

MINUTES
of the
FEDERAL PRACTICE COMMITTEE MEETING
held Friday, April 23, 2004
in the Jury Assembly Room (# 598), 5th 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
Magistrate Judge David L. Piester
Magistrate Judge Thomas D. Thalken
Magistrate Judge F.A. Gossett, III
Chief Bankruptcy Judge Timothy J. Mahoney
Sally Johnson for United States Attorney Michael G. Heavican
David R. Stickman, Federal Public Defender
Charles E. Lowe, Assistant Attorney General
Thomas D. Dahlk
Stuart J. Dorman
Mary C. Gryva
Robert K. Kirby
Todd R. McWha (FPC Chairperson, 2004)
Howard P. Olsen, Jr.
Michael L. Schleich
Lisa D. Stava
Alan G. Stoler
Jeannette Stull

Several judges were absent due to Former Governor Frank Morrison's funeral.

1. Report by Judge Kopf on status of Federal Practice Fund.

The Federal Practice Fund has a balance of \$179,758.49. The Fund is "refreshed" with a \$5 yearly assessment fee from Bar members admitted to practice in the United States District Court. The Fund has a balance similar to last year at this time. Among the disbursements are expenses paid to Kellie Paris Asaka, the lawyer the court hired so we would not appoint lawyers to take civil rights cases without compensation. This arrangement with Ms. Asaka has worked out well.

2. Report by Judge Kopf on Chief Justice Rehnquist's visit on October 29, 2004.

The Federal Practice Fund will be used to help the Hruska Institute of the Nebraska Bar Foundation charter a plane to bring the Chief Justice to Nebraska.

3. Discussion Draft of New Local Rules.

Chief Judge Kopf stated that redrafting the court's local rules has been an arduous process. The project has been in the works for over three years, first started by Magistrate Judge Thalken, then taken over by Judge Smith Camp and a committee of court staff. The committee provided the judges a draft in January 2004. Chief Judge Kopf then appointed a committee of four senior career law clerks (Jim Eske, Therese Bollerup, Cheryl Zwart and Mary Buckley), all who have experience practicing law, to take the judges' comments and rework that draft. This committee separated the new local rules into three categories: general, civil and criminal.

Jim Eske, one of the senior career law clerks, provided an overview of the redrafted local rules to the Federal Practice Committee:

- * The Executive Summary prepared by Jim notes the major changes and modifications made to each of the rules.
- * The general rules apply to civil, criminal and bankruptcy cases, as well the procedure for assignment of judges, bankruptcy references and appeals, courthouse security, bar admission, and attorney discipline. The general rules are taken directly from the existing local rules and no major changes were made.
- * The civil rules should look familiar. They have been reworked but, for the most part, there are not many substantive changes.
- * The biggest change made to the civil rules relates to summary judgment motions. The briefing requirements are more stringent. Movant's failure to (1) include in the brief a separate statement of material facts and (2) pinpoint citations to supporting evidence, will constitute grounds to deny the motion. The non-moving party must respond to each paragraph of movant's statement of material facts. Uncontroverted facts will be deemed admitted.

- * There is another provision that admits reply briefs on all motions, without the need for asking permission of the court.
- * The rules allow service of discovery documents by fax or e-mail, if all parties are in agreement.
- * Advance notice is required for subpoenaing documents from nonparties. Chief Judge Kopf stated that former FPC member Carole McMahan-Boies had earlier expressed concern that she often is not given advance notice when her client's medical records are subpoenaed in a federal employment discrimination case. So the local rules were changed to mirror the Nebraska rules on subpoenaing a nonparty.
- * Motions for reconsideration are permitted, but will be limited to a 10-day filing period and one motion per order. Such motions are disfavored.
- * The criminal rules include many of the same provisions as the civil rules, but under a different numbering system as required by the federal rules. (Chief Judge Kopf explained that there is a national committee of judges who review local rules. Districts are required to follow their numbering system so that we do not impose requirements that are inconsistent or duplicative of the federal rules.)
- * The other big change is that we stripped out of the court's general and standing orders what we could put in the local rules. This constituted, in large part, general and standing orders dealing with criminal matters.
- * All of the administrative procedures for CM/ECF (Case Management/Electronic Case Filing) were not incorporated into the court's local rules. The administrative procedures provide technical details. In the case of a conflict, the administrative procedures will control because they will be revised more frequently as CM/ECF is enhanced.

THE FEDERAL PRACTICE COMMITTEE MEMBERS HAVE UNTIL MAY 21, 2004 TO SHARE THEIR SPECIFIC CONCERNS ABOUT THE REDRAFTED LOCAL RULES. MEMBERS SHOULD SEND THEIR E-MAIL OR LETTER TO CHIEF JUDGE KOPF, WITH A COPY TO HIS JUDICIAL ASSISTANT KRISTIN LEININGER. <Richard.Kopf@ned.uscourts.gov> <Kristin.Leininger@ned.uscourts.gov>

The local rules will be proposed to the judges at their May 7, 2004 meeting. The judges will then have an “up or down” vote on these rules on June 2, 2004.

