

Nebraska Federal Litigation Civil II



Active Case Management with Self-Represented Parties

Pro Se Docket

Provides case management of civil cases filed by

- 1) plaintiffs;
- 2) proceeding without counsel; and
- 3) in forma pauperis.

Does not provide case management over:

- 1) Criminal cases, including those seeking recovery of forfeited or seized property, the review of a federal conviction or sentence, or the review of a state-imposed death penalty.
- 2) Civil cases:
 - where the pro se party is a defendant;
 - a plaintiff or petitioner is a prisoner, the filing fee was paid, and summons for service was issued by the clerk;
 - for bankruptcy relief; or
 - seeking review of a social security decision.

Plaintiff's Initial Filings

Evaluating a pro se complaint

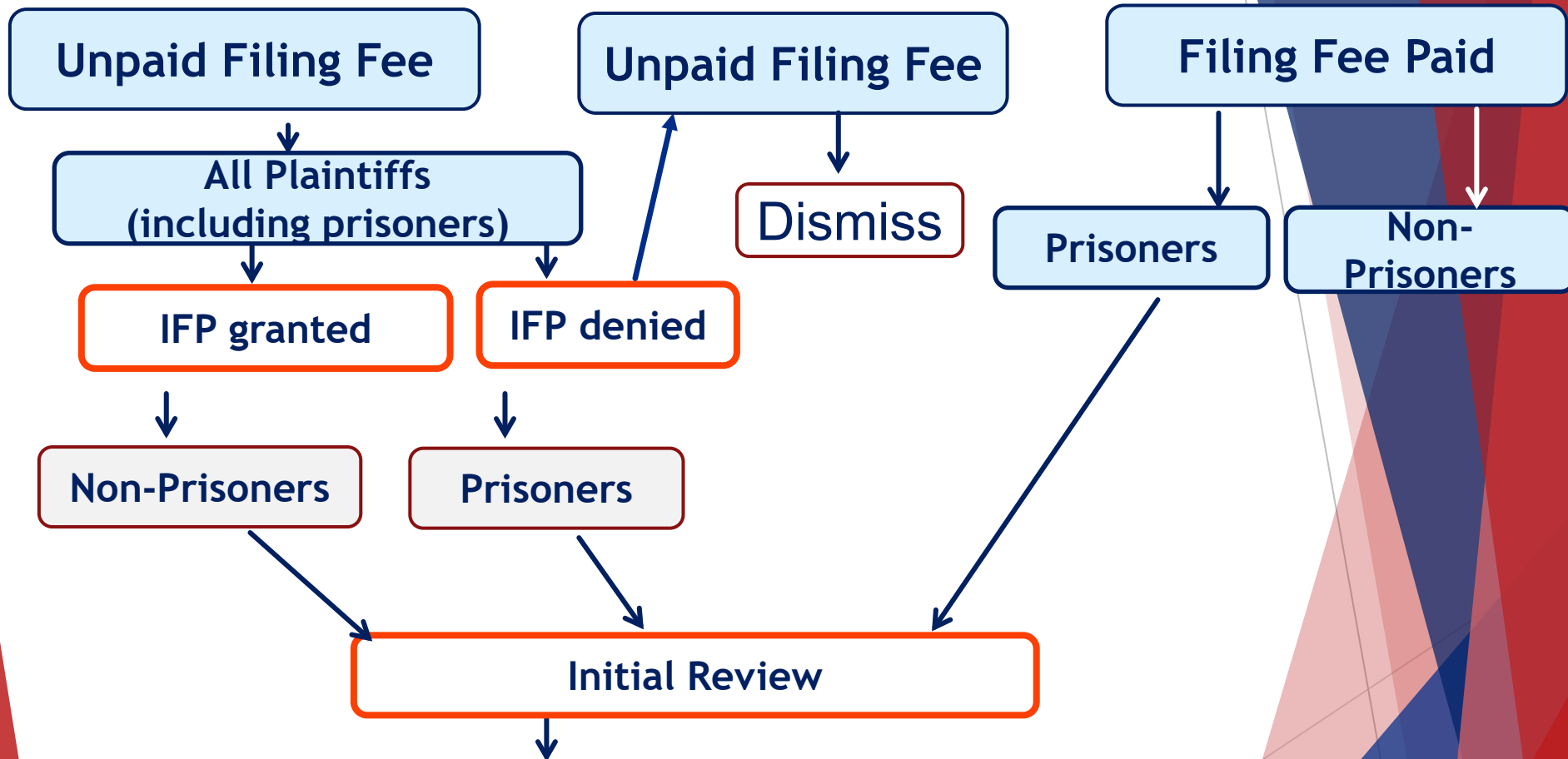
- Prisoners (Prison Litigation Reform Act—PLRA)
- Non-prisoners

