ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

Volume I *Number 3*

Admission to the Federal Bar — The Work of the Devitt Committee

The Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts, appointed last year by Chief Justice Warren E. Burger, consists of twelve judges, the Honorable Edward J. Devitt serving as Chairman, six legal academicians, and six prominent trial lawyers.

The full 24-member group first convened on September 22, 1976, and defined the general issues: What is the quality of representation in civil and criminal cases in the federal district and appellate courts? If inadequacies exist, what remedies should be undertaken, particularly in relation to proposing a uniform rule for admission to practice in the federal courts?

Dorothy W. Nelson

In order to facilitate the gathering of facts and opinions about these issues, the Committee is (1) conducting a survey of United States district and appellate judges which includes some sampling, reporting and evaluation of actual cases; (2) carrying out a similar sampling of lawyers' opinions; and (3) preparing a number of Committee hearings to gather the views of other interested persons and organizations. The Commiittee hopes to determine:

First: *The Elements of Minimum and Maximum Advocacy.* What are the most important elements leading to criteria for determining the quality of representation?

Second: *The Current Quality of Representation.*

Third: *Causes of Inadequate Representation.* If inadequacies in the quality of representation are perceived, what are the possible causes?

Fourth: *Appraisal of Existing Tentative Proposals.* The Commiittee has not developed a substantial factual basis from which it can formally conclude that a substantial problem exists in the quality of representation requiring a remedy. Recognizing a divided opinion on this point, the Committee has decided that while the factual inquiry goes forward, it is important to gather public reaction and suggestions concerning the impact of proposed remedies.

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Canon 9: Former Government Lawyers and Private Practice

Former government attorneys, and the private firms they join, are increasingly being caught up in the ethical thicket created by the "appearance of evil" doctrine embodied in Canon 9 of the ABA Code of Professional Responsibility.

Promulgated in 1970, the Canon states that "A lawyer should avoid even the appearance of professional impropriety." (The original inspiration might well have come from Shakespeare's Bassanio, who, in the Merchant of Venice, lamented about how the law's pleas obscure the "show of evil".)

Benjamin E. King

Public trust in the legal system is the "raison d'etre" for Canon 9, which carries forth the ethical principles previously contained in Canon 36 of the now superseded Canons of Professional Ethics *General Motors Corp. v. New York,* 501 F. 2d 639, 649, (2d Cir. 1974).

The latest and perhaps the most widely controversial attempt to deal with the problem discussed here consists of a rule proposed by the Ethics Committee of the District of Columbia Bar Association. It would bar an entire law firm from remaining in a case pending before a regulatory agency whenever it has hired away a lawyer who, as a public employee, had a substantial responsibility in the matter. Such opinion, as proposed, was recently rejected, and the matter referred to a subcommittee to draft amendments allowing a possible waiver or consent by the government provided the disqualified attorney is effectively insulated from the handling of the case.

As the Ethics Committee pointed out, criticism typically may arise where the IRS or Anti-Trust Department has decided that certain conduct, although illegal, will not be prosecuted because of the need to allocate their resources, or a governmental agency invites contract bids pursuant to published specifications but is willing to negotiate for lower standards. If the private firm has hired a former public lawyer who had a significant role in the matter, an appearance is said to be created either that a client has obtained unfair advantage, a conflict exists,

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Proposed-Revision of Civil Local Rules of the Central District of California

The Los Angeles County Bar Association, through the Federal Courts and Practice Committee (Bar Committee), is working on a revision of the Civil Local Rules of the United States District Court for the Central District of California. At its March 10, 1976 meeting the Bar Committee formed the Local Rules Revision Subcommittee (the Subcommittee), naming me as Co-Chairperson with Edwin H. Taylor, to the purpose of a general revision of all of the Civil Local Rules for the Central District. The Subcommittee was formed to work with the Rules Revision Committee of the Central District (Court Committee), chaired by Judge William P. Gray and further comprised of Judges Warren J. Ferguson, Malcolm M. Lucas, Irving Hill and Jesse W. Curtis.