Judge Kopf urged the United States Attorney and the Federal Public Defender to look especially close at the rules. Federal Public Defender Dave Stickman will forward the local rules to the CJA Panel attorneys to solicit their review and comments. Sally Johnson of the United States Attorney’s office will also distribute the local rules to the assistant U.S. attorneys.

Tom Dahlk asked if time is stayed for an appeal if a motion for reconsideration is filed? Judge Kopf said, “No.” Is a motion for reconsideration used for a bench trial? Judge Kopf indicated that it is not; a motion for reconsideration is typically used for discovery matters.

Charlie Lowe asked if there is a statement in the redrafted local rules about pro se people being bound by the same rules. There is such a statement in the existing local rules. Jim Eske replied that this statement appears in the general local rules.

Charlie Lowe commented that the summary judgment procedure does not appear to be radically different. Judge Kopf agreed. Tom Dahlk asked if this rule is a way to put parties on notice? Judge Kopf said, “Yes.”

Judge Kopf reported that Judge Urbom now fully approves the redraft of local rules. He originally had expressed concern about having separate local rules for general matters, and civil and criminal cases.

Chief Judge Mahoney reported that the bankruptcy rules are in the process of being revised by a committee. He hopes the redraft of the bankruptcy local rules will be completed by January 2005.

Magistrate Judge Thalken commended the committee of career law clerks who took over the redrafting of the local rules. He stated that they have done a fantastic job of segregating the rules.

Judge Kopf expressed his appreciation for his senior career law clerk Jim Eske. Jim practiced law for 17 years with Barlow Johnson and before that was a clerk for a Supreme Court judge. His experience contributed significantly to this project.

4. Start planning for late summer or early fall seminar on new local rules and perhaps other topics.

Chief Judge Kopf suggested holding a Federal Practice seminar this year centered around the court's redrafted local rules.

Charlie Lowe suggested splitting up the seminar between civil and criminal rules.

Bob Kirby suggested adding another topic to draw people in, such as courtroom technology. Bob Kirby remembers two seminars he thought were "fabulous": (1) the judges panel which Judge Riley moderated and (2) when Bart McClay demonstrated ELMO.

Magistrate Judge Thalken suggested holding the Federal Practice seminar in conjunction with the Nebraska State Bar Association's annual meeting in October 2004 in Omaha. Since people will be in attendance at the NSBA annual meeting and will not have to come specifically for our seminar, holding the FPC seminar at the same time will help defray costs.

Chief Judge Kopf suggested holding the meeting at the Hruska Courthouse in Omaha rather than at the Hilton.

Judge Kopf will visit with Sam Clinch at the Nebraska State Bar Association and check out available days and times for holding the Federal Practice Seminar during the NSBA Annual Meeting.

If the October seminar goes well, we can migrate the seminar to Lincoln. The local rules will be placed on the court's website and there will be a mass mailing to Bar members as well.

Judge Kopf suggested a 40 minute session on courtroom technology, a 20 minute session on general local rules, a 30 minute session on civil local rules, and a 30 minute session on criminal local rules, for a two-hour seminar.

THE FEDERAL PRACTICE COMMITTEE SEMINAR ON COURTROOM TECHNOLOGY AND NEW LOCAL RULES IS SET FOR WEDNESDAY, OCTOBER 20, 2004, AT 1:30 P.M. AT THE ROMAN L. HRUSKA U.S. COURTHOUSE, 111 SOUTH 18TH PLAZA, OMAHA, NEBRASKA. THE SEMINAR WILL BE LISTED IN THE NSBA ANNUAL MEETING SCHEDULE PROGRAM.

Judge Kopf asked Howard Olsen if he thought it is important to hold a seminar on courtroom technology and new local rules in North Platte/Western Nebraska. Howard asked if the technology in the North Platte Courthouse is going to be updated? Judge Kopf said, "No."

Todd McWha requested that a seminar on the new local rules be held in North Platte/Western Nebraska. Judge Kopf suggested holding an hour long seminar for the Western Nebraska bar on the new local rules and perhaps the four career law clerks could put on a panel discussion. A date will need to be selected. The Western Nebraska Bar annual meeting is held later in the summer and is usually a social gathering/golf tournament, with no formal meeting.

5. Report on Judge Kopf's meeting with Chief Judge Loken regarding CJA payments.

Chief Judge Kopf explained that in the District of Nebraska, the Federal Public Defender handles around 70 percent or so of the appointed criminal cases. Attorneys on the CJA Panel list are appointed to the other 30 percent of appointed criminal cases. The CJA Panel attorneys are paid from a congressional appropriation under the Criminal Justice Act. Those attorneys submit vouchers to the court and if the voucher is over a threshold, the court has to approve and then submit the voucher to the Chief Circuit Judge for his review and approval. For a long time those excess vouchers have not been given very much scrutiny. When he became chief circuit judge, Judge Loken became concerned that these vouchers were not receiving the scrutiny they should. Chief Judge Loken has begun to reduce CJA vouchers. This has created frustration. Dave Stickman and Alan Stoler are aware of this issue. This has real significance to a fairly large segment of our bar.