IFP applications

- Prisoners
- Non-prisoners

Requests for appointed counsel

Initial Review



Dismissal prior to service if the complaint is frivolous or malicious, fails to state a claim, the defendant has immunity, or the allegation of poverty is untrue.

Motion for Appointment of Counsel

Standard of Review: Discretion of the court.

Whether the pro se party and court will benefit from the appointment of counsel, considering:

- ▶ The factual and legal complexity of the case;
- ▶ The presence or absence of conflicting testimony;
- ▶ The extent of the pro se party's own efforts to locate counsel;
- ▶ His or her ability to investigate the facts and present or defend the claims; and
- ▶ Whether Plaintiff must have counsel because he or she is e.g., a minor is a minor, incapacitated, etc.

Court-Appointed Counsel

“Amended Plan for the Administration of the Federal Practice Fund and the Federal Practice Committee” at

<https://www.ned.uscourts.gov/internetDocs/pom/crtplans/fedpract.pdf>

For indigent pro se litigants, FPC funds can pay:

- Litigation costs for indigent pro se civil litigants;
- Attorney fees for court-appointed counsel when appropriated funds are not available for such representation.
 - one half paid when counsel files an appearance in CM/ECF, and
 - the remainder paid after the court enters judgment or otherwise closes the case.
- Limited to \$2000 unless the Chief Judge approves additional funds

FPC funds can pay mediation costs for all indigent litigants.

Pretrial Judicial Assistance



Progression Order
Conference

Discovery Conferences

Settlement Conference

Pretrial Conference

Online Court Resources

Guide:

- **“Proceeding Without an Attorney”** at <https://www.ned.uscourts.gov/public/proceeding-without-an-attorney>

Forms:

- **Application to Proceed IFP and Affidavit for IFP Application**
- **Summons Forms**
- **USM-285 form**

Nebraska Civil Rules

Trial



Criminal Filings 2022

- ▶ Felony defendants decreased by 4.91% for the 12 months ending March 31, 2023
- ▶ Nebraska has the 9th highest per judge criminal filings nationally for 2022 at 169 per judge
- ▶ Nebraska criminal filings have fallen from 202 per judge in 2017.
- ▶ Filing to disposition has increased from 9.6 months in 2017 to 13.5 months in 2022. (240 in 2013)

Civil Filings 2022

- ▶ Civil filings decreased by 7.93% for the 12 months period ending March 31, 2023.
- ▶ 392 civil filings per judge in 2022. Down from 406 in 2017.
- ▶ 12.3 months from filing to disposition. Up from 10.4 months in 2017.
- ▶ 34.6 months from filing to trial, up from 27 months in 2017 for 16 trials per judge. (19 months in 2010 - 30 trials)

