon lawyers of both countries has increased so markedly in recent years, an understanding of this common philosophy with respect to high standards of integrity and training is vital. It is, and should be, the keystone in the structure of confidential, professional relations between attorney and attorney, and between attorney and client.