DISTRICT OF COLUMBIA BAR

REPORT OF THE AD HOC COMMITTEE ON
FEDERAL PRACTICE STANDARDS OF DIVISION IV
AND
THE STEERING COMMITTEE OF DIVISION IV
ON
MINIMUM STANDARDS FOR ADMISSION TO PRACTICE AS
TRIAL ATTORNEYS IN THE FEDERAL COURTS

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PREFACE

The Board of Governors of the D.C. Bar, on April 10, 1979, adopted the following resolution respecting this report:

The Board of Governors has received the Report of the Ad Hoc Committee of Division IV on Federal Practice Standards and the Steering Committee of Division IV on Minimum Standards for Admission to Practice as Trial Attorneys in the Federal Courts.

The Board of Governors adopts the views set forth therein.

The Board of Governors hereby authorizes presentation of these reports to the Judicial Conference of the District of Columbia Circuit and in testimony before the Federal Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts. The Board herewith also authorizes presentation in testimony of the Division IV report entitled "Proposed Rule Providing Nationwide Admission for the District Courts of the United States."

The Board of Governors urges the Judicial Conference of the District of Columbia Circuit to adopt the resolution entitled "Proposed Resolution for the Judicial Conference of the District of Columbia Circuit" and attached to this resolution.

The Proposed Resolution for the Judicial Conference of the District of Columbia Circuit appears at pp. 49 - 51 of this report.*/

*/ The Board authorized non-substantive editorial changes in the report and the form of the resolution prior to its presentation in testimony and before the Circuit Conference.
I. Background

A. The Devitt Committee

In September 1976, Chief Justice Warren E. Burger acting pursuant to a resolution of the Judicial Conference of the United States, appointed a special Committee to Consider Standards for Admission to Practice in the Federal Courts. This Committee, which is chaired by Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota, is composed of members of the bench and bar, as well as representatives of the legal academic community.\(^1\)

In order to accomplish its task and obtain "the best practical or empirical picture of the adequacy of advocacy,"\(^2\) the Devitt Committee asked the Federal Judicial Center to design and undertake a comprehensive research program. The purpose of the research, according to the Devitt Committee, was to obtain data bearing on three matters: "(1) whether, in the judgment of judges

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1/ For a complete list of the names and affiliations of Devitt Committee members, see "Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts" (hereinafter, Devitt Committee Report or DCR), inside cover, attached hereto as Appendix A.

2/ Id. at 4.
and lawyers, there is a substantial problem of inadequate performances among advocates in the federal courts, (2) ...whether any inadequacies were perceived to be more apparent among certain segments of this group of advocates, and (3) ...[the identification of] components of advocacy in which practitioners are most in need of improvement." The results of the FJC research are contained in a report entitled The Quality of Advocacy in the Federal Courts ("FJC Report").

Relying to a substantial extent upon the FJC Report, the Devitt Committee concludes that there is "a need to improve the quality of advocacy in the United States District Courts." Moreover, the Devitt Committee concludes that such improvement "can best be accomplished by assuring minimum uniform national standards of competency for admission to practice." In light of these conclusions, the Devitt Committee has tentatively recommended the adoption and implementation of minimum standards through mandatory written examinations and prior experience requirements. In addition, the Devitt Committee has recommended the establishment of local performance review committees (staffed by members of the bar),

3/ Id. at 5-6.
5/ DCR, pp. 8-9.
6/ Ibid.
continuing legal education programs, and other measures designed to improve the quality of advocacy in federal courts. 7/

In the past year, the Devitt Committee's report and tentative recommendations—as well as the FJC research upon which they are based—have been widely disseminated and subjected to much debate and comment. In April of this year, the Devitt Committee will conduct public hearings in Washington, D.C. and elsewhere for interested parties to present their views. 8/ Following the hearings, the Devitt Committee is scheduled to reconsider its tentative recommendations for submission to the Federal Judicial Conference.

7/ The Devitt Committee's other recommendations are as follows:

   a. "Law schools should make available greater opportunity for students to take trial practice courses;"

   b. "Student practice rules should be adopted;"

   c. "District courts with Bar cooperation periodically should sponsor Federal practice programs;" and

   d. "More specific guidance on competency should be given by the ABA Code of Professional Ethics."

We have not addressed these issues in our deliberations or report.

8/ The hearings in Washington are scheduled for April 26 and 27, 1979. Earlier hearings are scheduled in San Francisco (April 5 and 6), Kansas City (April 9) and Atlanta (April 17 and 18). Public notice of such hearings is attached hereto as Appendix C.
B. Division IV's Ad Hoc Committee on Federal Practice Standards

In November 1978, the Steering Committee of Division IV appointed an Ad Hoc Committee on Federal Practice Standards. The primary function of the committee was to review and report on the findings and recommendations of the Devitt Committee. Members of the Ad Hoc Committee include private practitioners, Federal Government attorneys, and a member of the Trademark Trial and Appeal Board of the Patent and Trademark Office.

In the course of its work, the Ad Hoc Committee reviewed the FJC Report and the Devitt Committee report, together with Supplements A, B, and C thereto; a report by the Federal Practice Committee of the Young Lawyers' Division of the American Bar Association (ABA), dated December 6, 1978 (attached hereto as Appendix D), and response thereto by Anthony Partridge, co-author of the FJC study (attached hereto as Appendix E); a report of the Committee on Minority Rights and Liberties, dated December 19, 1978 (attached hereto as Appendix F), and comments supplied by interested members of the D.C. Bar. Additional

9/ Supplement A is a report of the Devitt Committee's Subcommittee on Remedies. Supplement B is a Tentative Draft of Proposed Uniform Rules Governing Admission to Practice in United States District Courts. Supplement C is a report of the Devitt Committee's Subcommittee on Rules for Limited Admission to Practice of Law Students.

10/ In this regard, the Ad Hoc Committee wants to acknowledge particularly the comments and assistance of W. Wesley Roberts, a member of Division IV. Mr. Roberts' written comments are attached hereto as Appendix G.
comments were solicited by the Ad Hoc Committee in a panel discussion at the midyear meeting of the Bar in January 1979. In an article in the District Lawyer, the President of the Bar also solicited comments on this issue from the Bar's membership. (District Lawyer, February/March 1978, at 6.)

In addition, the Ad Hoc Committee requested an independent critique of the FJC Report by Gary Price, President of Resource Planning Corporation, a private consulting firm specializing in matters pertaining to law and the administration of justice. Mr. Price, who assisted the Bar in its 1977 poll on the Federal Appellate Court System (see Appendix H), reviewed the FJC Report and consulted with the Ad Hoc Committee on a pro bono basis.

In light of this review, the Ad Hoc Committee concluded that: (1) the data collected by the Federal Judicial Center does not support the Devitt Committee's findings of a substantial need to improve the quality of advocacy in the Federal courts; (2) without such data, the costs to the Bar and to the public of implementing the across-the-board remedial measures proposed by the Devitt Committee cannot be justified; and (3) even if

11/ For a statement of the qualifications of the Resource Planning Corporation and a summary of Mr. Price's comments to the Ad Hoc Committee, see Appendix H.
there were sufficient evidence of a need for remedial measures, neither the FJC data nor the common experience of the Ad Hoc Committee members suggests that the specific remedies proposed by the Devitt Committee would meet the need. Accordingly, the Ad Hoc Committee recommended that the Devitt Committee's three principal tentative recommendations be held in abeyance unless and until further research is done to justify those proposals.

In addition, the Ad Hoc Committee suggests a possible approach to such research that might shed light not only upon the general problems of federal court advocacy, but also upon the specific needs of the District of Columbia. Such research, in the view of the Ad Hoc Committee, may be conducted appropriately, either as an independent effort of the D.C. Bar or as a pilot project for future study by the Judicial Conference of the United States.

C. The Steering Committee of Division IV

The Ad Hoc Committee prepared a draft report for consideration by the Steering Committee of Division IV. The Steering Committee reviewed the draft report in a meeting held on April 2, 1979. Thereafter, substantial revisions were made in the Ad Hoc Committee's report, particularly as relates

12/ The D.C. Bar is divided into sixteen divisions. While membership in the D.C. Bar is compulsory, membership in each Division is voluntary. The members of each Division elect a Steering Committee, which in turn is permitted to adopt as the views of the Division reports and recommendations on matters appropriate to the Division's jurisdiction.

The Steering Committee of Division IV consists of six members of the Bar. Their names are listed on the front of this report.
to the "experience" requirement and the possibility of recommending mandatory training without further research. The Steering Committee again deliberated upon this issue in a telephone conference on April 4, 1979, and concluded that the original basic recommendation of the Ad Hoc Committee calling for postponement of all three principal remedial recommendations should be adopted.

II. The Data Base Used by the Devitt Committee

A. The FJC Report

The FJC Report is based principally on an analysis of data from three survey questionnaires. In the first questionnaire, each of the Federal District Court judges was asked whether, in his or her opinion, inadequate trial advocacy was a "serious problem" in his or her court. 13/ Three hundred, sixty-six (366) or 81% of the judges responded to this question. 14/ A minority of the judges responding, 41.3%, answered "yes," and 58.7% answered "no." 15/

In the second questionnaire, the same group of Federal District judges was asked to evaluate individual performances of lawyers who appeared in trials that ended in May and June, 1977. 16/ One thousand, nine hundred and sixty-nine (1,969) performances of lawyers were evaluated by this questionnaire. 17/ Of the 1,969 performances, 90.9% were rated adequate or better.