U.S. District Court — Judicial Caseload Profile

NEBRASKA

12-Month Periods Ending

		Dec 31 2017	Dec 31 2018	Dec 31 2019	Dec 31 2020	Dec 31 2021	Dec 31 2022	
Overall Caseload Statistics	Filings ¹	1,575	1,674	1,569	1,432	1,589	1,394	
	Terminations	1,610	1,594	1,538	1,371	1,504	1,375	
	Pending	1,139	1,210	1,224	1,286	1,370	1,382	
	Percent Change in Total Filings Current Year Over Earlier Year	-11.5	-16.7	-11.2	-2.7	-12.3		
Number of Judgeships		3	3	3	3	3	3	
Vacant Judgeship Months ²		12.0	13.0	18.7	0.0	0.0	0.0	
Actions per Judgeship	Filings	Total	525	558	523	477	530	465
		Civil	224	254	234	235	274	237
		Criminal Felony	202	195	197	171	188	169
		Supervised Release Hearings	99	110	92	71	68	59
	Pending Cases ²		380	403	408	429	457	461
	Weighted Filings ²		504	516	481	464	498	453
	Terminations		537	531	513	457	501	458
	Trials Completed		21	18	20	12	19	12
Median Time (Months)	From Filing to Disposition	Criminal Felony	9.6	8.9	9.0	10.6	12.4	13.5
		Civil ²	8.9	7.4	8.8	7.9	5.0	6.8
	From Filing to Trial ² (Civil Only)		-	-	22.2	-	-	-
Other	Number (and %) of Civil Cases Over 3 Years Old ²		29 5.0	28 4.4	37 5.8	38 5.7	37 6.1	41 6.6
	Average Number of Felony Defendants Filed per Case		1.2	1.2	1.2	1.2	1.3	1.2
	Jurors	Avg. Present for Jury Selection	29.9	32.3	33.3	36.2	34.5	35.7
		Percent Not Selected or Challenged	12.2	9.8	20.1	19.5	16.7	23.9

**Numerical
Standing
Within**

U.S.	Circuit
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82	9
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39	5
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57	5
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9	4
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22	6
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50	5
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30	3
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43	5
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59	8
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41	5
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12	2
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26	6
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U.S. District Court — Judicial Caseload Profile

NEBRASKA

		12-Month Periods Ending						Numerical Standing Within		
		Sep 30 2010	Sep 30 2011	Sep 30 2012	Sep 30 2013	Sep 30 2014	Sep 30 2015			U.S.
Overall Caseload Statistics	Filings ¹	1,780	1,613	1,699	1,693	1,569	1,531			
	Terminations	1,926	1,691	1,788	1,691	1,604	1,541			
	Pending	1,159	1,138	1,110	1,166	1,158	1,141			
	Percent Change in Total Filings Current Year Over Earlier Year	-14.0	-5.1	-9.9	-9.6	-2.4		57	8	
Number of Judgeships		3	3	3	3	3	3			
Vacant Judgeship Months ²		0.0	0.0	1.7	0.0	0.0	12.0			
Actions per Judgeship	Filings	Total	593	538	566	564	523	510	40	5
		Civil	250	230	244	218	213	215	77	8
		Criminal Felony	218	211	206	240	214	201	7	2
		Supervised Release Hearings	126	97	116	107	96	95	7	2
	Pending Cases		386	379	370	389	386	380	65	7
	Weighted Filings ²		513	470	468	483	434	450	44	5
	Terminations		642	564	596	564	535	514	34	4
	Trials Completed		30	24	23	21	16	20	27	7
Median Time (Months)	From Filing to Disposition	Criminal Felony	8.2	7.8	8.0	7.6	7.9	8.0	29	2
		Civil ²	8.6	8.3	7.7	9.0	8.8	7.4	19	3
	From Filing to Trial ² (Civil Only)		19.0	21.7	20.8	25.2	25.9	28.6	42	5
Other	Number (and %) of Civil Cases Over 3 Years Old ²		18 3.1	28 4.9	21 3.6	30 5.2	25 4.4	40 6.9	56	8
	Average Number of Felony Defendants Filed per Case		1.2	1.2	1.2	1.2	1.2	1.2		
	Jurors	Avg. Present for Jury Selection	34.9	31.5	37.8	34.6	33.8	33.6		
		Percent Not Selected or Challenged	20.6	11.8	27.8	16.8	23.1	18.9		

