

***MINUTES***  
***of the***  
***THE FEDERAL PRACTICE COMMITTEE MEETING***  
***held Thursday, October 23, 2003***  
***in the Jury Assembly Room (# 598), 5<sup>th</sup> Floor***  
***Robert V. Denney Federal Building***  
***Lincoln, Nebraska 68508***

The Federal Practice Committee meeting was called to order at 1:30 p.m.  
Members in attendance were:

Chief Judge Richard G. Kopf  
District Judge Joseph F. Bataillon  
District Judge Laurie Smith Camp  
Senior District Judge Warren K. Urbom  
Magistrate Judge David L. Piester  
Magistrate Judge F.A. Gossett  
Clerk of Court Gary D. McFarland  
Sally Johnson for United States Attorney Michael G. Heavican  
Dean Patrick J. Borchers  
Thomas H. Dahlk  
Stuart Jay Dornan  
Mary C. Gryva  
Robert J. Kirby  
Professor Roger W. Kirst  
Charles E. Lowe  
Michael L. Schleich  
Alan G. Stoler  
Jeannette Stull  
Todd R. McWha

**1. Gary McFarland's retirement scheduled for August 2, 2004.**

Gary McFarland is retiring as Clerk of Court after 32 years of service to the District Court. Gary said he has thoroughly enjoyed his employment with the court and will miss everyone. After he retires, Gary intends to help his son start an insurance business.

Chief Judge Kopf stated that Gary has been a marvelous friend to the court and the absolutely best Clerk of Court we could have hoped for. We will miss him.

Chief Judge Kopf explained that the court has advertised to find a replacement for Gary. On October 31, 2003, the judges will consider all the applications. It is Chief Judge Kopf's hope that Chief Deputy Clerk Denise Lucks will be selected as the next Clerk of Court, although the court en banc will make that decision. Denise has roughly 15 years of experience with the court, starting as a docket clerk, courtroom deputy clerk, operations supervisor/manager, and then as chief deputy clerk since 1998. She led the CM/ECF project which received national recognition. She has both a Bachelors and Masters degree. On top of all that, she and her husband are rearing young children. The court is lucky to have Denise's application, along with a lot of other very qualified applicants.

**2. CM/ECF is fully implemented.**

Chief Judge Kopf reported that CM/ECF is fully implemented. All civil and criminal cases, as well as all old cases, are filed on the CM/ECF system. Now it is a matter of making CM/ECF work as well as we can.

The District of Nebraska is on the cutting edge when it comes to CM/ECF. Our people are mentoring and assisting other courts all over the country through site visits, telephone calls and the internet.

Technology is evolving so rapidly. We think we can go from CM/ECF to other related projects and hopefully keep us on the cutting edge of technology. For example, can we do more with videoconferencing, such as holding initial appearances or arraignments at distant facilities? At any given time, we have 500-600 people in the U.S. Marshals' custody all over the Midwest. For those that do criminal defense work, being able to communicate with their clients has become a real problem.

Chief Judge Kopf reported that at the last two meetings the Chief District Judges held with the Chief Circuit Judge (Chief Circuit Judge Hansen and now Chief Circuit Judge Loken), they have been trying to suggest that the Circuit become more willing to accept the appellate record on CM/ECF. CM/ECF was also a hot topic at the Eighth Circuit Judicial Conference this summer.

The Circuit Court is not entirely of one mind on that. Clerk of Court Michael Gans has some serious reservations on how CM/ECF would work for his shop. Who would print the record? From our point of view, we do not care. But Mike does care.

The Circuit will lag far behind in CM/ECF implementation in the Midwest and will probably not get there until the pressure builds. Chief Deputy Clerk Denise Lucks is working with various groups in the Eighth Circuit to show the Circuit how it can use CM/ECF in way that will be user friendly.

Patrick Borchers indicated that at the Eighth Circuit Judicial Conference meeting, there was a great deal of admiration of the District of Nebraska, since very few districts are not anywhere near where Nebraska is at with CM/ECF.

