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Roger Williams University School of Law

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Professor Michael Yelnosky argues that the ABA's Federal Judiciary committee should include "a broad cross-section of the profession."

From the WASHINGTON POST: "The Bar Association panel should diversify its representation" by Michael J. Yelnosky

August 15 (web) & 16 (print), 2013: *Michael J. Yelnosky is a professor at Roger Williams University School of Law in Bristol, R.I.*

At its annual meeting last week, the American Bar Association (ABA) named six new lawyers to its 15-member Standing Committee on the Federal Judiciary, which rates potential nominees for federal judicial vacancies. As it has for years, the ABA overwhelmingly populated this committee with lawyers who represent business interests in state and federal courts. Five of the six new members work for some of the country's largest law firms and regularly represent some of this country's biggest corporations. The sixth represents businesses defending against claims for which they have liability insurance — "insurance defense" cases. On the committee, they will join four other lawyers who work at large corporate firms, four who represent businesses in smaller law firms and one who specializes in defending lawyers sued for malpractice.

Not one of the lawyers on the committee for 2013-14 regularly represents individuals who bring lawsuits alleging they were harmed by the actions of corporations or other business entities, and not one represents individuals charged with anything other than white-collar crimes.

I recently completed a study that shows that lawyers who represent business interests have been overrepresented on this ABA standing committee for many years. That overrepresentation is inconsistent with the special role the ABA has in federal judicial selection. Unless the committee becomes more representative of the profession, the ABA should not retain this privileged status.

To many, it probably comes as a surprise that the ABA plays a formal role in the selection of federal judges. There is no constitutional or statutory provision for ABA involvement. The ABA is simply a voluntary professional organization, and fewer than one-third of the licensed lawyers in the United States are members. Nevertheless, the ABA has, with few exceptions, issued a rating for each potential nominee for a federal judicial vacancy since 1952, when the Eisenhower administration invited it to do so.

The ratings are the work of the standing committee. Before a nomination to one of the lower federal courts, the White House sends the name of a prospective nominee to the committee. The committee member from the judicial circuit with the vacancy investigates the prospective nominee's professional and personal background and makes a recommendation to the committee, which rates potential nominees as "well qualified," "qualified" or "not qualified." (The process differs somewhat for Supreme Court vacancies.) That rating and a report are sent to the White House and, if the nomination proceeds, to the Senate Judiciary Committee.

The committee's ratings are consequential. A recent study concluded that ABA ratings are highly predictive of a potential nominee's success. Those who receive low ratings, particularly those who receive a "not qualified," are significantly more likely to have their nominations withdrawn or rejected. Therefore, knowing who rates the nominees is of vital public importance.

The ABA says that committee members come from "varied professional experiences and backgrounds." But since 1999, approximately 60 percent of the committee members worked for law firms of more than 100 lawyers that predominantly or exclusively represent large corporations. Only 16 percent of all private practice lawyers in the United States work in firms of that size. The business orientation of the lawyers on the committee becomes even more apparent when one considers that approximately 80 percent of the lawyers who have served since 1999 have done so while exclusively or predominantly representing corporations or other business entities. By contrast, fewer than 10 percent of the lawyers on the committee since 1999 have represented individuals as plaintiffs on a regular basis, and not one represented defendants in non-white-collar criminal cases.

Lawyers who represent corporations in litigation surely have a different perspective from those who, for example, represent individual plaintiffs in product liability actions or defendants in drug prosecutions. That perspective almost certainly influences the assessment of judicial candidates on criteria as subjective as “integrity,” “judicial temperament” and “professional competence,” which guide the committee’s rankings. The ABA has, with virtually no public discussion, given lawyers who make their livings representing Fortune 500 companies the right essentially to veto federal judicial candidates.

These lawyers share another characteristic that suggests they should not have that veto power: They work at law firms controlled overwhelmingly by white men. If lawyers on the committee believe big firms such as their own are the best training ground for future judges, minorities and women will be disadvantaged. A recent study concluded that African American nominees are 42 percent less likely to receive a high rating from the ABA than professionally identical white lawyers nominated by the same president, and women are 19 percent less likely to receive a high rating than identically situated men.

The significant power that the ABA standing committee wields comes with the responsibility to ensure that prospective judicial nominees are evaluated by a broad cross-section of the profession, not only by those who represent a small portion of the population the federal courts exist to serve.

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