13/ For a copy of this questionnaire, see Appendix B, p. 97.
14/ Id. at 15. In the District of Columbia, 12 judges responded. Id. at 16. (Table 3.)
15/ Id. at 15-16.
16/ For a copy of this questionnaire, see Appendix B, p. 85.
17/ Id. at 13.
on an overall basis; and only 8.6% of the performances were judged to be less than adequate.\textsuperscript{18} In addition to asking for an overall evaluation of the trial performances, the second questionnaire asked for judges' ratings of the lawyers on the basis of twenty-nine factors of trial performance. (Question 11, Appendix B, p. 86.) The judges' ratings on these factors showed that the most serious problem in the 1,969 trial performances was the use of objections, and that 18.9% of the lawyers reviewed appeared to be "seriously deficient" in that area.\textsuperscript{19} The same ratings with respect to other factors ranged from 0.7 to 16.6%.\textsuperscript{20}

In a third questionnaire, the Federal Judicial Center sought to elicit the trial bar's opinions about the quality of advocacy in Federal courts.\textsuperscript{21} The questionnaire was sent to two groups of lawyers: (1) lawyers who had been identified by a sampling of docket sheets in cases that had gone to trial and who had conducted ten or more trials in district courts during the period from 1972 to 1977; and (2) lawyers who had been identified by judges as "highly capable trial lawyers."\textsuperscript{22} The trial lawyers' questionnaire included a question as to whether, in the trial

\textsuperscript{18} Ibid. 0.6 percent of the performances were not rated by the judges.  
\textsuperscript{19} Id. at 52. (Table 32.)  
\textsuperscript{20} Ibid.  
\textsuperscript{21} For a copy of this questionnaire, see Appendix B, p. 103.  
\textsuperscript{22} Id. at 16-17.
lawyer's opinion, there was a serious problem of inadequate trial advocacy in particular categories of trial lawyers. Although there was no direct correlation between the judges' and lawyers' questionnaires, the authors of the FJC study concluded that: "Their [the trial lawyers'] responses... suggest that the trial bar, on the whole, is about as likely as the bench to conclude that a serious problem exists." 23/ Furthermore, according to the authors of the FJC Report, "[l]awyers who are themselves regarded as highly skilled trial lawyers are more likely than either the bench or the trial bar as a whole to think there is a serious problem." 24/

In the opinion questionnaires (the first and third questionnaires described above), the judges and trial lawyers were asked to give simply a "yes" or "no" answer to the question of whether there is a serious problem in federal court advocacy. On the judges' questionnaire on individual trial performances (the second questionnaire described above), the judges were asked to rate each lawyer's performance in the monitored cases on a scale from 0-6, ranging from "first rate" to "very poor." None of the questionnaires provided an explanation of the standards to be applied, and the judges were free to use their own criteria

23/ Id. at 5.
24/ Ibid.
in applying the labels "first rate," "not quite adequate," etc.

B. Division IV's Views

We believe the fundamental deficiency in the FJC research is that it undertakes to develop data concerning inadequate trial advocacy without the benefit of any common standard for evaluating the quality of advocacy. Rather, the study assumes an acceptance of those standards which were intuitively applied by the judges and lawyers questioned.\textsuperscript{25/}

To be sure, the authors of the FJC Report readily acknowledge the limitations of the data obtained. Indeed, in discussing the apparent inconsistencies of the judges' performance ratings, the authors cite "different standards for evaluating performances and different views about... the level of a 'serious problem'" as a cause for inconsistency.\textsuperscript{26/}

\textsuperscript{25/} As the authors of the FJC Report stated: "Judges were asked to evaluate particular performances without being given any standard for the measurement of performance quality. Judges and lawyers were asked for their opinions about the quality of lawyer performances, again without being given any standard...Implicit in this research, therefore - assumed rather than tested - is an acceptance of the standards for evaluation that are accepted by judges and lawyers..." FJC Report, Appendix B, p. 1.

\textsuperscript{26/} See also, the authors' comments on reviewing the judges' ratings on videotaped performances: "These percentages provide our first caveat regarding the interpretation of the 8.6 percent inadequacy found in the case reports. The caveat is that a certain percentage of ratings of inadequacy will be made on performances that an overwhelming percentage of judges would have rated at least adequate if not considerably better." \textit{Id.} at 21.
But, as Mr. Price points out:

[A]cknowledging it does not make those limitations go away. If you are limited by your data you are also ultimately limited in terms of the conclusions you can reach from that data.

Price letter to the Ad Hoc Committee, Appendix H.

And, commenting on a related problem with the FJC research, Mr. Price continues:

Another specific weakness is a derivative of the first. Though the report indicated that judges were asked to evaluate performances '... without being given any standard for the measurement of performance considered,' the researchers forced choices from respondents that represented a degree of discrimination that could not possibly be derived without acknowledged standards. In essence, the researchers said to the judges: 'We would like you to rate lawyers' performance based upon your own experience and judgment without any hint as to what constitutes good or bad performance. Further, we would like you to distinguish between 'first rate,' 'very good,' 'good,' 'adequate,' 'not quite adequate,' 'poor,' and 'very poor.' This is patently an impossible task. If there were to be no predetermined standards it clearly would have made more sense to separate responses that would have clustered answers in a way that could have been interpreted more clearly. In other words, had the respondents been offered 'excellent,' 'adequate,' and 'poor,' as alternatives, the answers might have been more meaningful. Even when you have established standards, it is sometimes difficult to distinguish 'good' from 'adequate' and 'not quite adequate' from 'poor.' Without predetermined standards, however, the responses become meaningless. Id. at paragraph 3.

We accept and agree with Mr. Price's comments in this regard. Moreover, we believe that even if the data obtained in the FJC study were assumed to provide a reliable indication of the opinions of federal judges and practicing lawyers regarding the extent of inadequate advocacy,
the FJC Report nevertheless does not support the Devitt Committee's conclusion that there is a serious problem with the quality of advocacy in the United States trial courts. As shown above, only 8.6% of the actual lawyer performances judged were found to be less than adequate. 27/ These statistics, in the view of the authors of the FJC study, "... present a very favorable picture of the quality of advocacy in the district courts." 28/ And, if the data suggest anything regarding the Devitt Committee's recommendations, it is that the porposed remedies are disproportionately with the magnitude of the problem.

Nor do we believe the FJC statistics establish a valid basis for the imposition of the specific remedies proposed. As the authors of the FJC Report themselves noted: "There is nothing in the present research that would tell whether or not a particular remedy would be more effective than another in dealing with the problem." (FJC Report, p. 2.)

27/ See, p. 8, supra.

To sum up our position respecting the empirical data underlying the Devitt Committee Report: (1) the absence of standards for evaluating trial lawyers performance renders doubtful the conclusions drawn from the data respecting the magnitude of the alleged competency problem; (2) the data, even taken at face value, does not support the judgment that there is a problem serious enough to warrant the proposals recommended; and (3) assuming arguendo the existence of the problem, the data does not adequately support the remedies proposed.

However, it is not enough to say that the particular data bank described in the FJC study fails to support the proposed reforms. The views of Mr. Partridge, one of the authors of the FJC study (respecting the report of the Young Lawyers' Division of the ABA), should be particularly noted in this connection (Appendix E, p. 4):

Their position seems to be that you shouldn't do anything at all unless the efficacy of the remedy is proved by the research. That simply isn't the way we make decisions in the real world. We use research data in combination with knowledge gained from experience, intuition, logic, hunch, or what have you. At some point, we have to decide, on the basis of all the evidence we have, what our policy is to be -- not for all time, but for now.

I would not wish to suggest that we got the answers to all the questions that people would like to have answers to. But I think it would be fair to ask the Federal Practice Committee what more they really want us to know that there is some reasonable chance of learning through further research. It is not enough to say that developing a standard of competence which can be
used to determine the quality of advocacy in the federal courts is "no easy task." (p. 16) If that is what they think should be done, how would they propose to go about it? If, as I suspect, it isn't possible to develop an objective standard for judging the quality of trial advocacy, then let us not wait for it. The view of the Federal Practice Committee seems to be that we should delay any decision for an infinite period. I think it would be more appropriate either to make decisions on the basis of information now available, or to specify the additional information that is important to the decision that can be obtained within a reasonable time. At some point, the policy decision has to be made on the basis of the best information practically obtainable.

There is force to Mr. Partridge's general observations respecting the nature of the policy-making process in the real world. But we would add a caveat of our own: to the extent policy-makers are relying on intuitive judgments and subjective evaluations of "real world" problems which they have already discovered by extensive empirical research have not yet been clearly demonstrated to exist, they are especially duty-bound to assay carefully the potential "costs" of the proposed reforms to the existing institutions before implementation. 29/ With considerations of these types in mind, we undertake a review of some of the policy judgments and specific recommendations of the Devitt Committee.

29/ The Report of the Subcommittee on Remedies demonstrates that the Devitt Committee gave careful consideration to the "cost" side of particular alternative remedial solutions to the problem the Committee believed existed. See generally Appendix A hereto, Supplement A. We think some of those anticipated costs would be more likely to tip the balance against adoption of the proposed remedies at this time if the empirical data were given less weight in the policy-makers' minds.
III. The Devitt Committee's Recommendations

A. Minimum Standards for Admission to Federal Trial Practice

1. Written examination on federal practice subjects

   a. The recommendations

   As one means of achieving uniform standards of competency for trial lawyers, the Devitt Committee recommends the adoption and implementation of District Court rules providing for a mandatory examination in Federal practice subjects.\(^{30}\)

   According to the Committee, such subjects include Federal jurisdiction, Federal Rules of Civil, Criminal, and Appellate Procedure, Federal Rules of Evidence and the Code of Professional Responsibility.

