

**MINUTES OF THE
FEDERAL PRACTICE COMMITTEE
FALL MEETING**

**Wednesday, October 17, 2001
Held in the Jury Lounge, Fifth Floor
Robert V. Denney Federal Building & U.S. Courthouse
Lincoln, Nebraska**

The meeting was called to order at 1:30 p.m. by Chief District Judge Richard Kopf. Federal Practice Committee members attending the meeting were: Clerk of Court Gary McFarland, Acting U.S. Attorney Mike Heavican, Federal Public Defender David Stickman, Carole McMahon-Boies, Laurie Smith Camp (2001 Chairperson), Charlie Lowe, William Wright (2002 Chairperson), Roger Kirst, Stuart Dornan, Robert Kirby, Michael Schleich, Howard P. Olsen and Thomas Dahlk. Others in attendance were District Judge Joseph Bataillon, Senior District Judge Lyle Strom, Magistrate Judge Kathleen Jaudzemis, Magistrate Judge Thomas Thalken, and Chief Bankruptcy Judge Timothy Mahoney. Mary Gryva, Alan Stoler, Ralph Whitten, Robert Cannon, and Kathleen Rockey were absent from the meeting.

1. Review of latest financial report.

Judge Kopf explained that:

- (A) The Federal Practice Fund (FPF) was obligated to pay for dishes and the like (\$550.00) for the Conference room in the Hruska building. Clerk of Court Gary McFarland will let the Bar know (via the court's website and electronic e-mail) that the Circuit has agreed that the Conference room is available for use by lawyers.
- (B) FPF is being used to pay for a "survival Spanish" course which is offered free of charge to lawyers and court employees. Judge Bataillon reported that some lawyers, as well as U.S. attorneys, court personnel and probation officers, are participating in this training. This training may eventually be offered in Lincoln, and then in outstate Nebraska.

Judge Bataillon also reported that he recently returned from Mexico City. He participated in the 2001 Mexican Government's Judicial Visitation Program. Arrangements were made for him by the Omaha Mexican Consulate. The Mexican federal courts are trying to improve their image throughout the United States. Judge Bataillon found the quality of federal jurists to be fine, but was told their state judicial system has certain problems.

The Mexican judges stressed that Mexican citizens should be informed of their rights under Article 36 of the Geneva Convention. In addition, the Mexican government is trying to relax the United States' restrictions on people coming from Mexico to the United States. Many of the people coming from Mexico are males under 24 years of age who are skilled in the agronomy industry. Mexico is concerned about this drain on their workforce. They would like to see a change in VISAs so Mexicans can do seasonal work and then return to Mexico.

Judge Bataillon further reported that the new Mexican Consulate in Omaha is very outgoing and interested in outreach programs within the community.

Stu Dornan stated that the Omaha Mexican Consulate was very helpful to him in a recent criminal case.

- (C) FPF was and will be used to pay for costs of the Open Doors of Justice Program for high school students and teachers scheduled for October 25 and 26, 2001, in Lincoln and Omaha. Judge Strom explained that he and Chief Deputy Clerk Denise Lucks tried to develop an educational program for the young people of our community and at about that time, the Open Doors of Justice Program became available. A letter was sent to every school in Nebraska inviting students and teachers to participate and offering to pay for the teacher's transportation costs for a half-day training session. Students are chose to serve as lawyers and participate

in a Supreme Court argument regarding search and seizure. This annual program is designed to introduce students to the Constitution and the federal court system. The FPF will be used to provide lunch to the students. This year, there will be approximately 50 students participating in the Lincoln program, and 75 students participating in the Omaha program.

- (D) FPF has been and will be used to support interpreter certification testing and to foster the growth of qualified Nebraska interpreters. The FPF has been used to help support the Nebraska Supreme Court in its effort to certify interpreters. Currently, there are no interpreters in Nebraska who are eligible to take the exam for Administrative Office certification. The Nebraska Association of Interpreters & Translators are also helping the Supreme Court with an annual seminar.