Caseload Take Aways

- ▶ Pandemic backlog has slowed dispositions peaked
 - ▶ Disposition times have hopefully peaked
- ▶ There will be more help with criminal trials
- ▶ Civil and Criminal filings are down
 - ▶ With a new judge there will be more caseload capacity than there has been in some time



Failure to
Prosecute

Failure to
Respond

Plaintiff's Conduct: Dismissal	Defendant's Conduct: Default
Failure to serve/want of prosecution Failure to comply with court orders	Failure to Respond Failure to comply with court orders
Show cause order and warning (dismissal)	Show cause order and warning (move for default or dismissal)
Findings and recommendation for dismissal	Findings and recommendation for dismissal, or entry of default
Objection and Court Order or Court Order	

Rule 30(b)(6) Depositions

- Topic list
- Meet and Confer requirement
- Witness preparation v. work product
- Time limitations
- Duplicative depositions

Topic List

The Court considers whether the topics are:

- relevant,
- proportional to the needs of the case,
- not unduly burdensome or duplicative, and
- described with reasonable particularity.

2020 Amendment

Before or promptly after the notice or subpoena is served, the serving party and the organization **must confer in good faith about the matters for examination**. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify.

Witness Preparation and Work Product

The witness **must** personally:

Become educated as to what the organization knows (cannot rely solely on counsel's knowledge) by:

- Knowing how the information was gathered;
- Participating in witness interviews; and
- Review the documents relied on.

Counsel **must**:

- Facilitate the gathering of information for the witness to review; and
- Cull information that is privileged or is not responsive to any of the designated topics.

Counsel **must not** become the primary information source upon which the witness relies upon.

Contention topics

A Rule 30(b)(6) notice requiring a corporate designee to, e.g.,

“Identify all facts, witnesses, or documents” supporting the allegation in [Paragraph XX of the complaint][the Fifth Affirmative Defense]”

impermissibly requests work product, is unduly broad and overburdensome, and are not the proper means for obtaining a summary of the facts supporting the opponent’s allegations.

An option to consider:

It is improper for a witness to testify at trial from prepared notes under the guise of refreshing recollection.

However, a corporate designee must testify to all information reasonably known to the corporation, including matters beyond the designee's personal knowledge.

“A well-prepared deposition notebook has the potential to enhance the accuracy and depth of a designee's testimony. As such, use of a notebook is not indicative of a designee's unpreparedness; nor is it evidence of witness coaching.”

Time Limit

Rule 30(d)(1):

Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.

The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

Duplicative Depositions

Is a separate 30(b)(6) deposition appropriate where:

- the most knowledgeable witness in the subject area has already been deposed; and
- that witness would have been the corporate designee for a 30(b)(6) deposition?

Rule 30(b)(6) Sanctions



Egregious or lack of specificity on a topic

Witness' efforts to prepare

Clarity of topical listing in the notice

Selection of testifying witness

Disclosing and Using Non-Retained Experts

- Reporting or non-reporting witness?
- Disclosure requirements of a non-reporting expert
- Communicating with non-reporting experts: Waiver of attorney-client privilege

“Non-retained” a/k/a “Non-reporting” Experts

Defined:

An expert who was not retained or specially employed in connection with the litigation and bases his or her opinions on percipient observations and personal knowledge, and not facts supplied by others.

Must distinguish between:

- lay opinions,
- expert opinions derived from personal knowledge of the facts and data at issue in the litigation, and
- expert opinions based on facts and analysis developed separately from involvement in the relevant events.

“Non-retained” Expert Reports

As to non-retained experts, a party must disclose:

- the subject matter of their testimony, and
- a summary of the facts and opinions for which they will provide testimony.

Draft reports and disclosures for both retained and non-retained experts are protected and not discoverable.

Work Product

Non-retained Experts

Work product confidentiality is waived as to documents and information the expert considered in connection with the proposed testimony.