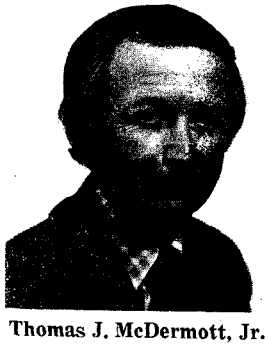
A seven-person steering committee for the Subcommittee has already completed the overview for proposed revisions and submitted it to Judge Gray, who with the Court Committee, will pass on the concepts submitted, contribute additional suggestions, and give overall guidance for the project to move forward.

The changes suggested generally fall into one or more categories:

1. Changes to make the rules uniform in style and render the rules in a more concise form;
2. Rearrangement of various sections to more suitable locations;
3. Transfer of some sections to other parts of the rules of court (e.g., Bankruptcy or Criminal Rules);
4. Deletion entirely; or
5. Substantive changes by the addition of entirely new material.

When the Court Committee comments, subcommittees of the Bar Committee will be assigned specific rules for detailed revision. After a series of reviews by the Court Committee, the Bar Committee and the Board of Trustees of the Los Angeles County Bar, the proposed revised rules will be ultimately submitted to the Federal Court as a whole for acceptance, rejection, or revision.

In general, the proposed changes do not alter greatly the procedures presently followed by the Court. It is hoped that the revisions will work toward the amendment or elimination of outdated sections while updating and consolidating the relevant material. Portions that do not directly apply to the attorney in civil law practice will be moved (e.g., portions of some rules that apply only to Court or Clerks will go into General Orders). Another principal aim is the clarification of certain sections that are not, in the opinion of the Subcommittee, sufficiently clear. There are several instances where the Bar Committee has asked for guidance from the Court Committee as to the intent of certain rules. The Bar Committee is of the opinion that the rules should be rearranged into a more logical sequence for easy reference. Finally, among the foremost purposes of this proposed revision is the incorporation of certain concepts which many of us have thought, at various times, should be delineated.



Thomas J. McDermott, Jr.

Currently being considered is a local class action rule that, among other things, would place duties on the class proponent to move forward on class certification. The basis for this proposal was drawn from class action rules of other districts.

The Subcommittee requested guidance from the Court Committee as to the feasibility of reproducing Court forms within the texts of the applicable rules as well as cross-referencing between the Local Rules and the Federal Rules of Civil Procedure.

While this work has been taking place, on a broader scale, Judges Albert L. Stephens, Jr., (Chief District Judge for the Central District of California) and Louis Drucker (retired Los Angeles Superior Court Judge) have been working on a "Proposed Standardization of Local Rules for United States District Courts of California." The concept of standardizing the local rules of the four districts of California is an intriguing and very probably beneficial and practicable one. Although the basic premises of the four sets of local rules are similar, the structure and character are quite different in many cases. It seems reasonable to assume that each district may have room to benefit from the ideas and experience of other districts.

The suggestions and possibilities are too numerous to go into in depth and much of the work is yet to be done. The Subcommittee and I would be most interested in any input readers of ABTL Report might have to contribute.

—Thomas J. McDermott, Jr.

The proposed revision of the Civil Local Rules of the United States District Court for the Central District of California is still in the early stages of development. Chairman Thomas J. McDermott, Jr., of the Federal Courts and Practice Subcommittee working on this project, would appreciate any comments, ideas or suggestions.

Canon 9

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favoritism is being shown to former colleagues, the lawyers are engaged in switching sides ("forsaking yesterday's client for today's fee"), the opposition's most effective advocate has been bought, or governmental power has otherwise been abused to advance an attorney's career.

Moreover, the disqualification of any lawyer in a firm traditionally has justified by imputation the exclusion of all his partners and associates. *American Can Company v. Citrus Feed Co.*, 436 F. 2d, 1125, 1128-1129 (5th Cir. 1971).

The main counter argument is that such wholesale disqualifications will discourage young lawyers from entering public service because their future opportunities in the private sector will be sharply curtailed; also, it is claimed that no conflict exists if the erstwhile regulatory lawyer is screened off both from the case and its gener-

ated fees after having gone private, as it were. (ABA Standing Comm. on Ethics and Professional Responsibility, Formal Opinion 342 (1975)).

