BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMENTS OF THE SECTION ON COURTS, LAWYERS, AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR REGARDING PROPOSED AMENDMENTS TO LOCAL RULES 104, 701.1, and 711

Cornish F. Hitchcook, Co-Chair
Robert N. Weiner, Co-Chair
Carol Elder Bruce
Richard B. Hoffman
Jeffrey F. Liss
Randell Hunt Norton
Arthur B. Spitzer

Steering Committee of the
Section on Courts, Lawyers,
and the Administration
of Justice

Gregg H. S. Golden, Co-Chair
Richard B. Nettler, Co-Chair

Committee on Court Rules

June 1989

STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors."

SUMMARY

The U.S. District Court for the District of Columbia has published for comment proposed amendments to its local rules, providing for certification of lead counsel in contested matters, peer counseling for attorneys whose professional conduct is unsatisfactory, and periodic renewal of membership in the Bar of the Court. The Section on Courts, Lawyers, and the Administration of Justice of the D.C. Bar does not believe that the certification provisions will significantly improve the quality of trial advocacy, and recommends that that rule not be adopted; but the Section strongly supports the peer counseling proposal. The Section does not object to periodic renewal of Bar membership, but recommends that the Court give notice to counsel a reasonable time before the expiration of current registration.

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMENTS OF THE SECTION ON COURTS,
LAWYERS, AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR
REGARDING PROPOSED AMENDMENTS TO
LOCAL RULES 104, 701.1, and 711

The U.S. District Court for the District of Columbia has published for comment proposed amendments to its local rules. An amendment to Rule 104 would impose minimum requirements of experience or training before a lawyer could act as lead counsel in a contested evidentiary hearing or trial; new Rule 711, which may be viewed as a companion piece to Rule 104(b), would permit the Court to make a nonbinding referral for peer counseling in cases where a lawyer's performance is unsatisfactory; and new Rule 701.1 would require counsel to renew their membership in the Bar of the Court every three years, by certifying familiarity with certain rules and guidelines and paying a modest fee. The D.C. Bar's Section on Courts, Lawyers, and the Administration of Justice applauds the Court's effort to meet a troubling problem, but is concerned that a trial bar certification program will not address the problem adequately. We recommend that the Court not adopt proposed Rule 104(b); however, we support proposed Rule 711. We support Rule 701.1 with modifications.

New Rule 104(b) provides that any lawyer who acts as sole or lead counsel in any contested evidentiary hearing or trial must certify that he or she has previously acted as sole or lead counsel in a contested hearing or trial in a federal district court; or has participated in a junior capacity in an entire contested trial; or has completed a trial advocacy course of substantial length and content. In 1985, the U.S. District Court for the District of Maryland instituted a very similar requirement, as one of 14 districts in a pilot program. The District of Maryland has since abolished its rule, and it is the Section's understanding that many of the 14 pilot districts have abolished or substantially modified their similar rules. While we are not privy to the reasoning of all of these courts, we understand that it was widely considered that requirements such as those embodied in Rule 104(b) did not appreciably improve the level of practice. We remark in any event that, at last year's D.C. Circuit Judicial Conference, Judge Marvin Aspen observed that after six years of experience with a trial bar rule in the Northern District of Illinois, it was impossible to determine objectively whether the requirements had improved lawyer performance. See Proceedings of the 49th Judicial Conference of the D.C. Circuit, 124 F.R.D. 241, 265 (1988).

Looking at the individual options available for certification under Rule 104(b), we find difficulties with each. Option 1, based on prior experience as lead counsel, is limited solely to experience in federal district court. Thus, a lawyer with years of trial experience in the courts of several states and the District of Columbia, would be ineligible to act as sole or lead counsel in the U.S. District Court for the District of Columbia. So, too, would a lawyer with substantial experience in administrative adjudications. Similarly, Option 2, based on participation in a junior capacity in an entire contested trial, is based on federal district court experience. In any event, the Section questions whether exposure to a single contested trial is sufficient to impart the degree of professionalism that both the Court and the Bar would desire. Finally, Option 3, based on completion of a trial advocacy course, would theoretically ensure that the lawyer has acquired the requisite skills; but as a practical matter, the Section believes that the failure rate among persons attending such courses is so low as to suggest that "satisfactory completion" of a course is not a suitable measure of whether a lawyer has acquired substantial trial advocacy skills. In any event, the expense of such a course, and the amount of time it requires, mean for all practical purposes that the

benefits of Option 3 may be limited to members of the Bar who are employed by the Government or by large law firms. Regardless of the option, we suggest that whether education or experience improves a lawyer's performance is largely determined by the lawyer's dedication to professionalism and willingness to do the necessary work.