   Relying upon the advice of the National Conference of Bar Examiners and "the success of the multi-state bar examination," the Devitt Committee concludes that an examination can be designed which will fairly test an applicant's knowledge of Federal practice subjects.\(^{31}\) Moreover, according to the Committee the examinations could be administered conveniently and at minimal cost at the same time as the multi-state bar examination.

   The examination requirement, as described here, would not apply to "grandpersons," i.e., "persons who have been admitted to the bar of any United States District Court

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\(^{30}\) The Devitt Committee's recommendations on examinations and relevant discussion appears on pages 9 - 11 of its Report, attached hereto as Appendix A. The Subcommittee on Remedies evaluates the issue at pp. 23 - 24 of their report. (Supplement A to Appendix A.)

\(^{31}\) Appendix A, p. 16.
before the effective date of these standards." According to the Committee, "[t]he costs -- both system costs and personal costs of administering such a requirement, in our view, far outweigh the probable benefits." 32/

As the Devitt Committee reported, there was "some dissent" to the Committee's recommendation on written examinations. According to the Committee, the dissent was based mainly on the grounds that the FJC study "listed lack of knowledge in third place in the order of [trial] deficiencies, that there is no known correlation between passing examinations and improving advocacy, and that the cost does not justify the benefit." According to the Committee, the major rebuttal to the dissent was that "knowledge is a pre-condition to development of advocacy competence." 32/ Ibid.

b. The views of Division IV 33/

After an independent review of the available data -- and a consideration of personal experience -- we must agree with the dissenters of the Devitt Committee and urge the rejection of a mandatory written examination for federal court admission. We take this position for two reasons. First, as the Young Lawyers' Division of the ABA concludes: "[T]he Devitt Committee has not demonstrated the need for testing lawyer knowledge...[and] more importantly, the Committee has not shown that such testing will improve the quality of advocacy." Appendix D, at 13. Indeed, 32/ Appendix A, p. 11.

33/ We discuss the "grandparent" issues as they relate to the testing and experience requirements in a separate section.
as the Young Lawyers' Division further points out, the FJC research shows that of the 1,969 lawyer performances rated by the District Court judges, the percentages rated adequate or better in knowledge of federal practice subjects were as follows:

Federal Rules of Evidence 84.2%
Federal Rules of Procedure 90.4%
Federal jurisdiction and venue statutes 94.5%
Code of Professional Responsibility 96.6% \(^{34/}\)

To say the least, these figures do not suggest the need for mandatory examinations. Nor does the FJC data on the related issue of the correlation between performance and study support the recommendation. As the Young Lawyers' Division points out:

The Federal Judicial Center researchers studied the educational backgrounds of 244 of the lawyers whose trial performances were rated in order to determine whether there was a correlation between education in some of these subjects and the quality of the lawyers' trial performances. The Judicial Center found no correlation between trial performance 'and the study of either federal civil procedure or the Federal Rules of Criminal Procedure.' \(^{34/}\) (FJC 43) In the case of professional responsibility, 'the proportion of inadequate performance does not appear to be related to whether one has had the course but lawyers who have not had the course are more likely to turn in a performance regarded as 'first rate.''' \(^{34/}\) (Id.)

\(^{34/}\) Appendix D, p. 12.
Lastly, since so few lawyers in the sample had missed a course in evidence in law school, statistical analysis was impossible; but the authors of the study noted 'that of the inadequate performances by lawyers . . . none were turned in by lawyers who had missed [this] subject.' (Id.) 35/

In light of these facts and analysis, one of the authors of the FJC study states that "[T]he data do not suggest that lack of knowledge of the examination subjects was a major problem, except for the Federal Rules of Evidence, which were relatively new at the time of the study." Appendix E, p. 3.

Our second concern on the examination proposal is the possibility of duplicate testing. In the District of Columbia, as in many other jurisdictions, 36/ the standard examination for entrance to the Bar covers most -- if not all -- of the Federal practice subjects specified by the Devitt Committee. For example, the District of Columbia Bar examination includes a section on "Pleadings and Practice," which covers areas of Federal civil and criminal procedure. In addition, a section on Legal Ethics covers the Code of Professional Responsibility. Moreover, the Multistate Bar

35/ Mr. Partridge's views respecting this portion of the Young Lawyers' Division report is set forth at Appendix E, p. 3.

36/ For a thorough discussion of this point, see the comments prepared by W. Wesley Roberts, member of the D.C. Bar, attached hereto as Appendix G.
Examination, which is given in the District of Columbia and 43 states, tests applicants on the Federal Rules of Evidence and constitutional aspects of Federal jurisdiction and venue. The discretion for designing actual questions in these areas of practice lies with local or national Bar examiners. If these examinations are now deficient in the areas of Federal practice cited by the Devitt Committee, they should be re-designed. In any event, in our opinion the dubious benefits of additional testing do not justify the costs.

2. Prior trial experience
   a. The recommendation

In addition to mandatory written examinations, the Devitt Committee proposes prior trial experience as a prerequisite for admission to federal practice. The experience, according to the Devitt Committee, could take several forms, e.g., "second chairing" an experienced lawyer in a case, observing a number of adversary proceedings, or participating in state court trials, simulated trials in law schools, or continuing legal education programs. The minimum number of such experiences, according to the Devitt Committee, should be four (4), with a minimum of two (2)

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37/ The Devitt Committee's discussion of this issue appears at pages 12 - 20 of its report. The Subcommittee on Remedies evaluates the issue at pp. 27 - 40 of its report. Appendix A Supplement A.
involving participation in actual "live" trials. If an individual could not meet these experience requirements, he or she could seek a pro hac vice waiver from the court on a showing of good cause in the pursuit of a client's interest.

One issue not directly addressed in the Devitt Committee's Report is whether or not a trial before an Administrative Law Judge would qualify as a trial experience. Thus, Supplement D to the Devitt Committee's Report -- the "Tentative Draft of Proposed Uniform Rules Governing Admission to Practice in United States District Courts" -- contains the following definition of the term "Qualifying Trial" (p. 3, para. e):

'Qualifying Trial' (i) is a trial in a court of record, state or federal, involving substantial testimonial proceedings, of at least a full trial day in scope, going to the merits, or (ii) the substantial equivalent, such as may occur in a preliminary proceeding in a court of record in which testimonial evidence going to the merits is taken. Qualifying trials include trials before United States magistrates.

See Appendix A thereto. There is then also a definition of "testimonial proceedings" in para. i which states:

Testimonial proceedings are all proceedings in which the oral testimony of a witness is being taken before a judge or magistrate, and do not include depositions.

See id. This appears to leave open the question whether a trial before an Administrative Law Judge constitutes a trial in a "court of record" involving a "testimonial proceeding."

This matter is of some significance to the D.C. Bar, which includes among its members many federal practitioners who would have considerable experience in testimonial proceedings before Administrative Law Judges, followed perhaps by enforcement proceedings in federal court where trial-type hearings do not eventuate. Division IV recommends that the proposed rules in any event be revised to include as "qualifying trial experiences" trials before Administrative Law Judges, if these rules were to be adopted now.
In proposing this requirement, the Devitt Committee recognizes three potential problems: (1) assuring new applicants for admission the opportunity to gain supervised experience; (2) applying the experience requirements to current members of the federal bar; and (3) making sure the federal bar requirements are neither "over-exclusionary nor inadequately demanding." The Devitt Committee has a split opinion as to how these problems should be resolved. A "slight majority" of the Devitt Committee favors allowing lawyers without the requisite experience to remain or to become members of the federal bar only for purposes of filing a complaint and conducting pre-trial activity. A "substantial minority" of the Devitt Committee rejects the bar-trial bar solution and recommends instead that the experience requirement be applied to all current and prospective members of the federal bar.

More detail as to how the "experience" requirement might actually be implemented is provided in the Report of the Subcommittee on Remedies (Appendix A, Supp. A) and the tentative Draft of Proposed Uniform Rules Governing Admission to Practice in the United States District Courts (Supp. B). The Subcommittee on Remedies addresses directly the issues of: (1) adequate availability of opportunity for "experience;" and (2) whether or not the actual trial experience will truly involve something more than mere observation (Appendix A, Supp. A., pp. 36 - 37):
D. Assuring Opportunities for Experience

It is a central part of our recommendation that the bench and bar in each district accept an obligation to make certain that every person who is otherwise qualified will have a reasonable opportunity to get the prerequisite trial experience. We recognize that one of the most troubling accusations could be that the trial bar system is just another mechanism to perpetuate or obtain elitism at the bar. Any system adopted should be so patently feasible that it would not run the serious risk of unnecessarily precluding those lawyers who are motivated and desire to get the prerequisite trial experience. In short, we must make certain that the trial bar proposal will be feasible in actual practice wherever it is adopted. Our goal is not to assure elitism but rather to make it possible for the bar to have pluralism with excellence.

In utilizing, in various cases, its powers to appoint counsel, many of whom will be paid, the court would appoint as associate counsel lawyers who wish the prerequisite qualifying experience. This would be done with the understanding that the senior counsel, a member of the trial bar, would be obligated to aid associate counsel in giving him or her all of the prerequisite training to maximize the professional experience from an educational and training perspective.

The District Court would be obligated, also, to maintain a list of members of the trial bar who would be willing to serve as a senior advisor to any lawyer who had a case but was not qualified to appear alone as lead counsel. It is understood that these senior advisors would associate with the junior, not yet a member of the trial bar, with or without compensation as may be appropriate in a particular case.