In a similar vein, the New York City Bar's Committee on Professional and Judicial Ethics decided that disqualification of the entire firm in such circumstances would not be required where the ex-government attorney can be sufficiently isolated from the matter so as to avoid the appearance of impropriety.

While still subject to refinement, such opinions have helped focus the legal spotlight on the purpose and reach of Canon 9.

The recent consolidated class action of *Woods v. Covington County Bank*, 537 F. 2d 804 (5th Cir. 1976), involving Los Angeles attorney Roger J. Nichols, illustrates the manner in which the Canon is being enforced. The dispute arose out of a series of swindles perpetrated against returning prisoners of war and others, who were induced to invest in industrial development bonds which proved to be unsecured, uninsured and worthless. The POW's, just back from Viet Nam and seeking to invest the large sums of pay accumulated during their confinement, were estimated to have lost about $316,000 in this matter alone. Similar class suits are pending in other jurisdictions.

A member of the U.S. Naval Reserve, Mr. Nichols had been consulted by some POW's while on two weeks' active duty with the Judge Advocate General's Office. During that period, as well as an additional 5-day stint, Mr. Nichols investigated the circumstances of the fraud and possible areas of legal liability. The principal perpetrators either had fled or been indicted, and efforts were centered on determining whether heftier prospective defendants such as the local bank, municipality or public officials might be held responsible.

After returning to private practice, Mr. Nichols was contacted by and agreed to represent the former POW's, and suit was filed in the Federal District Court in Alabama. Defendants then were successful in obtaining an order disqualifying Mr. Nichols, his partner, Mason H. Rose V, and their law firm, from serving as plaintiffs' counsel on the premise that Canon 9 had been violated.

The Fifth Circuit Court of Appeals, in a detailed opinion, unanimously reversed.

The Circuit Court focused on Ethical Consideration 9-3 which states:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists." (See also Disciplinary Rule 9-101(B) which forbids a lawyer from accepting private employment in a matter in which he had substantial responsibility while a public employee).

After deciding that inactive or part-time reservists who are dependent on civil occupations for their livelihood are not subject to the blanket disabilities imposed

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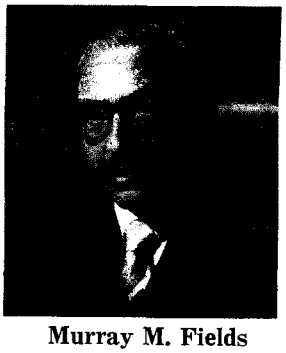
Letter from the President

Some thoughts on assuming office. In these days of searching for "roots," I turned to ABTL's Articles of Incoproation:

"To advance the science of jurisprudence as it relates to trial advocacy; to promote judicial procedural reforms; to educate practitioners and to disseminate information of interest to those members of the legal profession practicing business litigation through a continuing legal education program; to maintain the honor and integrity of the legal profession; to promote high ethical standards of professional conduct; and to cultivate social fellowship among its members."

How well are we attaining these worthy goals?



Murray M. Fields

The efforts and dedication of our predecessors in office unquestionably demonstrate considerable success; they form a firm foundation for the continuity, growth and expansion of ABTL and its aims and aspirations. The programs offered at our dinner meetings and seminars have drawn our interest and enriched our perceptions. Their scope has been wide and varied, from the initial program presented by Justice Robert S. Thompson on "California's Long Arm Statute' to "The Hired Gun," a seminar on the use and misuse of expert witnesses.

But these programs are only a portion of our work and achievements. ABTL Committees have been concerned with investigating and reporting on matters of concern for the public, the bar and the bench: among them, a survey of Court reorganization, a report to the Los Angeles Superior Court concerning the problems of selection and discovery of expert witnesses, a study with regard to *pro bono* representation and the legislative effort to require attorneys to provide a minimum number of hours per year as a public service, and a review of and report on the expansion of BAJI instructions in actions on contracts.