In short, while the Section recognizes that certain lawyers exhibit professional deficiencies, and agrees that more qualified and better prepared lawyers are desirable, we feel strongly that the standards proposed for trial certification in Rule 104(b) are inadequate to assure the desired level of professionalism. At the same time, these standards could in individual cases work to deprive individuals of the counsel of their choice, who may be perfectly competent to handle these matters. We further believe that more stringent standards would be difficult to establish and enforce, particularly if they are to be required of all counsel regardless of whether individuals evince any deficiencies in professional performance. Accordingly, we urge the Court not to adopt Rule 104(b). At the very least, adoption of this Rule should be deferred pending more detailed study of the experience of other Districts.

If the Court feels that the adoption of a trial bar certification rule is an immediate necessity, then the Section would propose the following amendments:

> (b) Appearance as Sole or Lead Counsel in a Contested Evidentiary Hearing or Trial on the Merits. Each attorney who acts as sole or lead counsel in any contested or evidentiary hearing or trial on the merits, civil or criminal, must have on file with the Clerk's Office a certificate, in a form prescribed by the Clerk, that the attorney
>
> (1) has previously acted as sole or lead counsel in a federal district court, or the Superior Court of the District of Columbia or a state trial court, in a contested jury or bench trial or other contested evidentiary hearing in which testimony was taken in open court and an order or other appealable judgment was entered; or
>
> (2) has previously acted as sole or lead counsel in a contested adjudication or trial-type proceeding before a federal or state administrative agency in which testimony was taken and an order or other appealable judgment was entered; or
>
> (3) has participated in a junior capacity in an entire contested jury or bench trial in a federal district or
>
> (4) has satisfactorily completed (in) a clinical or trial advocacy program for credit toward the requirements of a J.D. or LL.B. at an accredited law school; or (ii) the trial advocacy course sponsored by the District of Columbia Bar/Georgetown University CLE Program; or (iii) a State-Bar-accredited continuing legal educational trial advocacy course of at least 30 hours, such as those run by the National Institute

> of Trial Advocacy or the Attorney General's Advocacy Institute; or (iv) an aggregate of _____ hours of accredited continuing education programs in trial advocacy.

In this proposal, the Section leaves to the Court's discretion the minimum number of CLE hours required to satisfy Rule 104(b)(4)(iv). We reiterate, however, that we do not believe that this problem is readily susceptible to a solution that depends on paper qualifications; and we urge the Court not to adopt proposed Rule 104(b).

On the other hand, we believe that proposed Rule 711 may provide an excellent first step in responding to the problem. Indeed, in instances where a lawyer's professional performance has fallen short of the Court's justifiably high standards, the Court may wish to consider whether peer counseling should be coupled with some form of mandatory professional training in the field of trial advocacy. In circumstances where an individual has demonstrated identifiable performance deficiencies, then both peer counseling and professional education can be tailored to meet the specific needs of the individual. We note, too, that the District of Maryland has adopted a more detailed "lawyer assistance" rule. Under that rule, the lawyer assistance committee is an arm of the court, chaired by a deputy clerk. The committee may establish

or cooperate in programs to improve the quality of performance of the Bar, and may recommend that a lawyer seek further professional education. A lawyer who is referred to that committee by the court is under a professional obligation to cooperate with it.

We recommend that the Court adopt proposed Rule 711, and that the Court consider whether the rule might be enhanced by requiring further professional education in appropriate cases. The Section believes, however, that these referrals should be confidential. A referral for professional education that is confidential and thereby separated from a particular contested matter before the Court, ought to be better received by the lawyer. Further, lawyers may cooperate more enthusiastically with a legal education program which does not appear to be imposed as punishment for deficient performance, and which has not stigmatized them before their client.

New Rule 701.1 requires every member of the Bar of the Court to renew his or her membership every three years by paying a modest fee and certifying familiarity with the rules (and, in some cases, the Sentencing Guidelines). The Section is not troubled by this rule in principle, even given its avowed purpose of pruning the roll of lawyers admitted to practice before the Court. What concerns the Section is that satisfaction

of this requirement seems to depend entirely upon counsel. There is nothing in the rule to suggest that, as the end of the three-year period approaches, counsel will receive a reminder from the Clerk's Office. Unlike a driver's license, which the driver must renew, there is nothing that a lawyer will carry around with him that bears an expiration date. The rule requires the lawyer to remember, every third year, that he must recertify his eligibility to practice. Since few lawyers maintain three-year tickler files, and since the recertification program is apparently intended to be self-funding (through the $25 fee), it seems only reasonable that the Court should send a notice to counsel in advance of the recertification date, just as the D.C. Bar and the Bars of every state send annual registration notices to counsel.

Accordingly, we strongly suggest that proposed Rule 701.1 be modified to provide that members of the Bar of the Court shall be given notice to renew their membership within a reasonable time before the expiration of their current certification.