The tentative Draft Rules appear intended to implement this view that the "qualifying units of trial experience" will encompass something more than sitting at senior counsel's table and watching the trial. The following definitions from the tentative Draft Rules are helpful to review (Appendix A, Supp. B., pp. 2 - 3):
(a) "Experienced member" is a member of the bar who has "required trial experience."

(b) "Lengthy-trial credit" is a credit of two or more participating units for participation in lengthy testimonial proceedings in a qualifying trial. Two such units are allowed if the testimonial proceedings extend to the equivalent of six full days or more; three units if nine full days or more; and four units if twelve full days or more.

(c) "Observation unit" is a unit of experience in which the person credited with the unit observes a "qualifying trial" in a United States District Court and an "experienced member" of the bar of that court supervises the observation and consults with that persons about it.

(d) "Participation unit" is a unit of trial experience in which the person credited with the unit participates as lead counsel or as assistant to lead counsel. If the unit is acquired after the effective date of these Rules, it must occur in a "qualifying trial" in which the person credited with the unit is (i) serving as lead counsel advised by an "experienced member" of the bar of a United States District Court or (ii) participating either as assistant to an "experienced member" of the bar of a United States District Court or as a student appearing in accordance with a student practice rule recognized by the District Committee on Admissions as a qualifying student practice rule. If the unit of experience was acquired before the effective date of these Rules, it qualifies as a participation unit even though the person credited with the unit was not associated in the trial with an experienced member of the bar of a United States District Court.
(e) "Qualifying trial" is (i) a trial in a court of record, state or federal, involving substantial testimonial proceedings, of at least a full trial day in scope going to the merits, or (ii) the substantial equivalent, such as may occur in a preliminary proceeding in a court of record in which testimonial evidence going to the merits is taken. Qualifying trials include trials before United States magistrates.

(f) "Qualifying units of trial experience" are "participation units," "observation units," and "simulation units."

(g) "Required trial experience" consists of four "qualifying units of trial experience," at least two of which are "participation units."

(h) "Simulation unit" is a unit of experience in which the person credited with the unit participates satisfactorily as counsel in a simulated trial that occurs in a law school or continuing education course recognized by the District Committee on Admissions as adequately supervised. Satisfactory participation in the simulated trial may be certified by a supervisor of the trial.

(i) "Testimonial proceedings" are all proceedings in which the oral testimony of a witness is being taken before a judge or magistrate, and do not include depositions.

b. Views of Division IV

We are troubled by this issue. First, there are serious doubts as to whether the data collected support the need for or advisability of comprehensive experience
requirements.\footnote{39}

\footnote{39} It should be observed, however, that among the correlations that the Federal Judicial Center Study did indicate the data suggested was a correlation between prior district court trial experience and the rating the lawyers received in the judges' case reports. See generally FJC Study, App. B, pp. 39-42 and Tables 21 through 24. This correlation is also discussed in the report of the Young Lawyers' Division of the American Bar Association, Appendix D hereto at pp. 5-7. The ABA Young Lawyers' Division analysis of this correlation is in turn discussed in Mr. Partridge's letter, Appendix E hereto, p. 2.

Respecting this correlation, the FJC Study observes, \textit{inter alia}:

Once again, the data by themselves do not say that experience improves performance. It might be suggested that people who perform poorly learn, sooner or later, to withdraw from federal trial practice, and that the relationship between experience and performance quality is a consequence of that behavior. The inference that experience improves performance seems plausible, however.

See FJC Study, pp. 41 - 42. In general, the authors of this study felt this data was "highly significant, and suggest that lawyers without this prior experience are much more likely than others to turn in inadequate performances, and less likely to turn in 'very good' or 'first rate' ones." \textit{Id.} at 39.

The Subcommittee on Remedies relied significantly on this data in connection with the experience requirement. See Supplement A, pp. 29 - 32. It should be noted that -- to the extent the data depends on the trial judges' case reports, the amount of prior trial experience attributed to the lawyer was based on the judges' estimate of the lawyers' prior experience. See \textit{id.}, at 29 - 30. To the extent the data depends on the lawyers' Biographical questionnaires, the FJC Study notes particular technical problems with this segment of the data bank which cast doubt on the validity of the correlations. FJC Study, at 134.
An added concern about the proposed scheme is the extent to which the various means of acquiring experience would provide meaningful training.

In this regard, we believe that there is a substantial risk that in actual implementation the expectation of the Subcommittee on Remedies as to what will truly come out of "participation units" will fail to materialize. If -- as the Devitt Committee suggests -- "the way to learn how to try a law suit is to try a law suit" (Appendix A, p. 12), nothing in the proposed "experience" requirement system provides any meaningful assurance that the neophyte lawyer will be doing any actual trial work. It is quite possible for a lawyer to fully comply with all of the requirements without ever: (a) examining or cross-examining a witness; (b) introducing a single exhibit in evidence; or (3) even speaking on the record in the court.

In short, the system as presently envisioned really leaves the entire nature of the learning experience to the discretion of the "trial bar" member. The system leaves

40/ Alternatively, if the rules were to be revised to require division of witnesses, "stand-up" trial work, or other specific duties between the senior lawyer and his advisee, how many trial bar members will make themselves available? In general, the more "teeth" one puts into the "participating unit" definition to assure a truly meaningful learning experience, the less likely a "trial bar" member will take on the responsibility.

Another concern we have is the degree to which these young lawyers will be utilized as all-around "go- phers," free research aids, and sources generally of free labor for the types of work that busy litigators prefer to delegate while doing the "stand-up" work in court themselves.
open the significant possibility that the "experience" requirement in practice will degenerate into nothing more than a pro forma exercise in professional back-scratching.

On the other hand, it may be thought that -- without regard to the validity of the data bank or even the issue of whether or not there is a problem of competency in federal trial advocacy today -- the organized Bar should take steps to assure any potential litigant that a lawyer undertaking to represent him alone in a trial in court has at least some prior exposure to trial practice in some capacity. Cf. Mr. Partridge's letter, Appendix E, p. 3.

Considerations of this type make the "experience" proposals of the Devitt Committee Report the most persuasive, and the most troublesome among the three major substantive recommendations evaluated herein. Still, for the reasons suggested above, it remains our view that adoption of these recommendations too should await further evaluation. We note in this context that one aspect of the proposed "experience" requirements might well benefit from further systematic empirical study: that is, to what extent would these proposals constitute a significant "cost" -- in terms of availability of counsel, economic effects to the consumers of legal services and potential anti-competitive considerations.41/

41/ Worthy of consideration also is whether or not imposition of a "disclosure" requirement on attorneys presuming to conduct a trial alone with no prior experience would be a less restrictive way of meeting the basic concerns of fairness to the client.
This point becomes increasingly significant to the extent one takes the position that the experience requirement stands alone as a matter of intuitive good sense without regard to the state of the empirical data bank. To the extent one is relying strictly on intuitive judgments to support significant policy innovations, it is important to assess in advance in some systematic way the possible "costs" to the system of justice as it presently exists in interposing the proposed new reform.

If, however, the consensus view were to favor adoption of the proposed experience requirement without further empirical research, we suggest that it would be appropriate to substitute for the "experience" requirements outlined in the Devitt Committee Report, a single requirement of mandatory attendance at trial lawyers' institute or other program in which skilled and qualified attorneys will evaluate and coach applicants on necessary skill and technique.

At the very least, such a single training requirement should be considered for inclusion in the proposed new rules for

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43/ It has been suggested that the two-week training program of the National Institute of Trial Advocacy would be a good model for this approach. However, we believe that a mandatory two-week absence from practice and high tuition costs could discourage participation. Such discouragement, in our view, could lead to an unhealthy elitism in the federal bar. Accordingly, we suggest that if this approach were adopted, the Bar should assure the availability of training programs at accessible times and locations and reasonable costs.
admission to federal practice as an alternative way of meeting the experience requirement.

c. Particular thoughts of Division IV's Steering Committee on the "experience" requirement

The Steering Committee of Division IV, in the course of its deliberations on this issue, at one point contemplated recommending adoption of a universal training requirement now and without further empirical research. In the Steering Committee's view, intuition tells us that such a requirement should be a necessary and sufficient condition to a lawyer's undertaking alone to represent a client in a trial. One may dispute the form which an "experience" requirement should take -- i.e., actual trial observation, some degree of participation, simulated trial experience, and/or trial advocacy training. One also may dispute the contention that there is a "problem" or a "serious" problem, of incompetency in federal trial practice. But we are hard-pressed to dispute the notion that the legal profession owes some duty to a prospective client about to go into a trial with a lawyer to assure that client that the lawyer has had some exposure to trial advocacy in some form.44/

44/ We are not dissuaded from this position by a free market analysis. Adequate competition among lawyers to assure provision of legal services to consumers at the lowest price is quite rightly a legitimate and growing interest among all segments of the American public, including the organized bar. Any proposed restriction on access to the courts by new lawyers may be presumed to impinge on this interest. But we think sound policy still warrants and demands that the bar consider
The Subcommittee on Remedies had the following observations respecting imposition of a trial advocacy training requirement (Appendix A, Supp. A, pp. 45-46):

2. Law School Clinical and Trial Advocacy Courses.

The Subcommittee was urged to recommend that each applicant for admission be required to offer evidence of satisfactory completion of a course in trial advocacy taken either in law school or in a continuing education program. Two principal objections have been raised. The first relates to the impracticability of having representatives of the federal courts evaluate and certify such courses. The second objection relates to the impact upon law schools of requiring courses in trial advocacy. It is asserted that even if the requirement could be met in a continuing legal education program, nevertheless there would be heavy pressure on law schools to reallocate scarce resources to provide enough qualified teachers to meet the student demand for these courses. Effective clinical and trial advocacy courses involve higher costs per student than the most common forms of legal education.