Now that we have examined our "roots," what of the future? Our officers and the Board of Governors plan to offer dinner meeting programs and seminars that will continue to educate and instruct in matters of current interest and importance to the commercial litigator. We intend to work with local bar associations and to enhance the relationship of our fellow attorneys with members of the judiciary. And above all we shall endeavor to reflect the views of our members in matters of public and professional concern. To accomplish this we urge your support and encouragement. Suggestions with regard to subjects that should be explored and discussed in our coming meetings would be welcomed. ABTL is your forum to serve your needs.

—Murray M. Fields

Canon 9

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on government employees by pertinent congressional and state statutes (see 5 U.S.C. Section 2105 (d)), the court noted that Canon 9 does not require the disqualification of every attorney who has been privately retained in a case for which he had substantial responsibility while associated with the government. However, it was recognized that the "appearance of evil" doctrine has been applied even though the record was untainted by evidence of actual wrongdoing. (See *United States v. Trafficante*, 328 F. 2d 117 (5th Cir. 1964).

Observing that attorneys now commonly use disqualification motions for purely strategic purposes, the court stated that the appropriate test, under Canon 9, was whether a reasonable possibility exists that some specifically identifiable impropriety in fact has occurred, *and* the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in the particular case.

Turning to the facts, the court held that the Canon had not been violated since (a) the former government lawyer's action as a public official was not influenced, or open to the charge that it had been influenced, by the hope of later being privately employed in the same or related matter; (b) the Navy legal assistance program served to improve morale and resolve disciplinary problems; and, (c) the government had no direct interest in the attorney's investigation which was in any way inconsistent with that of the victimized servicemen.

Canon 9 often has been invoked to prevent the private use of information obtained by a lawyer while on the public payroll to avoid placing opposing litigants at an economic and tactical disadvantage. Such contention was disposed of here on the basis that the information accumlated by the attorney during his brief tour of active duty was not gained by the exercise of official authority, nor would it have been unavailable had he been acting in a purely private capacity.

Indeed, it was stressed that to uphold disqualification in such circumstances would frustrate the military assistance program; all government sponsored legal aid might cause disadvantages to opposing parties. The court found that no claim could be made about excessive attorneys' fees having been obtained since Mr. Nichols had agreed to represent class plaintiffs on a contingent fee basis. In conclusion, the court stated at p. 819:

> ". . . Inasmuch as attempts to disqualify opposing counsel are becoming increasingly frequent, we cannot permit Canon 9 to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers . . ."

In short, the Circuit Court felt the "appearance of evil" argument was more spectral than real; further, a Canon properly should be advanced as a shield and not as a courtroom fieldpiece.

—Benjamin E. King

ABTL Calendar

Dinner Program

Subject & Participants
"How to Sue and Defend Corporate Officers, Directors and and Employees" (Munger, Tolles & Rickershauser)

Date & Place
June 22, 1977, Hyatt Regency

4th Annual Seminar

(Henry S. Zangwill, Program Chairman)
Subject & Participants
"Witness Preparation and Examination"

Date & Place
Late Sept. or early Oct. (site to be selected)

Dinner Program

Subject & Participants
"Effective Law and Motion Practice"
(Panel: John R. Shiner of Darling, Hall, Rae & Gute; Mitchell L. Lathrop of MacDonald, Halsted & Laybourne; Patrick M. Kelly of Adams, Duque & Hazeltine; and Judges William P. Gray and Robert I. Weil.)

Date & Place
November 1977

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700 South Flower Street
Seventh Floor
Los Angeles, California 90017
(213) 626-6700

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Contributors to this Issue:

Dorothy W. Nelson is Dean of the USC Law Center and, among many other professional responsibilities, chairman of the American Bar Association's Committee on Education in Judicial Administration.

Benjamin E. King is a partner in the firm of Buchalter, Nemer, Fields & Savitch.

Murray M. Fields, president of ABTL, is a partner in the firm of Buchalter, Nemer, Fields & Savitch.

Thomas J. McDermott, Jr., editor of ABTL Report, is a partner in the firm of Kadison, Pfaelzer, Woodard, Quinn & Rossi.