2. Review of Gary McFarland's letter requesting amendment of FPF plan.

Clerk McFarland explained that every two years an outside auditor audits the court and agencies and their associated funds. The auditor read Nebraska's FPF plan and the section wherein it states that profits from a FPC seminar may be deposited in the FPF. The auditor believes that the court ought not be able to deposit extra funds into the FPF. While realizing a profit from a FPC seminar would be very rare and has yet to occur, Gary recommended that we amend the plan to prohibit us from depositing such extra funds. Rather, any profits would be refunded to the seminar participants pro rata. It was agreed that the Plan should be amended in conformity with the auditor's suggestions.

3. Status of Judge Shanahan and Judge Designate Smith-Camp.

Judge Kopf shared that he recently talked with Judge Shanahan, and that Judge Shanahan continues to be funny and doing very well. He will start radiation treatment soon which will take two months, and then another 30 days to recover. Judge Shanahan is hoping to return to work in the spring of 2002.

Laurie Smith Camp reported on her confirmation hearing. She stated that the Chair of the Judiciary Committee wanted more information from her and other judicial nominees. She has faxed her response. She is waiting for the Senate Judiciary Committee's vote.

4. Review of Judge Kopf's suggestion for a replacement for Judge Designate Smith-Camp; that is, Todd R. McWha from North Platte.

Judge Kopf explained that Laurie Smith Camp will need to be replaced on the FPC once she is confirmed by the Senate. Judge Kopf proposed that Todd R. McWha of North Platte be appointed to the FPC as Laurie's replacement. Bob Kirby expressed his support for Mr. McWha. Judge Kopf will send a letter to Todd advising him of his appointment to the FPC.

5. On October 16, 2001, Bob Cannon resigned from the Committee due to illness. Judge Kopf suggests that Jeanette Stull of Lincoln serve as a replacement.

Judge Kopf explained that Bob Cannon is recovering from a serious illness. While he is doing well, Bob has resigned from the FPC. Judge Kopf proposed that Jeanette Stull of Lincoln serve as Bob's replacement. Judge Kopf will send Jeanette a letter advising her of her appointment to the FPC.

6. Review of report from Judge Piester regarding time to disposition in civil cases.

Judge Kopf explained that one of the District Court's strategic plan goals is to take no longer than eight months to reach disposition in civil cases. He stated that the court is doing a reasonably good job of that. The judges continue to monitor these disposition numbers, both as to civil and criminal cases.

Magistrate judges are holding 90 day telephone conferences with lawyers to discuss discovery issues. Carole McMahan-Boies stated that she has been settling more cases since the implementation of the 90 day conferences.

Carole McMahon-Boies also stated that she probably turned away clients that she shouldn't have when the existing and new progression orders collided. But once we got past the old progression orders, her schedule balanced out.

Magistrate Judge Jaudzemis has been working up Judge Shanahan's civil cases and then those cases are being reassigned to another district judge for trial.

Judge Kopf explained that he intends to transfer all of Judge Shanahan's existing cases to Judge Smith Camp upon her confirmation.

7. Update on CM/ECF Project.

Clerk Gary McFarland reported that the court originally planned to start the CM/ECF test phase with Judges Kopf and Bataillon's civil cases starting January 2, 2002. However, due to the delay in the AO software, this test phase start date will be pushed back to March 2002, and the conversion of all existing civil cases to June 2002. The implementation dates are entirely driven by software glitches. The District and Bankruptcy Court staffs have done a great job and they are ready to implement CM/ECF.

The court will offer training sessions and demonstrations throughout the state. If the private bar wants training, court staff will come to their law firm if they have 10 people or more needing training. Law firms could pair up to meet the 10 person minimum requirement.