### **3. Financial report on Federal Practice Fund.**

Clerk of Court Gary McFarland reviewed the financial reports with the Committee. He pointed out that the District Court had \$208,141.84 on December 31, 2002. From January 1 through October 15, 2003, there was an infusion of funds through the attorney renewal process which brought in \$13,085.00. In addition, interest in the amount of \$1,778.11 accrued. There were expenditures in the amount of \$33,869.22. (A list of the expenditures from the Federal Practice Fund was distributed.) The balance on hand as of October 15, 2003, was \$189,180.51.

Alan Stoler asked about the juror parking violation expenditure. Gary explained that we had difficulty with one of the parking garages and the Federal Practice Fund reimbursed the juror since there were no appropriated funds to do so, and it was felt that the bench and bar would be served by helping this juror.

Chief Judge Kopf pointed out that on the last page of Federal Practice Fund financial documents, there is a listing of accrued but not paid obligations or outstanding authorizations. Those were calculated as of October 15, 2003. In

addition, Senior District Judge Lyle Strom has recently requested money from the Fund to pay for lunch during the Court's Open Doors to Federal Court Program. This program is for high school students who come to our courthouses in Omaha, Lincoln and North Platte. The Judges and court staff present an Administrative Office mock trial and the students serve as jurors. During this day-long program, we provide the students and teachers with lunch. Judge Kopf has approved this request.

**4. Request of Nebraska Supreme Court for funding from Federal Practice Fund for interpreter training.**

Janet Bonet, an interpreter some of you may use in Omaha, became very interested in trying to increase the training available to local interpreters. The Judges asked Federal Public Defender David Stickman to conduct an analysis about what the court should do. It was his recommendation that we ought not provide the training, but rather provide financial support for training in the state courts. Consequently, we have provided the Supreme Court \$2,500.00 annually for interpreter training for the last three or four years.

In September 2003, Kenneth Wade, Associate Administrator of the Nebraska Supreme Court, requested that we continue our financial support. Chief Judge Kopf thought he ought to bring this request to the Committee's attention and seek their advice on whether we should continue. FPD David Stickman is the President of the Criminal Defense Lawyers and he is strongly supportive of the Supreme Court's request.

Bob Kirby indicated that finding qualified interpreters is not only a real problem for the federal court, but also for Douglas County. He believes this is a needed expenditure.

Chief Judge Kopf stated that the federal court is in a good position because we are able to fly in highly qualified and certified interpreters from around the nation. But he recognizes that it is a problem for criminal defense attorneys, U.S. Attorneys and the state courts. There are only two federally certified interpreters in Nebraska: a professor at the University of Nebraska at Kearney and Dr. Jeck Navarette who is employed by the Nebraska Federal Public Defenders Office.

Stu Dornan stated that there are no interpreters available in Lexington or Wilbur where defendants are kept in custody. So he believes this training program will be helpful to defense counsel.

Chief Judge Kopf proposed that the Federal Practice Fund support the Nebraska Supreme Court's interpreter training again this year in the amount of \$2,500.00. Alan Stoler so moved. Motion seconded and passed.

5. **Proposed plan to put magistrate judges on the civil cases assignment wheel starting January 1, 2004, so that each magistrate judge has a 25-case civil docket.**

Chief Judge Kopf reported that one of the judges' strategic plan goals is to increase our magistrate judge consent cases to about 25 per magistrate judge<sup>1</sup>. At the suggestion of the subcommittee on the utilization of magistrate judges, the judges will be considering at their October 31, 2003 meeting whether to place the three magistrate judges on the civil cases assignment wheel (i.e., add Magistrate Judges Thalken and Gossett to the Omaha wheel and Magistrate Judge Piester to the Lincoln wheel).