The Devitt Committee

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Several models or proposals to improve representation have been suggested and are in varying stages of implementation:

1. *The Second Circuit Proposal (Qualifications for Practice Before the United States Courts in the Second Circuit).* The United States Court of Appeals for the Second Circuit has resolved that the district courts give serious consideration to a rule for admission to practice. The rule would require the successful completion of a course of study either in a law school or in a continuing education program, or the deemed equivalent, covering five specified subject matters: (a) Evidence; (b) Civil Procedure, Including Federal Jurisdiction, Practice and Procedure; (c) Criminal Law and Procedure; (d) Professional Responsibility; and (e) Trial Advocacy. The proposed rule would also require that an applicant demonstrate certain experiences as satisfied either by assistance in the preparation and attendance at certain testimonial hearings or by simple attendance at other testimonial hearings.

2. *Federal Bar Examination Proposal.* Proposals have been made for a national federal bar examination or a federal section included within the multi-state bar examination. (Malcolm R. Wilkey, *A Bar Examination for the Federal Courts,* 61 A.B.A.J. 1091 (1975)). A number of existing standards for admission to federal practice require knowledge of, or passing a bar examination on, subjects of federal practice; some state bar examinations include such subjects. Some local federal court admission rules require affidavits of knowledge, and at least one requires a locally administered federal bar examination.

3. *Specialty Certification.* A number of state bar associations, including California and Texas, have recently initiated and are expanding systems of voluntary specialty certification. These systems may be adaptable to specialty certifications in general federal court representation, or in specific subject matter areas of federal practice.

4. *Mandatory Continuing Legal Education.* The states of Minnesota, Iowa and Wisconsin have recently initiated systems of mandatory continuing legal education for members of their state bars. These systems also may be adaptable to the federal courts.

Many other concepts – e.g., apprenticeship, conditional admission subject to evaluation by the judges – may be studied by the Committee.

Some ideas about the several models or proposals to improve representation have been publicized. Of particular importance is the report of the Association of American Law Schools on the Proposal for Rules of Admission to the Federal District Court in the Second Circuit (A.A.L.S., *Report on the Clare Committee Proposal for Rules of Admission to the Federal District Courts in the Second Circuit* (1976)).

The AALS Committee emphasized that legal educators are seriously interested in the improvement of the quality of legal services, including provision of adequate representation of clients in the federal courts. At the present time, however, the Committee is not prepared to agree with the Second Circuit Report diagnosis of the causes of the deficiencies in trial advocacy (lack of knowledge and skills preparation as contrasted to unpreparedness, laziness, etc.) nor with its prescription for remedying the prescribed deficiencies. Rather it was persuaded that if additional steps were now needed to insure more adequate representation that a federal bar examination was a more promising remedy.

The AALS Committee also pointed out that several studies now are underway or in the planning stages that promise a systematic exploration of the various lawyering tasks, including trial advocacy, and the contributions that legal education can make to the education and training of lawyers. The American Bar Foundation has embarked on a project on Legal Education and Professional Development of Lawyers involving 500 lawyers. It aims to produce articulated statements of the effects of legal education on the development of lawers and how law schools can meet the requirements of contemporary law practice. Another study is the Competent Lawyer Study launched in 1973 at the initiative of the Law Schools Admission Council. The National Conference of Bar Examiners, the American Bar Foundation and the Association of American Law Schools have cooperated and contributed. Among other purposes, this project contemplates identifying the qualities that account for competent professional performance and seeks to discover the contribution that legal education may make to a lawyer's capacity to perform competently. The initial reports are due this year.

The Association of American Law Schools is cooperating with these studies. In the meantime, the AALS Committee claims that law schools need the protection of their historical independence and educational judgment afforded by the absence of officially dictated course requirements.

More specific objections are voiced by the AALS Committee. It does not deny, as an abstract proposition, that students would be well advised to take the five courses that relate to practice and procedure in the federal courts. As a condition for admission to the bar, however, the Committee claims that the requirement is objectionable on several grounds.