Judge Mahoney explained that the Bankruptcy Court will implement its CM/ECF commencing January 2, 2002. The Bankruptcy Court will offer training to their "attorney advisory group" in November and December, 2001. Beginning January 2, 2002, everything filed with the Bankruptcy Court will be put into the CM/ECF system. Both debtor and creditor counsel will be encouraged to electronically file starting mid-January 2002. The Bankruptcy Court will not go back and scan previously filed documents.

Judge Kopf stated that CM/ECF is the most intense undertaking in terms of hours of work and funds that the Court has ever taken.

Judge Thalken also stated that the court is converting to Lotus Notes in November 2001.

8. Review of report from Judge Jaudzemis regarding mandatory mediation.

Judge Jaudzemis stated that she received four very thoughtful letters regarding the mandatory mediation program, two opposed, two in favor. Copies were given to the FPC.

Judge Jaudzemis believes while Judge Shanahan is out recovering and until Laurie Smith Camp's confirmation, the mediation program does not fit very well for our court. However, she suggested that the mediation option be added into the 90 day conferences as an agenda item.

Carole McMahon-Boies stated that she does not know how good of a case she has until depositions are taken. Mediators' fees are approximately \$200 an hour. Bob Kirby asked if the FPF could be a source of funds for paying for mediation.

Bill Wright stated that in his opinion the best mediator is one who is aggressive and expresses his/her opinion about how good of a case you have. Judge Kopf stated that there is a big disagreement on how aggressive a mediator should be. The more aggressive mediator is oftentimes successful in reaching an agreement among the parties. When people are forced to mediate, people come to mediation with a different attitude and that can change the outcome significantly. With mandatory mediation, there is a presumption that you are operating with a weakness. If the court encouraged that a case is one that could be resolved by mediation, the parties may be more agreeable to mediation.

Charlie Lowe stated he does not like mandatory mediation. It could especially be a problem for state government as different factors go into their settlement

decisions. Judge Jaudzemis agreed that mandatory mediation might not work for government agencies.

Judge Thalken has found that the plaintiff is usually willing to try mediation, but defendants are usually reluctant.

Judge Strom shared his experience of when was appointed to serve as a mediator in an Eighth Circuit case.

Judge Kopf recommended that the mandatory mediation program be tabled for now. Judge Jaudzemis agreed. Judge Kopf stated that the judges have received good feedback to discuss at the next judges' meeting.

9. Review of whether FPF should be used to pay for portrait of judges who have died or taken senior status.

The FPF was recently used to help pay for Judge Beam's portrait. This situation raises the question of whether this should be done in the future. Judge Urbom told Judge Kopf that he believes that there should be a policy for future similar situations. Judge Kopf explained that the request regarding Judge Beam's portrait came to him from the Circuit Executive and not from Judge Beam.

It is quite varied on how other portraits have been paid for. Most generally, former law clerks and families have paid for other judges' portraits. Judge Beam's portrait cost \$10,000, of which the FPF paid for half.

Judge Strom believes that the FPF should not be used to pay for portraits, but that a judge's family should be approached.

Charlie Lowe questioned whether it falls under any FPF category. Bill Wright believes portraits have a marginal educational value and he does not believe the FPF should be used for judges' portraits in the future.

Judge Thalken suggested that the FPF make a contribution to the Historical Society, and then the Historical Society could be a vehicle for judges' portraits.

Judge Kopf stated that it is his personal view that it is not a good thing to use the FPF for judges' portraits and that he will recommend to the Judicial Council not to do so in the future.

10. Review of recommendations of Judge Bataillon, Judge Urbom, Mr. Kirby and Mr. Lowe about use of the Federal Practice Fund to pay attorneys in indigent cases.

