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Judge Wilkey's Contributions to the Cause of Justice Through Improving Competence in the Federal Forum

*Caridad P. Matthews**

Any discussion of Malcolm Wilkey's many accomplishments must include his invaluable contributions to the advancement of the cause of justice through improving the quality of practice before the federal courts. His writings and his outstanding service on the Devitt Committee¹ demonstrate his admirable dedication to improving lawyers' ability to represent their clients effectively in federal court and their overall competence as advocates. He reasons that enhancing lawyer skills will improve justice because "increased capabilities will contribute greatly to the speedier and more effective conduct of litigation in the federal courts and give the nation a more effective, fairer, and efficient system of justice."²

As early as 1972, Judge Wilkey called for a consistently high, nationwide set of admission and practice standards:

Only by consolidating this currently divided admission process under a single aegis, to create what might be termed a "United States Bar" or "National Bar", with uniform nationwide criteria for the admission of attorneys to practice before all United States district and appellate courts, can we develop a consistently high level of self-regulation throughout the country.³

That same year the first multistate bar examination was given.⁴

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1. Chief Justice Burger's concern over the problem of incompetency in federal courts led him to commission the Judicial Conference of the United States Committee on Rules for Admission to Practice in the Federal Courts, chaired by the Honorable Edward J. Devitt, to consider a federal bar examination as a prerequisite to practicing before federal district courts.

2. Wilkey, *A Bar Examination for Federal Courts*, 61 A.B.A. J. 1091, 1091 (1975).

3. Wilkey, *Proposal for a "United States Bar,"* 58 A.B.A. J. 355, 356 (1972).

4. From 1967 to 1972 the National Conference of Bar Examiners researched means of examining applicants seeking admission to the bars of the various states. John Eckler,

Although no "United States Bar" or "National Bar" yet exists, the multistate bar examination, which has become a standard tool for admission to state bars, implements many of Judge Wilkey's suggestions:

For those without experience in federal law, as for those not yet admitted in any court, it seems reasonable to require an examination (in addition to the state bar examination) covering at least three subjects: the United States Constitution, federal civil and criminal procedure, and federal administrative law. The examination should be able to test an applicant's knowledge in no more than six hours. In the light of the increasing impact of federal law in all phases of life, it would be in the public interest to ensure that those entrusted with the responsibility of assisting in the administration of justice have more than a passing familiarity with the fundamental laws and legal procedure of this nation.⁵

He developed this concept further in an article entitled *A Bar Examination for Federal Courts*,⁶ which listed five areas of essential knowledge for a qualified practitioner in federal court: federal civil and criminal procedure, federal jurisdiction, federal substantive criminal law, federal constitutional principles, and federal administrative law. While recognizing that the multistate examination tests knowledge on some federal subjects, such as the federal Constitution, Judge Wilkey points out that no federal court tests federal substantive criminal law⁷ or administrative law.⁸ Hence,

no federal court has any effective way of determining that state-licensed lawyers, who regularly apply for admission to the federal courts whatever their preparation, skill, and experience in state courts, have even the rudimentary knowledge of an ex-

Esq., of Brickler & Eckler, Columbus, Ohio submits that the members of the Multistate Bar Examination Committee were acquainted with Judge Wilkey's excellent article.

5. Wilkey, *supra* note 3, at 358.

6. Wilkey, *supra* note 2.

7. Judge Wilkey states that substantive federal criminal law, which is very different from state criminal law, "is found in Title 18 of the United States Code and is scattered in a hundred places throughout the principally civil law and penalties of the fifty volumes of the Code." *Id.* at 1091-92. In light of this, it is incomprehensible that no federal court tests an applicant's knowledge in this area.

8. Judge Wilkey explains that a good part of the cases in the federal courts "arise from or relate to proceedings before the eighty-odd federal regulatory agencies, and with the spate of laws dealing with the environment, health, and consumer protection, this litigation is bound to increase." *Id.* at 1092.

clusively federal body of law absolutely necessary for them to be qualified practitioners in the federal courts.⁹

The bar of the federal courts is necessarily a trial bar, and an increasing number of young lawyers litigate in the federal forum right after graduation. Judge Wilkey therefore questions why, when no state will license a lawyer without testing his knowledge of that state's civil, and usually criminal, procedure and the forms of pleading, no federal court requires a similar test for the federal rules of procedure and complexities of federal jurisdiction.¹⁰

Considering that a litigator's competence affects the client, judge, jury, and ultimately, the taxpayer,¹¹ Judge Wilkey submits that "elemental instincts of self-protection and a recognition of the courts' obligation to the litigating public demand an end to this absurd situation."¹² He proposes, therefore, a federal bar examination covering the five suggested areas. He suggests further that if only a few district courts, preferably those with a large and growing bar membership, would adopt such a requirement, all district and appellate courts could observe the results.¹³

Once more his proposal has been acted upon. In 1976, one year after the proposal was published, Chief Justice Burger commissioned the Judicial Conference of the United States Committee on Rules for Admission to Practice in the Federal Courts, chaired by the Honorable Edward J. Devitt, of the District of Minnesota, to consider an examination. Judge Wilkey served on the Devitt Committee from 1976 to 1979.

As a result of the committee's work, thirteen federal jurisdictions, as part of a pilot program, have imposed special requirements, such as a federal bar examination, for attorneys wishing to practice in their courts. This pilot program has now come to a close and is being evaluated. In September a report was presented to the judicial conference, recommending that other jurisdictions consider imposing special requirements for admission to practice in their courts.

Judge Wilkey's dedication to improving the quality of jus-

9. *Id.*

10. *Id.*

11. It is well recognized that a trial conducted by competent counsel takes approximately one-fourth the time of one conducted by incompetent counsel.

12. Wilkey, *supra* note 2, at 1093.

13. *Id.*

tice through increasing competency in the federal forum is also evident in his contributions to legal education. He advocates a law school curriculum that will *produce* only competent lawyers and a bar exam that will *admit* only competent lawyers.¹⁴

He proposes that the law schools offer a more varied curriculum to third-year students in the areas he identifies as the five major fields of legal competence: litigation, office counseling (including negotiating, interviewing clients, and drafting documents), legal writing (a heavy dose of supervised legal memoranda and opinion writing), business issues, and government administration. Such a curriculum would better prepare a law student for "the real world," whether he or she plans to be a litigator, law clerk, judge, office lawyer, or government lawyer, and would consequently improve the quality of federal practice.

Judge Wilkey is the chief advisor to the Federal Civil Practice Institute, a nonprofit organization established to train private lawyers exclusively for federal civil practice.¹⁵ It is considered to be the only institute of its kind in the nation. His invaluable contributions to the institute in organizing, writing, lecturing, and recruiting other faculty demonstrate his continued dedication to improving the quality of federal practice before the federal courts and advancing the cause of justice.

Judge Wilkey's contributions—advocating a federal bar exam, working on the Devitt Committee, and educating federal practitioners to be more effective litigators—will affect the federal courts nationwide and will ensure a more efficient system of justice for future generations.

14. Wilkey, *The Constant Objective and the Changing Structure of Legal Education*, B. EXAM., Nov. 1981, at 4; Wilkey, *What Role for the Law School in American Legal Education? Purposefully Restructuring the Law School Curriculum*, 1981 B.Y.U. L. REV. 1. He has also spoken on this subject at numerous law schools and symposia.

15. The Federal Civil Practice Institute will hold its fourth annual seminar at the Georgetown University Law Center on September 25-26, 1986.