First, any external mandating of law school courses presents real dangers to education and may lead to a proliferation of conflicting rules for admission in different jurisdictions. A concrete example of this type of problem is Rule 13 recently adopted by the Indiana Supreme Court. This rule specifies 50 semester hours of course work (over half of a student's courseload) in 13 different subject areas that must be completed in law school by a candidate for the Indiana Bar. If additional states were to impose their own course requirements, it might quickly become impossible for law schools to prepare their students for the bar examination in any state other than the one in which the school is located. This potential balkanization of the legal profession runs counter to the trends of the last half century, and poses, some claim, an intolerable burden for the law schools. The Second Circuit Committee, in addressing this concern, gave general assurances that the Judicial Conference of the United States should work with the interested parties to retard proliferation of additional course requirements.

A second ground for objection to law school course requirements presented by the AALS Committee are the costs. As Chief Justice Burger has pointed out in his

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The Devitt Committee

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annual messages on the State of the Judiciary, the resources allocated to the Third Branch of government continue to be grossly inadequate. In his 1970 message before the American Bar Association in St. Louis, he reported that the entire allocation for the federal judicial system was less than the cost of one C-5A airplane. Trial advocacy courses are very expensive because they require a large number of faculty and supervisors for a few students, plus additional teaching equipment such as videotapes and other aids. Further, to ensure that the Trial Advocacy course has the content that serves the objectives of the rule would seem to require the court to audit periodically the teaching materials and teaching. In addition to being repugnant to the traditions of academic freedom, this is also functionally impracticable (there are more than 167 approved law schools throughout the country).

Most schools now provide an offering in trial advocacy but are unable to make it available to all students. The practical effect of the Second Circuit rules would be to require schools to reallocate their resources and make the described trial advocacy available to all students. This reordering of educational priorities by direction of an external governmental body troubles the law schools. While conceding that more resources might be devoted to the teaching of advocacy skills many maintain that the larger problem of the law must continue to be addressed, and that priorities in these matters should be set by the schools themselves. For instance, some law faculty feel that microeconomics and the law is the most important thing to happen since the advent of legal realism. Others feel that we must allocate resources to address problems of legal institutions – how to make them better and more just. They claim that many of the courses which appear esoteric may, in reality, better prepare future lawyers for contemporary problems.

The AALS Committee concludes that at the present time a federal bar examination might be the best means to determine admission to the federal bar. The Second Circuit Committee aparently judges that tests were not suitable for this purpose, but possibly the Committee did not fully explore some recent developments in the field. Professor Robert E. Keeton's efforts for the National Institute of Trial Advocacy employ a transcript or filmed courtroom proceeding and individual computer consoles through which a student can change the course of proceedings by interposing objections or new evidence. Thus far, these techniques have been limited to instruction, but they may be adaptable for testing purposes.

The work of the Devitt Committee is scheduled for completion sometime in 1978. It is vital, therefore, that individuals and groups having an interest in the work of the Committee testify and present written recommendations. The issues concern much more than the competency of the trial bar, touching a wide range of topics: admission to the bar, specialization and certification, bar discipline and academic freedoms. The bench, the bar, legal educators and the public have a high stake in the work of the Committee and should not let the opportunity pass to participate in its work.

Dean Dorothy W. Nelson

Members of The Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts (Chairman: Honorable Edward J. Devitt).

Robert L. Clare, Jr., Shearman and Sterling, New York City
Thomas E. Deacy, Jr., Deacy and Deacy, Kansas City
United States District Judge Sherman G. Finesilver, Denver
Assistant Dean E. Gordon Gee, the J. Reuben Clark Law School, Brigham Young University, Provo, Utah
Henry Halladay, Dorsey, Marquart, Windhorst, West and Halladay, Minneapolis
United States District Judge A. Leon Higginbotham, Jr., Philadelphia
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Dean Joseph R. Julin, the Holland Law Center, University of Florida, Gainesville
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United States Circuit Judge J. Clifford Wallace, San Diego
United States Circuit Judge Malcolmn R. Wilkey, United States Court of Appeals, Washington, D.C.
United States District Judge Hubert L. Will, Chicago

Report for the Committee: John E. Kennedy, Southern Methodist University. Staff support: Carl H. Imlay, General Counsel of the Administrative Office of the United States Courts, Washington, D.C.

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