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<sup>1</sup>Earlier, the judges had set a goal of redrafting our local rules and implementing a system where magistrate judges would have a consent docket of about 25 civil cases for trial. In 2003, and recognizing that the court's progress had been slowed, the judges, during one of their governance meetings, created the court's Docket and Local Rules Committee. The charge of the Docket and Local Rules Committee was to: (1) redraft and restate the local rules by a date certain; (2) oversee on a regular basis the status of the local rules and, where appropriate, suggest amendments; (3) harmonize the local rules with standing or general orders and with CM/ECF; (4) **develop and oversee procedures governing the use of magistrate judges**; (5) develop procedures for the efficient interaction of the bankruptcy court and the district court; and (6) review on a periodic and consistent basis the district court's docket and, where appropriate, suggest changes in procedures, including, but not limited to, assignment procedures. Judge Smith Camp is chair of the Docket and Local Rules Committee and the local rules and general orders subcommittee, Gary McFarland is chair of the docket subcommittee, and Magistrate Judge Gossett is chair of the subcommittee on the utilization of magistrate judges.

Magistrate Judge F.A. Gossett, III, further explained that if a magistrate judge is selected during the random draw, consent forms will be automatically mailed to the parties. There will be a blind opt out, i.e., the forms go to the clerk and not the judge. If the parties do not consent, the Clerk's Office will conduct another judge draw from the wheel that only contains the Article III judges, and the magistrate judge will not know that the parties opted out. Magistrate Judge Gossett stated that he would not be personally offended by an opt out, but there might be that appearance. Thus, the reason for the "blind" opt out.

Judge Smith Camp explained that this is a more structured procedure. Lawyers will be notified that their case has been assigned to a particular magistrate judge as a result of a random judge draw. The parties will be required to sign opt out forms in order to have an "Article III only" judge draw. She believes this procedure is something a lawyer can easily explain to their client, i.e., the assignment of the case to a magistrate judge was due to a judge draw. However, if the parties do not wish to consent, they are not required to do so and their "opt-out" is blind.

Magistrate judges could still have more than 25 consent cases. However, when a magistrate judge falls below 25 consent cases, the Clerk's Office will add the magistrate judge back into the random judge draw/assignment wheel.

At one time, Magistrate Judge David Piester had close to 25 consent cases. Judge Kopf was able to drive up his consents by actively calling the parties. When he stopped doing that, the consents fell.

Chief Judge Kopf believes that it is important for magistrate judges to have experience with trials on an ongoing basis. It will help them with their other duties.

The court's criminal case load went up 42% over last year according to the Administrative Office's Federal Judicial Caseload Statistics (March 31, 2003.) As a result of the heavy criminal caseload, and the fact that magistrate judges cannot try felony criminal cases, the judges want to provide the Bar and litigants with a trial alternative for civil cases.

Charlie Lowe asked if settlement conferences in a consent case could be held before a different magistrate judge and not by the assigned "consent" magistrate judge. Magistrate Judge Gossett believes that Charlie's suggestion would be a very

viable alternative. Magistrate Judge Piester commented that magistrate judges have not been handling very many settlement conferences, now that they are holding planning conferences. There is not time. Parties are referred to mediation.

Roger Kirst expressed concern about trials before magistrate judges (Article I versus Article III). Roger Kirst prefers the old way – “real judges, real juries.” Chief Judge Kopf stated that the statute changed about five years ago to permit the court to take a more active role in encouraging trials before magistrate judges. Judge Kopf further stated that as a practical matter, the Article III judges will never allow the magistrate judge consent calendar to get so high that they cannot do anything else. Magistrate judges do so many other things for the Article III judges and thus there is a practical limitation on the number of trials conducted by magistrate judges. It is not the Article III judges’ intent to turn magistrate judges into de facto Article III judges.

Bob Kirby stated that it has been his observation in the past few years that our district has not had a lot of consent cases because attorneys are poor at opting in. If there is a procedure to opt **out** instead, it is his thought that not many will.