The Subcommittee is not of a common mind regarding the soundness of these and other objections to requiring courses in trial advocacy. In view of the problem regarding resource allocation, however, we do not recommend specific courses as conditions to admission to practice in federal courts, and we also decline to recommend that the American Bar Association and Association of American Law Schools consider amending minimum law school accreditation standards to require that a school offer to all students who wish it an opportunity for clinical training or a course in trial advocacy.

44/ (footnote cont'd. from previous page)

at least minimal regulatory measures aimed at protecting the lay consumer from placing his fate in the hands of a totally inexperienced trial lawyer. Noteworthy in this regard is that presently the bar does not even impose a specific disclosure requirement on an inexperienced lawyer who might undertake a trial without any prior exposure to trial advocacy in some form. The relevant disciplinary rules and ethical considerations in the ABA's Code of Professional Responsibility do not appear to preclude acceptance of a client by a lawyer in these circumstances, or to specifically mandate disclosure to the client of the lawyer's lack of prior experience. See ABA Code of Professional Responsibility, Canon 6, and D.R. 6-101.
The Committee believes that supervised performance of an advocate's tasks, in simulated or actual trials, is a good way to develop improved performance. We therefore recommend encouragement and support for further development of law school instruction in this area. We recognize that problems of scarce resources and competing demands have inhibited the expansion of clinical and trial advocacy opportunities for law students, and we urge that the bench and the bar lend their support to the schools to aid them in expanding opportunities for well-supervised clinical and trial advocacy experience.

Imposition of a training requirement as a necessary condition for undertaking representation of a client alone in court may entail more potential "costs" to lawyers, law schools, and bar administrators than allowing a lawyer to qualify through the proposed "observation" and "participation" units. But we believe that -- to the extent intuition informed by personal experience argues in favor of some type of experience requirements -- intuition also suggests that the proposed qualifying trial experiences really will not in practice provide the consumer of legal services any real benefit.45/

Still, the reflections of the Subcommittee on Remedies persuade us that imposition of such a requirement also should await further study. These reflections show that in this case also the "cost" side of the equation needs further study. Among the questions which arise are the following:

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45/ It might be worth re-surveying the same lawyers and judges who responded to the prior survey instruments to see if they believe any real value will be derived from these proposals.
(1) If a training-type requirement is universally imposed as a necessary condition to admission to federal practice, are there enough available and worthwhile programs in existence in this country to allow prompt enrollment of all potential federal trial practitioners?

(2) What should be the mechanism for "certifying" a particular training program? Should each local bar independently certify the program, or should a special certification program be organized under the aegis of the American Bar Association and the various law school-related associations?

(3) Are there special justifications for "grand-person" exemptions to such a single universal training requirement? Specifically:

   (a) Should such a requirement only be imposed on "new" members of the bar;
   
   (b) Should such a requirement be imposed on all bar members with exemptions for present bar members meeting actual experience requirements of the type described in the existing Devitt Committee proposals?

(4) Should any bar-imposed training program be conditioned on provision by the bar at no or minimal cost of the training, in order to further minimize potential anti-competitive effects and
guarantee maximum openness of the courts of our country? Alternatively, should any such program carry with it scholarship or fee-waiver requirements on a showing of personal financial need? (5) Should training programs be separately designed for criminal and civil litigation needs? (6) Should organizations such as local U.S. attorneys' offices and Public Defenders' offices be able to secure certification of their training programs as a means of meeting the requirement?

These considerations have led the Steering Committee to adopt as the view of Division IV the proposed resolution for consideration by the Circuit Judicial Conference on the Devitt Committee Report, which in substance would postpone action on each of the three major recommendations of the Devitt Committee Report. 46/ We have included in that resolution a particular provision aimed at securing prompt re-evaluation of the desirability of a training requirement as a separate issue.

As a postscript, we call attention to the FJC data respecting the relationship between study of trial advocacy and performance rating. App. B, pp. 43-44 and Table 26. The FJC Report summarizes this data as follows (Id. pp. 43-44):

The responses about law school subjects are presented in table 25. The number of performances by lawyers who had not studied evidence or criminal law in law school was so

46/ A copy of this Resolution is attached at the end of this Report.
small as to make statistical analysis impos-
sible. But it may be noted, as a straw in the
wind, that none of the inadequate performances
by lawyers who responded to the biographical
questionnaire were turned in by lawyers who had
missed these subjects. No correlation was found
between performance ratings and the study of
either federal civil procedure or the Federal
Rules of Criminal Procedure. In the case of
professional responsibility and trial advocacy,
statistical analysis indicates that the dis-
tributions of performance ratings are significant
— that is, unlikely to be due simply to the luck
of the draw. The trends in the data, however,
are somewhat surprising. In both cases, the
proportion of inadequate performances does not
appear to be related to whether one has had the
course, but lawyers who have not had the course
are more likely to turn in a performance regarded
as "first rate."

In the case of trial advocacy, the analysis
was taken a step further. We identified respon-
dents who said that they had either studied trial
advocacy in law school or studied the subject for
ten hours or more in continuing legal education
courses, and compared them with respondents who
had not had such instruction. Once again, the
results are statistically significant, and are in
the same direction as those noted above. These
data are presented in table 26. An attempt was
then made to perform the analysis separately for
those lawyers who graduated from law school in
1972 or later, to try to limit the independent
effects that experience might have had on the data.
This produced a group of only fifty-eight respon-
dents, of which only fourteen had not had some
study of trial advocacy. The results did not
suggest a different outcome for this limited
group, but the numbers are so small that any
analysis would have to be considered untrustworthy.

These results, in our view, should serve only
to illustrate the rule about the difficulty of
drawing causal inferences from statistical data.
We are aware of no plausible reason for believing
that students skills are damaged by studying
professional responsibility or trial advocacy.
In the absence of such a reason, it seems to us
that the explanation of the data is much more likely
to reside somewhere else — for example, in the
greater experience of those who attended law
school when courses in these subjects were not
generally available.
Standing alone, this empirical data would probably not dissuade the Steering Committee from recommending imposition of a mandatory training requirement in some form even without further study. But--taken together with our concerns about the "costs" and feasibility of such a requirement--the data does suggest a further reason for caution at this stage.

d. The Bar-"trial bar" and "Grand-person" Issues

(1) The bar-"trial bar" issue

The Subcommittee on Remedies sets forth a detailed discussion of the bar-trial bar issue at pp. 16-21, Supp. A, App. A hereto. In its view, the "trial bar" concept represents a less costly and restrictive way of achieving the benefits thought to be derived from imposition of experience and testing requirements then would arise from imposition of these requirements on all attorneys seeking admission to the Federal courts. See Ibid. Broader philosophical questions are raised by this proposal. See also Roberts' comments and recommendations, App. G, p. 20.

We are opposed to the "trial bar" concept. We feel that the imposition of a bar-trial bar structure in this country at this time would have the detrimental effects of increasing costs of litigation and reducing a trial lawyer's knowledge of his or her case. In Washington, where many lawyers practice in specialized areas of the law, this latter problem may be particularly acute. We are concerned also that the consumers
of legal services may be misled by the "trial bar" concept into believing that it encompasses a notion of specialized expertise in federal trial work, a view we believe not justified by the described experience requirements.

(2) The "grand-person" issue

This is one of the issues upon which the Devitt Committee, in its October 20, 1978 Notice, particularly invited comment, especially as relates to the experience requirement. See Appendix A hereto. As we have noted, the Devitt Committee recommended applying the testing requirement only to new members of the bar, while applying the experience requirement (as limited by the "trial bar" concept) to all bar members. 47/

The real justification for "grand-person" exemptions may be thought to relate to the added "costs" of imposing new burdens retroactively on existing bar members and to the realistic politics of bringing about an otherwise desirable social reform. On the other hand, such provisions can be challenged on such grounds as their effect in eliminating from the reform the very group supposed to constitute the present "problem". Also, such reforms arguably have discriminatory impact on presently underrepresented groups in the bar. See, e.g., the report of the A.B.A. Committee on Minority Rights and Equal Opportunities, Appendix F hereto.

47/ Various waiver and pro hac vice provisions also are suggested. See, e.g., Devitt Committee Report, Appendix A, P. 15.
The Steering Committee of Division IV has concluded that—in view of its basic recommendations—we should not take any position on behalf of Division IV at this time on the "grand-person" questions.

B. Performance Review Committees

1. The overall concept

The Devitt Committee has suggested, as one of the measures to be adopted to improve the performance of trial lawyers, that the legal profession adopt a program of peer review. This is envisioned as a program under which a panel, consisting wholly or in a majority of attorneys, would attend trials without prior announcement or notice, would evaluate the ability and skill of the attorneys conducting the trial, and would thereafter counsel those attorneys whose work in the courtroom was adjudged to be less than adequate.

The Devitt Committee's discussion of the proposal will be found at Appendix A, pp. 20 - 22. The Subcommittee on Remedies discusses the matter at pp. 40-43, Appendix A, Supp. A. Tentative Draft Rules respecting the performance review committees will be found in Appendix A, Supp. B to this report, at pp. 10-16.