The Chief District Judges of the Eighth Circuit have met with Chief Circuit Judge Loken about that subject. Chief Judge Kopf has provided our judges, Dave Stickman and Alan Stoler with a report of that meeting. Judge Kopf indicated that more specific guidelines may be drafted in the future to help CJA lawyers. A lengthy discussion ensued in which several members expressed their disagreement with the practice of cutting vouchers, especially without an explanation.

6. Report on contract extension with attorney Asaka to represent indigent litigants.

The contract with Attorney Kellie Paris Asaka was extended and her rate was increased to \$2,000 per case. Thus far, she has only been appointed to a few cases and the impact on the Federal Practice Fund was very minimal.

Charlie Lowe reported that he has spoken with Linda Willard about her dealings with Ms. Asaka. It has been helpful to deal with someone who has an understanding of the process and thus no need to reeducate.

7. Next meeting: Thursday, October 21, 2004, 2:00 - 3:00 p.m.
(during NSBA 2004 Annual Meeting)
At Hilton Omaha/Quest Center, in Omaha
8. Other business.

Lisa Stava was welcomed as a new member of the Federal Practice Committee.

Chief Judge Richard G. Kopf reported that the United States District Court has been able to avoid layoffs this year. However, the federal courts are in critical financial trouble. The federal courts' budgets will be frozen again next fiscal year and the District of Nebraska may end up laying off staff. The court's budget impact statement is due to Washington within the next 15 days.

Chief Judge Kopf reported that District Judge Thomas M. Shanahan will take senior status on May 5, 2005. Our temporary judgeship will expire without replacement. Judges Kopf and Bataillon met with Chairman Sensenbrenner in January. Chairman Sensenbrenner said he would do his best to help us, but we do not expect relief until after the election.

Senior Judge Shanahan will have a docket of 100 criminal cases, but no civil cases. His caseload of civil cases was reassigned to Judges Bataillon and Smith Camp. The grand jury just returned numerous indictments, so the Omaha judges' dockets have greatly increased. If necessary, Judge Kopf will take Omaha civil cases and go to Omaha to try cases. We are also bringing in judges from other districts to try cases (District Judge Robert T. Dawson from the Western District of Arkansas, and District Judge Bernard A. Friedman from the Eastern District of Michigan).

Chief Judge Kopf stated that with Judge Shanahan's senior status, the District of Nebraska's criminal case load will be one of the highest in the nation, even higher than any of the other border states.

Magistrate Judge Gossett stated that magistrate judges have been added to the case assignment wheel. The goal is to get magistrate judges to 25 cases. Judge Thalken has received several consent cases and is close to having 25 cases. Once he does, his cards will be pulled from the assignment wheel. The actual breakdown of magistrate judge assignments

versus consents is being tracked, but there are too few numbers so far to report on at this point.

In advance of this meeting, Howard Olsen had asked Chief Judge Kopf about the status of digital sound recording for the federal court. Judge Kopf explained that when the court moved to CM/ECF, the court got into a dispute with free lance reporters about placing their transcripts on the web. Judges felt they should. This led to a bunch of problems. Then Judge Kopf's court reporter, David Francis, retired. So Judge Kopf decided to try digital sound recording for his courtroom. A purchase contract will be let this month. Other federal courts are going to digital sound recording.

Howard Olsen also asked for a report on the pilot project for electronic availability of civil transcripts. Judge Kopf gave a report on behalf of Chief Deputy Clerk Denise Lucks who was out of state at a court meeting. The District of Nebraska had asked the Judicial Conference of the United States to look into court reporter salaries and the reduction of their income due to CM/ECF. The pilot project was a result and the District of Nebraska is a participant. Since the pilot project began on January 12, 2004, eight civil transcripts have been requested in the District of Nebraska. Four of the transcripts were filed by staff reporters, the other four were filed by free lance reporters. There have been no redactions, although one notice of intent to request redaction was filed and it is being reviewed. With respect to impact on court reporter income, at this point it appears to be neutral because of the redaction process. However, we really do not have enough data yet to draw a strong conclusion. The pilot project is also being run in the Districts of Maine and Kansas. The District of Kansas is placing their transcripts on the web immediately, which annoys the reporters.

Magistrate Judge Piester indicated that he had recently distributed the annual report on mediation. There is a higher percentage of settlements in mediation, but not very many cases are being mediated.

Mary Gryva expressed her concern about the decision that came down in United States v. Walker on the effect of superceding indictments. Mary plans to file a motion every time a superceding indictment is filed asking if it supplants the original indictment. Sally Johnson stated that Walker was a very unusual case. Chief Judge Kopf asked Sally if a superceding indictment could state if it supplants all other indictments or not, so there is no question. Sally Johnson will pass this request along to Mike Heavican.

The meeting adjourned at 2:40 p.m.