Chief Judge Kopf stated that this proposal will be voted on at the judges’ October 31, 2003 meeting. If the proposal passes, the “opt out” procedure would begin January 1, 2004. The judges will notify the bar on what we are going to do. Chief Judge Kopf does not intend to solicit comments from the bar. He is satisfied with the feedback from the Federal Practice Committee members.

Patrick Borchers recalls a Supreme Court case similar to this proposal. A few years ago, a case was tried to a magistrate judge, the losing party appealed, but received a “no do over” ruling.

Judge Kopf inquired of the members of the Federal Practice Committee about their thoughts. Aside from Roger Kirst, no one expressed any objection.

6. **Solicited suggestions for replacement members for Alan Stoler and Bill Wright whose terms expire on December 31, 2003. Also, discussed Stu Dornan's continued membership in light of his appointment as Douglas County Attorney.**

Alan Stoler and Bill Wright's terms expire on December 31, 2003. Alan Stoler would like to continue to serve, and Judge Kopf indicated that he would be reappointed.

Chief Judge Kopf believes we should give Bill Wright a break. He has been a tried and true member. Todd McWha will give some thought to a replacement for Bill Wright from Central Nebraska. Chief Judge Kopf encouraged the other FPC members to give it some thought as well.

Finally, although Stu Dornan has recently become Douglas County Attorney, he indicated his desire to remain a member. Judge Kopf agreed.

7. **Recognized and thanked Bob Kirby for his exemplary service as Chair of the Committee. Recognized Todd McWha as the new Chairman of the Committee for 2004.**

Judge Kopf thanked Bob Kirby for his service. Todd McWha is pleased to accept Chief Judge Kopf's invitation to serve as Chairman of the FPC Committee for 2004. Todd encouraged the FPC members to contact Judge Kopf with any needs or questions, and then Judge Kopf will be in contact with him.

8. **NEXT MEETING DATE IS FRIDAY, APRIL 23, 2004, AT 1:30 P.M. IN LINCOLN.**

9. **For the "good of the order."**

Congratulations to Judges Warren K. Urbom and Lyle E. Strom for receiving their 50 year pins at the Nebraska State Bar Annual meeting today.

Chief Judge Kopf indicated that he has not gotten together with Roger Kirst to talk about a **Federal Practice Committee sponsored seminar**.



Roger Kirst indicated that the only seminar topic he has come up with is a review of civil rights litigation (1983 and specialized statutes).

Should we host a stand-alone seminar, or a seminar in conjunction with the annual Bar meeting? Bob Kirby believes that a stand-alone seminar is far superior to competing with other seminars during the annual Bar meeting.

Chief Judge Kopf believes there is already a good number of CLE courses available, and that the FPC ought not hold a seminar unless there is some particular need. On the other hand, Roger Kirst did a great job with the last seminar that was held two years ago. It was very well attended. Thus, if the FPC members want to hold a seminar, that is fine with the court.

Magistrate Judge Piester suggested that we hold another strategic planning-type meeting with the bar. Or perhaps survey the bar so as to provide lawyers with a mechanism where they can offer their feedback. Bob Kirby stated that the last “strategic planning” meeting with the bar was very well attended and popular. A lot of ideas from that meeting were implemented by the court. The 90-day meetings came directly out of that meeting.

Judge Smith Camp suggested that once there is a final polished revision of the local civil and criminal rules and standing orders (first draft is due January 2004), it would be a good time to hold a seminar to discuss those changes.

Charlie Lowe suggested the FPC hold a “primer” seminar for those who are not familiar with practicing law in the federal district court. This would likely not be enough for a full day, so perhaps the “primer” could be combined with the “strategic planning” meeting.

Chief Judge Kopf requested that the FPC members give some thought as to whether the FPC should sponsor a seminar and then to send him an e-mail within the next 10 days. Judge Kopf will collect and summarize the responses, discuss any suggestions with Roger Kirst and Todd McWha, and then get back to the Committee on whether there should be a seminar.

The meeting adjourned at 2:30 p.m.