Peer review, as here designed, is intended to be an educational and not a disciplinary process. 48/ Discipline is to be still the province of grievance committees. The interaction between peer review and a grievance proceeding would

48/ Devitt Committee report, Appendix A at 20.
occur only if an attorney failed in a significant way to cooperate with a peer review committee. Yet, peer review would not be voluntary; participation would be mandatory and, as indicated, a failure to cooperate, particularly in a prescribed remedial program to correct deficiencies, could be punished. 49

The Ad Hoc Committee had a split opinion as to the advisability—and viability—of a performance review system. Favoring the system is the view that performance review is the single guaranty of competency for practicing lawyers. According to this view, the observance and critique of an actual trial performance cannot be matched in value by any staged performance or training technique.

Opposing the system is the view that—at least as proposed by the Devitt Committee—the system is essentially unworkable. The first major criticism is that the system would not be fair. Unless every active trial attorney within a defined jurisdiction were subject to peer review within a specified time—a process which could place excessive strain on the time and resources of the bar—the fact that any particular trial lawyer had been subjected to such a review would be interpreted by the community as a reproach by the organized Bar with the sanction of the Court under whose aegis the peer

49/ See, id., at 21.
review committee was functioning. In the view of these members, even if the panel found nothing to criticize in the performance of trial counsel, the fact that a visit had occurred, unless such visits were routine in the courts of the community, would be seen as a rebuke.  

Second, the critics argue that the very people one would want to have on a peer review panel, i.e., active and skilled trial lawyers, could not devote the time that would be required. The alternative, according to the critics, would be to have every litigating attorney with a stated minimum amount of experience serve as a peer review panelist. This latter arrangement, in the view of the critics, could readily deteriorate into a "reciprocal back-scratching" exercise.

Third, the critics cite the problem of a lack of available, uniform standards by which a litigator's performance could be judged. This problem, according to the critics, is particularly acute where a peer review committee exceeds a relatively small size. In such case, according to the critics, the standards of evaluation, which include a certain irreducible minimum of subjective judgment, would be so diffuse that any useful comparison of skills would, as a practical matter, be impossible. The clear divergencies in view between federal judges as to what constitutes good advocacy uncovered by the FCJ study, underscores the magnitude of this problem. In the

50/ To be sure, proceedings under the proposed peer review system would be confidential. However, at least under certain circumstances, the mere presence of reviewers in the courtroom could be misinterpreted.
view of the critics, without some consistency in the standard which is applied, any particular performance may be evaluated too stringently, too leniently, or simply inappropriately.

Fourth, the critics believe that any review of a trial which takes in less than the whole trial would be inherently unfair. According to the critics, a trial must be seen in its entirety before a valid evaluation of a lawyer's skill can be made, and it is highly likely that, without a good working knowledge of the pretrial discovery, conferences and orders, even the observation of all the trial would be inadequate in many cases for the formation of a legitimate assessment of adequacy or inadequacy of performance. The time that would be required for all of this would be very great and, at least in the view of the critics, beyond reasonable expectation.

Fifth, the critics cite problems posed by the attorney-client privilege. In the case of a grievance lodged by a former client, the privilege is waived to the extent necessary to consider the grievance. In the case of peer review, on the other hand, the client would not be consulted and, even if approached by the panel, might be quite unwilling to waive the privilege. However, as the critics point out, it might well be that confidential information controls what is or is not done at a trial, and an informed client might be in complete agreement with counsel's advice to accept certain risks, rather than incur greater risks if alternative approaches were taken.
The tactics resulting from such considerations might, without more detailed information, seem to reflect poorly on an attorney's ability. The facts needed for an informed judgment by a committee, therefore, simply might be unavailable to its members. Indeed, in the view of the critics, if a peer review committee included public prosecutors as well as defense counsel, the question of preserving the attorney-client privilege might be an insuperable obstacle to a viable system.

On another level, the critics believe that a client might easily feel that he was being subjected to an unfair disadvantage if his attorney were compelled to conduct his trial with a critical panel peering, so to speak, over counsel's shoulder. According to the critics, litigation is enough of an emotional and intellectual strain without the added pressure on counsel of being conscious of the need to perform well, not alone to win the case, but to avoid criticism by official inquirers of his manner of conducting it.

For the reasons cited, the Steering Committee of Division IV unanimously recommends against adoption of the proposed peer review system.

2. Specific provisions

In addition to the general conceptual issue of whether or not to have peer review, we have considered specific provisions of the Devitt Committee's recommendations. These comments are offered in the event that notwithstanding the
objections noted above, some form of peer review is adopted.

(a) Lay persons should be represented on the review and visitation panels. (See App. A, p. 21.) In taking this position, we accept the principal arguments for lay representation advanced by the Devitt Committee, i.e., "that lay participation would increase public credibility and acceptance of the process and that the lay members would in fact add a worthwhile perspective to the process." (Ibid.) In addition, we believe that lay involvement is desirable because one of the skills of trial advocacy is convincing a lay jury.

(b) We assume that the reason for including non-trial bar members on a performance review committee is to include the point of view of a specialist in the litigated matter (i.e., a specialist in tax law, estate work, etc.). If that assumption is correct, we point out that a permanent appointment of three such practitioners (see proposed Rule 5(c), App. A, Supplement B) will not adequately cover the various specializations in the law. The Committee therefore recommends that the non-trial attorney positions be left open, to be filled on an ad hoc basis by a pool of selected specialists in the various areas of the law.
(c) We are concerned about the proposal to grant authority to the court to appoint the membership of a performance review committee. In the view of the Committee, the process should be run by and for the bar as a measure of self-improvement.
(d) We are concerned about the lack of adequate appeal procedures and guidelines for appropriate remedies. (See proposed Rule 5(e)(3)). Without such provisions, we suggest that a lack of due process is inherent in the system as proposed.

IV. Conclusion: Division IV's Main Recommendation and a Possible Alternative Design for Research

A. Main Recommendations

As noted, we conclude that the existing data does not presently justify imposition of the three principal recommended requirements for admission to federal practice. We recommend adoption of these proposals be postponed at least until further empirical research demonstrates that these requirements are justified.

We also recommend reconsideration of a specific rule that would prohibit an attorney from undertaking to conduct a trial on behalf of a client in federal court where the attorney has had no exposure whatsoever to trial practice, either through prior experience or through training. We urge further research focused on the costs of this specific rule, covering the issues outlined at pp. 31 - 35 of this report.
We have embodied our major recommendations in the
Proposed Resolution for the Judicial Conference for
the District of Columbia Circuit, which immediately follows
this report.

B. Postscript: A Possible Alternative Design For
Research.

We note again Mr. Partridge's observations at p. 4
of his letter (App. E hereto):

I would not wish to suggest we got all the
answers to all the questions that people would like
to have answers to. But I think it would be fair
to ask . . . what more they really want us to know
that there is some reasonable chance of learning
through further research . . . If, as I suspect,
it isn't possible to develop an objective standard
for judging the quality of trial advocacy, then
let us not wait for it . . . I think it would be
more appropriate either to make decisions on the
basis of information now available, or to specify
the additional information that is important to
the decision that can be obtained within a reason-
able time . . . .

If Mr. Partridge is right about the standards issue,
and the usefulness of further research on the "problem" and
"benefit" side of the equation, then we would conclude that
the Devitt Committee's proposed remedies are not justified
by their potential costs and should be rejected outright.

51/
We observe that the Subcommittee on Remedies recommended that
a standing committee of the Judicial Conference of the United
States be appointed to develop "National Standards of Competence,"
both for admissions and peer review purposes. See Supplement A,
App. A hereto, at pp. 11-12a.

52/
The necessity for further research directed toward the trial
advocacy requirement remains, in our view.
But, in response to Mr. Partridges' request for some specifics, we describe hereinafter a possible design for further work that might lead to useful additional information. We note preliminarily that it may be a mistake to conceptualize the issue of the usefulness of further research in terms of "objective" versus "subjective" standards. Undoubtedly, subjectivity is inevitable in any standard aimed at the "art" of trial advocacy. But "subjectivity" can be brought in at a more detailed level of investigation and buttressed by more in-depth evaluation of possible causal factors.

Specifically, it may be useful to attempt a two-stage review. The primary research instrument for the first stage could be a multiple-page listing of specific trial activities and a questionnaire designed to elicit a "yes" or "no" response as to whether the lawyer being reviewed performed each activity. The activities listed in the questionnaire could include many of the factors of trial performance cited in the FJC study. (Question 11 of the District Judges' Case Report, Appendix B at 85.) However, the factors presented there would be broken down into several, more specific categories and questions. For example, instead of asking simply for an evaluation of an advocate's "offering exhibits," the proposed study could ask questions such as: (1) Did the advocate have a sufficient
number of copies of each document offered into evidence at the
time of offering? (2) Did the advocate introduce each exhibit
when it was being described in testimony or at the end of one
stage of trial? (3) Were there sustained objections as to
whether proffered exhibits represented the best evidence of a
fact? (4) Were there sustained objections as to whether a
proper foundation for the exhibit had been laid?

The questionnaire might be designed and tested by a
coordinating committee of respected trial lawyers, judges,
and professional pollsters or data analysts. The actual review
could be conducted by a relatively small group of trained
lawyers who would observe and critique the lawyers appearing
in randomly selected trials during a specified period of time.
Prior to the trials themselves, the lawyers conducting the
study could review the case record and pertinent pleadings.