Judge Bataillon chaired a sub-committee to advise the court regarding the use of the FPF to pay attorneys in indigent cases. Members of the sub-committee are Judge Urbom, Judge Bataillon, Charlie Lowe and Bob Kirby. The sub-committee met a couple times. It was the sub-committee's consensus that the FPF be used to reimburse attorneys for their time and expenses in certain pro se civil rights cases. Presently, the FPF provides payment of expenses only. However, questions arose about whether the cost would be prohibitive and the need to devise a plan to implement such payment. (This sub-committee was created as a result of Doug German/Nebraska Legal Services' request that the FPF underwrite \$88,000 to allow them to provide representation to indigent individuals. However, they would not be able to handle any prisoner work. Ninety percent of our IFP caseload is filed by prisoners.)

The sub-committee requested information from the Clerk of the Nebraska District Court, the Federal Public Defender, Eighth Circuit Clerk, and the Administrative Office, as well as the Clerks of Court for North Dakota and Northern District of Iowa. The sub-committee received Public Defender data, the annual expenditure by the Fund for expense reimbursement, the per case expenditure by the fund from 1995 to 2000, and the material sent by the Clerks of the Iowa Federal District Courts.

The sub-committee found that the system used by both Federal District Courts in Iowa was closest to our situation and recommended that we adopt a similar program. The Northern and Southern Districts of Iowa have entered into a contract with two attorneys who handle all civil rights cases to which the court appoints counsel. The contract is renewed annually and provides for appointment of no more than 60 cases per year. The attorneys are paid \$1,500.00 per case (half on entry of appearance and the remainder at judgment, or case closing). An additional \$200.00 per month is paid to each attorney for computer research fees. Reasonable out-of-pocket expenses (excluding computer research) are paid as billed. The Clerk for the Southern District of Iowa estimates it spends \$100,000.00 per year for this program. They have found that prisoners and inmates have a great deal of confidence in these two lawyers.

The Iowa Districts fund the expense through a mandatory continuing legal education requirement. Each attorney is required to participate in six hours of CLE in federal practice every two years. Attorneys file a biennial report regarding the CLE hours taken and submit a \$20 registration fee. If lawyers do not want to be on the pro bono appointment list for prisoner cases, they pay an additional \$20.

Judge Bataillon explained that Iowa has a similar situation as Nebraska. The sub-committee suggested that if we were willing to follow Iowa's system we might cap it at 15 cases however. And if we find that this is something that the FPF cannot support, we are only committed for a year.

Laurie Smith Camp asked that if the plaintiff is the prevailing party, whether attorney fees would be adjusted to reimburse the FPF and then the attorney could keep the remaining money. Charlie Lowe stated that with a system like Iowa's, many cases may well go away because of the attorneys' expertise and the inmate's confidence in those attorneys.

Judge Mahoney expressed concern about the federal court employing another attorney and all attorneys not being noticed about this opportunity. Judge Kopf stated that is why we would utilize a RFP, as well as require attorneys to pay a fee. Judge

Bataillon suggested that when dues statements are sent out, an explanation could be included.

Judge Mahoney stated that as member of the bar, all attorneys have an obligation to take pro bono work. Bill Wright suspects that most attorneys would be happy to pay a fee to get out of pro bono work.

Judge Mahoney is concerned whether this is an appropriate thing to do with the FPF. Judge Kopf commented that the sub-committee was created to determine if it is appropriate.

Judge Kopf believes that this system will give us some experienced, dedicated attorneys.

Judge Kopf stated that Senior District Judge Cambridge was very opposed to this idea.

Judge Strom stated that we have a duty to appointment someone with expertise to pro bono cases.

It was the consensus of the FPC that the judges should adopt the sub-committee's recommendation.

11. Next meeting: Friday, April 12, 2002 at 1:15 P.M.-3:15 P.M. (Lincoln, Jury Lounge)

Judge Kopf commented that it has been real helpful to hold FPC meetings close in time to the Judicial Council meetings.

12. Any issues from Chairman Bill Wright or other members.

Bill Wright and Roger Kirst will work together on organizing the 2002 Federal Practice seminar.

The meeting adjourned at 3:15 p.m. (Minutes taken by Kris Leininger.)

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