“Considered” is interpreted broadly to include everything the expert was exposed to, not only what was actually relied upon.

A broad description of the topics of expert testimony may obligate the party to broadly disclose what the expert reviewed.

Privileged Communications Non-retained Experts

Rule 26(b)(4) protects attorney-expert communications if the expert must prepare a report.

Rule 26(b)(4) does not itself protect communications between counsel and non-retained expert witnesses.



Alternative Dispute Resolution

- Mediation
- Settlement Conferences
- Obstacles to Settlement

- ▶ Stay or not?
- ▶ Reporting
- ▶ Mediator training:
August 24-26

Mediation



- ▶ Will the MJ conduct a settlement conference
- ▶ Which MJ will preside
- ▶ Scope of the conference
- ▶ What to expect

Settlement Conferences



Obstacles to Settlement

- ▶ Inflating the client's case expectations from the outset
- ▶ Failing to candidly explain case weaknesses to the client
- ▶ Failing to admit case weaknesses/posturing
- ▶ Demanding/offering unreasonable amounts
- ▶ Entering ADR planning to finish after the session is over
- ▶ Failing to respect that the case belongs to the client
- ▶ Failing to adequately prepare in advance; e.g, failing to thoroughly understand facts of the case, lay groundwork to negotiate liens, etc.
- ▶ Lack of advance communication with opposing counsel regarding impediments, e.g., a limited ability to pay, extensive liens, etc.

Motions for Summary Judgment



Nebraska Civil Rule
56.1

(effective December 1, 2022)

Local Rule 56.1(a) – the moving party (effective December 1, 2022)

NECivR 56.1(a)(1) “A summary judgment motion shall be supported by a brief and a separate statement of material facts” that the moving party claims entitled it to a summary judgment.

Failure to file a statement of material facts and/or to provide citations to the exact locations in the record which support those facts may be grounds to deny the motion.

NECivR 56.1(a)(3): The statement must describe the parties and recite all facts supporting the court's venue and jurisdiction. It cannot contain legal conclusions.

Local Rule 56.1(b) — Response (effective December 1, 2022)

The responding party files:

- 1) a brief and
- 2) a separately filed response which:
 - responds, by paragraph number, to the moving party's statement of material facts;
 - clearly states whether the movant's asserted facts are undisputed, disputed, or undisputed in part and disputed in part; and
 - if a paragraph is disputed in part, precisely explains what is disputed and what is not.

The responding party's statement may include:

- 1) evidentiary objections to the movant's stated facts; and
- 2) a statement of additional material facts, with precise record citations, as described in Rule 56.1(a)(2) & (a)(3).

Local Rule 56.1(b) — Response (effective December 1, 2022)

NECivR 56.1(b)(3)(e):

Failing to file an opposing brief or statement is not *alone* deemed a confession of a summary judgment motion; but the party opposing the motion still bears its burden under Rule 56.

Local Rule 56.1(c) — Reply (effective December 1, 2022)

If the party opposing summary judgment submits a statement of additional material facts:

the moving party must file a statement of concise responses to the opposing party's statement of additional material facts, in the same form as set forth in section (b)(1)(A).

Local Rule 56.1

(effective December 1, 2022)

NECivR 56.1(a)(4) and (b)(3): The parties' statements of material facts and responses are separately filed from their briefs; their words do not count toward the brief word limits.

NECivR 56.1(d) : Facts deemed admitted under NECivR 56.1 are admitted solely for purposes of summary judgment.

NECivR 56.1(e): A party shall not file a motion to strike based on alleged noncompliance with this rule.

Evidentiary objections are raised in the objecting party's brief or responsive statement.

NECivR 56.1(b)(1)(A): Legal arguments cannot be raised in responsive statements.

NECivR 56.1(f): The parties are encouraged to file a statement of stipulated facts; record citations are not required in stipulations.

Pretrial Conference and Trial Scheduling



Questions?

Thank You!