Upon the completion of the first stage of review,
the lawyers conducting the study could identify those lawyers
who, on the basis of the questionnaires, had done the best and
worst jobs of trial advocacy. (The number of lawyers to be
selected for this second phase of study, e.g., the top and
bottom five percent of those reviewed, could be decided prior
to the initiation of the study.) The lawyers so identified
could be visited by the lawyers conducting the study and asked
specific questions regarding their performance, background, and general practice. For example, each lawyer could be asked the approximate time of preparation of the case, how many cases he or she had previously argued in federal courts, his or her formal training in case-related subjects, etc. In addition, the lawyer could be asked questions regarding factors generally viewed as being outside of the traditional legal sphere. For example, did the lawyer ever participate in public speaking, debate or acting? Did he or she study logic or psychology before entering law school, etc.? From this kind of interview, the researchers could hope to acquire important data relating not only to the causes of adequacy or inadequacy in trial performance, but also possible remedies for solving apparent problems.

Finally, we observe that within the District of Columbia, there may be particular need for further research. The FJC data on the District show a striking inconsistency. As the Young Lawyers' Division of the ABA points out: "In the District, 75% of the responding district judges stated that they believed there was a serious problem in their courts (FJC 16, Table 3). Yet, in the actual ratings of trial performances, only 7.7% of the trial performances rated by the judges in the D.C. Circuit

53/

Gary Price, President of Resource Planning Corporation (see, Appendix H) reports that a study similar to that described here showed that the single common characteristic among "good" trial advocates was that all of them had studied philosophy in college.
were judged 'inadequate.'" Appendix D at 8. This inconsistency may be due in part to the relatively small number of judges in the District responding to the FJC questionnaires. Because of this relatively small number, the views of a single judge represented ten percentage points in the FJC's analysis of the quality of advocacy in this Circuit. See, FJC report, Appendix B at 15-16.
AD HOC COMMITTEE OF DIVISION IV

PROPOSED RULE PROVIDING NATIONWIDE ADMISSION FOR THE DISTRICT COURTS OF THE UNITED STATES

Committee Members:

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Approved: March 27, 1979

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PREFACE

The Board of Governors of the D.C. Bar, on April 10, 1979, adopted the following resolution respecting this report:

The Board of Governors has received the report of the Ad Hoc Committee of Division IV entitled "Proposed Rule Providing Nationwide Admission for the District Courts of the United States.

The Board of Governors adopts the views set forth therein.

The Board of Governors hereby authorizes presentation of this report to the Judicial Conference of the District of Columbia Circuit.

The Board of Governors urges the Judicial Conference of the District of Columbia Circuit to adopt the resolution entitled "Proposed Resolution for the Judicial Conference of the District of Columbia Circuit" and attached to this resolution.

The Proposed Resolution for the Judicial Conference of the District of Columbia Circuit appears at pp. 13 - 14 of this report.*/

*/ The Board authorized non-substantive editorial changes in the report and the form of the resolution prior to its presentation in testimony and before the Circuit Conference.
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PROPOSED RULE PROVIDING NATIONALWIDE ADMISSIONS FOR THE DISTRICT COURTS OF THE UNITED STATES

This report addresses a proposal for a nationwide rule permitting a lawyer to practice before any federal district court if he or she is a member of the bar of any one district court. The report was prepared by an ad hoc Committee of Division IV (hereinafter "the Committee"). The Committee has met only twice. The Committee has generally concluded that the proposal is desirable but that it raises questions and problems of some difficulty and of nationwide scope. Because the proposal is for a rule having nationwide application, the Committee believes that the Federal Judicial Conference would be a better forum in which to study, debate, and ultimately adopt the proposal.

Accordingly, the Committee has drafted and submits herewith a form of Resolution, for consideration by the Circuit Judicial Conference for the District of Columbia Circuit if it is in order to move for adoption at its May 1979 convocation. The resolution proposes nationwide admissions and identifies an agenda for further discussion about the proposal. It is the suggestion of the Committee that this Resolution be presented to the Steering Committee of Division IV and then to the Board of Governors and on to the D.C. Circuit Judicial Conference.
Need for a Rule

It happens that the Bench and Bar are just now evaluating a proposal to impose minimum standard requirements for admission to practice before the federal courts.¹ But whether or not the Devitt Committee Report is "enacted" and substantive standards² for admission to practice before the federal courts are adopted, the time is ripe for a nationwide admissions rule.

₁ Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts, 79 F.R.D. 187 (1979) (hereinafter the "Devitt Committee Report").

² The Devitt Committee summarized its recommendations in the following:

"SUMMARY OF RECOMMENDATIONS

"1. Minimum uniform standards of competency for attorneys in federal trial courts should be implemented by uniform district court rules providing for an examination in federal practice subjects, and four trial experiences, at least two of which must involve actual trials.

"2. Attorneys admitted to the federal bar before the effective date of the adoption of the new standards should not have to satisfy the examination requirement.

"3. Each district should adopt these standards as implemented in a uniform rule and create a District Committee on Admission.

"4. A performance review system should be instituted in each district to assist in improving the performances of attorneys practicing in that district, and a District Performance Review Committee should be created in each district.

"5. District Courts should adopt a student practice rule to provide second and third year law students an opportunity to participate, under close supervision, in the preparation and trial of actual cases.

[Footnote continued on following page]
If the Recommendations of the Devitt Committee Report are adopted, then a uniform nationwide admissions rule follows as a nearly self-evident corollary. If uniform standards of competency are established, then a lawyer admitted in District A by definition meets the competency standard for admission in every other district. The only main argument against full "reciprocity" that remains -- economic protectionism -- is inadmissible.

And if the Devitt Committee Report is not adopted, a uniform nationwide admissions rule would still be desirable for many of the same reasons articulated in the recent report.2a/

[Footnote continued from preceding page]

"6. Law schools, with the support of the bench and bar, should make available to students the opportunity to take trial practice courses and to engage in supervised simulated trials.

"7. District Courts, in cooperation with bar associations and law schools, should periodically sponsor seminars on federal practice subjects and improvement of trial skills.

"8. A Standing Committee on Admission to Practice of the Judicial Conference should be created to oversee the development and implementation of uniform national standards.

"9. A Committee on Admission to Practice of the Judicial Conference should study developments in testing methods for determining trial skills, the need for continuing qualification of all members of the bar and the feasibility of sponsoring programs for continuing legal education, particularly with respect to knowledge and developments affecting federal practice, procedure and trial advocacy.

"10. The American Bar Association's Code of Professional Responsibility should be examined with a view toward giving more particular and specific guidance to standards for trial advocates." 79 F.R.D. at 206-207. (Emphasis added.)

of the Committee on the District Court on D.C.-Maryland-Virginia reciprocity. In this way, the proposal for a uniform admissions rule is independent from, yet consistent with, the work of the Devitt Committee.

As President Weinberg noted in his recent "President's Page" column, 3 District Lawyer, Feb./Mar. 1979, p. 6, even if the Supreme Court has refused to recognize constitutional rights in the giving or receiving of legal representation pro hac vice, Leis v. Flynt, 47 U.S.L.W. 3477, Jan. 15, 1979; Martin v. Walton, 368 U.S. 25 (1961), the Bar has done so by its own canons of ethics. See, EC 3-9, calling for the bar to discourage "unreasonable" territorial limitations on practice in the public interest.

The absence of a nationwide admission rule is expensive, at a time when costs of litigation are already staggering. The current system of territorial restrictions on federal bar membership and of requirements for the retention of local counsel lays the Bar open to legitimate questions about legal featherbedding at the same time it discourages inter-district practice and deprives clients of the benefits of choice among fees or levels of expertise or efficiency. The existing situation is thus both inefficient and anticompetitive.

Precendents for a Rule

Significant precedents for the nationwide admission proposal already exist. Several district courts have recognized that it is not practical to restrict admission to lawyers who

3/ A nationwide admission rule would not be a "reciprocity" provision but a uniform rule.
are members of the bar of the state in which the district court is located or who have offices within the physical jurisdiction of the district court. For example, the District Court for the Western District of New York admits a member of the bar of any United States District Court outside New York as long as he or she is admitted in the state in which he or she maintains an office for the regular practice of law. The only other requirement for admission to the bar of the Western District of New York is that local counsel be appointed to receive service of pleadings, motions and the like. The United States District Court for the Western District of Louisiana has a similar Rule. These rules appear to be

4/ Rule 2(c) of the Rules of the District Court for the Western District of New York provides:

"A member in good standing of any United States District Court outside the State of New York may on motion of an attorney of this Court be admitted to practice in this court, provided he shall have been admitted to practice in the highest court of the state in which he maintains an office for the regular practice of law in person. Upon his ceasing to maintain such office he shall ipso facto cease to be a member of the bar of this court."

5/ Rule 3 of the Rules of the District Court for the Western District of New York states, in part:

"Any attorney . . . of this court, not having an office for the transaction of business in person within this district, when appearing of record in any cause shall specify an attorney of this court maintaining an office in the Western District of New York for the regular practice of law in person, upon whom service of papers shall be made."

6/ Rule 2(a) of the Rules of the United States District Court for the Western District of Louisiana provides:

"Any person who at the time of his application is a

[Footnote continued on following page]
grounded in the district court's desire to maintain
disciplinary control and guard against multiple addresses
for service. But logistics may also play a significant role
as the realities of geographical distance may require that
papers be served on counsel within the physical jurisdiction
of the district court.

The District Court for the Eastern District of
Wisconsin has a liberal admissions policy as well but tailors
its rules to its concern that a lawyer be familiar with Wisconsin
law. While the rules for that district provide that "[a]ny

[Footnote continued from preceding page]

member in good standing of the bar of any District
Court of the United States, or of the State of
Louisiana, or of any other state, and who complies
with the succeeding rules relevant to admission,
may be admitted to practice in this Court."

Rule 4, in turn, states:

"Every attorney of record in any cause, not resident
within the Western District of Louisiana and not main-
taining an office therein for the regular transaction
of business, shall file with each cause in which he
appears for any party an appointment of an attorney . . .
of this Court residing within the Western District of
Louisiana upon whom all notices, rules, and pleadings
may be served in accordance with the rules and practice
of this Court."

See also Rule 4(a) of the Rules of the District Court
for the Southern (and Eastern) District of New York, which re-
quires a member of its bar that does not have an office in the
Southern (or Eastern) District of New York to designate "with
his initial notice or pleading a member of the bar of either
district having an office within the Southern or Eastern District
of New York upon whom service of papers may be made."

Cf. Rule I(D) of the Rules of the District Court for
the Southern District of Alabama provides that a nonresident
member of its bar must "associate as co-counsel" a resident
member of the bar unless the foreign court of whose bar the
nonresident is a member would not impose a corresponding require-
ment on resident members of the bar of the Southern District of
Alabama.
licensed attorney in good standing before any U.S. Court, the highest court of any state or the District of Columbia is eligible for admission to practice in this court."
Section 2.04 of the Eastern District of Wisconsin's rules go on to provide that "upon its own motion, the court may require that a nonresident attorney obtain local counsel to assist in the conduct of the case."

Similarly, some district courts have conditioned admission to membership in their bars upon certification by the applying attorney that he or she is familiar with the local rules of the court as well as with the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the American Bar Association Code of Professional Responsibility. 7/

Other district courts admit members of the bar of a "foreign district court" only as a matter of true reciprocity -- that is, only if that district court would grant a corresponsing privilege to members of their bars. For example, 3(a) of the Rules of the District Court for the Southern District of New York states, in part, that:

7/ E.g., Rule 3(a) of the United States District Court for the Southern (and Eastern) District of New York, provides in part, that "[e]ach applicant for admission shall file . . . a verified written petition for admission stating . . . [that] he . . . is familiar with (a) the provisions of the Judicial Code . . . which pertain to the jurisdiction of, and the practice in, the United States district courts; (b) the Rules of Civil Procedure for the district courts; (c) the Rules of Criminal Procedure for the district courts; (d) the Rules of the United States District Court for the Southern (Eastern) District of New York; and (e) that he has read the Canons of Ethics of the American Bar Association, and will faithfully adhere thereto."
"[a] member . . . in good standing of the bar of a United States district court in New Jersey, Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rules extends a corresponding privilege to members of this court, may be admitted to practice in this court . . . ."

Still another variation on district court rules that have recognized admissions beyond their geographical boundaries are those that admit members of the bars of district courts that are located in states within the same or a neighboring appellate circuit. Thus, Rule 2(a) of the Rule of the District Court for the District of Connecticut provides:

"Any attorney of the Bar of the State of Connecticut or of the Bar of any United States District Court within the First or Second Circuits whose professional character is good may be admitted to practice in this court upon motion of any attorney of this court. . . ."

And as noted earlier, the Southern District of New York grants admission in its bar to members of the bars of New Jersey, Vermont and Connecticut.

Several district courts admit attorneys for a particular case or cause, commonly referred to as admission pro hac vice. Some rules add that such admission may be withheld when

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8/ E.g., Rule 7(b) of the Rules of the District Court for the Northern District of Alabama provides that "[a] member in good standing of the Bar of any Court of the United States or of the highest Court of any State may, in the discretion of a Judge of this court upon motion of a member of the bar of this court, be admitted to appear and participate as counsel for a party or parties in a particular case or cases."

See also Rule 2(c) of the Rules of the District Court for the District of Connecticut; Rule 6(b) of the Rules of the United States District Court for the District of Massachusetts; and Rule 3(c) of the Rules of the District Court for the Southern District of New York.
there is a finding that an attorney has engaged in "frequent and regular appearances in separate cases to such a degree as to constitute the maintenance of a regular practice of law." Other rules require the nonresident attorney to consent to the court clerk's receipt of service of process or condition pro hac vice admissions on the importance of the case or the amount in controversy. And without the benefit of a rule of general application, government lawyers travel freely from district to district -- as a matter of comity -- to appear in particular causes.

Problems Requiring Further Study

Despite the support of these precedents, the Committee concluded that the proposal raises several questions that should be considered by a more diverse forum than we can provide in the District of Columbia.

9/ Rule 2.02 of the Rules of District Court for the Middle District of Florida.

10/ Rule 1(B) of the Rules of the District Court for the Western District of North Carolina states, in part:

"If such permission is granted, and if a member of the bar of this court is not associated, said attorney and his client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk . . . of this court as process agent."

11/ "The court encourages such out-of-state attorneys to associate a member of the bar of this court in all cases, but will not require such association where the amount in controversy or the importance of the case does not appear to justify double employment of counsel." Id.
Washington lawyers may not be thought, for example, to have a broad enough view of the subject. It is easy to predict arguments from the small-firm and small-city bar that a nationwide admission rule would benefit only big firms and big city lawyers. A larger and more geographically diverse forum should assess the economic and competitive effects of existing rules and the proposed rule for nationwide admissions.\footnote{12} Such a forum should also consider whether it would be simpler and just as desirable to encourage expansion of existing \textit{pro hac vice} rules than to adopt a nationwide admissions rule.

Another problem is to select the right mechanism for "enacting" a rule for nationwide admissions. Could (or would) such a proposal be promulgated by the Federal Judicial Conference? Would legislation help? What is the relationship between such a rule and the proposed legislation, mentioned in President Weinberg's article, supra, that would abolish diversity jurisdiction? What would or should be the role of the Supreme Court and of the various district courts?

\footnote{12}{Data are not readily available on these points.}
The Committee also thought that study should be directed to the interfaces between the proposal and the ABA Code of Professional Responsibility (and state codes modeled after the ABA Code), specifically the provision dealing with holding oneself out as competent to handle a legal matter, and to applicable constitutional principles, such as those noted by President Weinberg and in the residency and right to travel cases.

Nationwide discussion of the idea and a nationwide collection of views and data would help in selecting from the limitations that might be grafted onto an open rule for admissions. The alternatives could include provisions that:

1. limit the number of appearances a lawyer could make in a "foreign district court" before he or she would have to join the bar of the state in which a district court is located;

2. give a district court judge discretion to grant or deny reciprocity based on an evaluation of the significance of local issues or the importance of the case;

3. require that local counsel be retained to receive service of process and similar papers;

4. require that an attorney certify that he or she is familiar with local rules;

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14/ DR 6-101(A)(1) states that a "lawyer shall not [h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."

Conceivably, the Rule may also impinge on the Code's prescripts against the unauthorized practice of law. See Canon 3 of the ABA Code of Professional Responsibility.
5. limit recognition of nationwide admissions to cases in which state law does not supply the rule of decision; or

6. as an alternative to a broad rule of nationwide admission, only grant admission to lawyers who are members of bars of district courts that would grant a corresponding privilege to members of the bar of the district court in which the nonresident attorney seeks admission.15/

In conclusion, the Committee recommends that the proposal for nationwide admissions is ripe for consideration, but that it needs to be studied at the level of the Federal Judicial Conference. This is an auspicious time for reevaluation of the requirements for practice before the federal courts. It is therefore appropriate that the proposal be addressed to a forum that can both represent regional interests as well as contribute fresh and diverse viewpoints.

15/ These alternatives are more fully discussed in Exhibit I, supra, at pp. 4-14.
PROPOSED RESOLUTION FOR THE JUDICIAL
CONFERENCE OF THE DISTRICT OF COLUMBIA
CIRCUIT RESPECTING A PROPOSAL FOR A RULE
FOR NATIONWIDE ADMISSION TO PRACTICE IN FEDERAL COURTS

WHEREAS, the Judicial Conference of the District of Columbia Circuit has concluded that the proposal for a rule for nationwide admission to practice before the federal district courts, described in the attached report, is timely and desirable in principle;

AND WHEREAS, several issues require resolution before a nationwide rule for admission to the bars of the federal district courts can be adopted;

AND WHEREAS, the attached report sets forth these issues, which are described more summarily below:

(1) What are the economic and competitive effects of existing admission rules and the proposed rule for nationwide admission?

(2) By what procedural mechanism could the Federal Judicial Conference enact a proposal for nationwide admission to the bars of the district courts, i.e., would or should Congress, the Supreme Court and/or the several district courts approve the proposal?

(3) Is the proposal in conflict with the ABA Code of Professional Responsibility, specifically the provisions dealing with the unauthorized practice of law and holding oneself out as competent to handle a legal matter?
(4) Is the proposal too broad; i.e., should it require that local counsel be retained to receive service of process or that an attorney certify that he or she is familiar with the district court's rules?*

AND WHEREAS, these issues would benefit from consideration in a forum such as the Federal Judicial Conference;

IT IS HEREBY RESOLVED THAT:

A. This proposal and the attached report are to be transmitted to the Federal Judicial Conference for its consideration and action; and

B. This Conference hereby offers to lend its support and assistance to the Federal Judicial Conference's consideration of the proposal in any manner that may be requested.

* For a list of additional limitations that could be appended onto a broad rule of admissions, see p. 11 of the attached Report on the Proposed Rule Providing Nationwide Admission for the District Courts of the United States.