

FEDERAL PRACTICE COMMITTEE MEETING MINUTES

April 24, 2020

Via videoconference and teleconference

Attendees included Chief District Judge John Gerrard, District Judge Robert Rossiter, Jr., District Judge Brian Buescher, Senior District Judge Laurie Smith Camp, Bankruptcy Judge Brian Kruse, Magistrate Judge Cheryl Zwart, Magistrate Judge Susan Bazis, Magistrate Judge Michael Nelson, Clerk of District Court Denise Lucks, Clerk of Bankruptcy Court Diane Zech, Chief Probation and Pretrial Services Officer Kit Lemon, Chief Deputy Clerk of District Court Gabriela Acosta, Federal Public Defender David Stickman, Committee Chairperson Dan Klaus, Committee Vice Chairperson Kenneth Wentz, III, Tanya Hansen, Kathryn Dittrick Heebner, Chad Swantz, Allison Balus, Austin McKillip, Joseph Howard, Gregory Frayser, Michelle Dreesen Epstein, Stephen Gealy, and Joshua Fershée. Budget and Finance Administrator Jeremy Reece also participated.

The following committee members were unable to attend: United States Attorney Joe Kelly, Rubina Khaleel, Daniel Lindstrom, Eric Berger, and James Smith.

1. Introductions and Opening Comments

Judge Buescher opened the meeting, noting that while the coronavirus pandemic has created a serious situation, work continues in the federal courts. Notice of the meeting was provided to all members of the District of Nebraska bar. Judge Buescher stated that more than 100 people were online.

2. Roll Call and Attendance of FPC Members

Roll call for committee members was conducted via e-mail.

3. Federal Courts Reports

a. State of the Court

Judge Gerrard began by thanking members of the practicing bar for their patience and cooperation during the pandemic. He also thanked the court's IT staff for their help in facilitating remote hearings and conferences. Court personnel in our district have remained healthy. Judge Gerrard provided the following updates on the docket:

Criminal

- The district's criminal caseload has grown slightly because jury trials cannot be conducted and there are fewer sentencings. However, the CARES Act has allowed the magistrate judges to continue processing warrants, conducting initial appearances, and taking pleas.
- The district judges are able to conduct sentencings and supervised release violation hearings by videoconference so long as the defendant consents.

- The grand jury has not been in session since March. The court hopes to have a grand jury in June. A few cases are proceeding by complaint, but there are no new indictments.
- Overall, we are falling slightly behind in the criminal docket but managing fairly well.

Civil

- Regarding the civil docket, things are proceeding relatively well. Discovery is presenting some challenges, but it is going as well as can be expected.
- The magistrate judges are progressing the cases and resolving disputes as they have before. The district judges are continuing to decide dispositive motions.
- There have been slightly fewer civil filings over the past two months. The civil docket is growing slightly, but is remaining fairly steady.

Trials

- In accordance with General Order 2020-08, no in-court hearings are scheduled through June 1, 2020. A decision on how the court will proceed in June will not be made until the week of May 10-14.
- Judge Gerrard is optimistic that pleas and sentencings will move forward and in-court hearings will resume in June. He is also optimistic the grand jury will meet in June. The grand jurors are an experienced group, having met over the last 16-17 months. The court extended the grand jury through November.
- As for jury trials, there is a lower likelihood that these will resume in June. The court will rely on public health guidelines and is awaiting upcoming guidance from the Administrative Office of the U.S. Courts.
- When jury trials resume, there will be some criminal trial congestion and speedy trial considerations.
- Judge Gerrard is in regular communication with other chief judges in the Eighth Circuit regarding how jury trials will be reinstated.
- Judge Gerrard plans to form an ad hoc committee during the last week of April to determine how jury trials should be conducted.
- The ad hoc committee should include the following: the three active district judges; a civil practice practitioner (preferably committee chair Dan Klaus); and representatives from the U.S. Attorney's Office, the Federal Public Defender's Office, and the Clerk's Office.
- Judge Gerrard emphasized that the ad hoc committee will be careful in its approach but cognizant that the cases need to move.

b. Magistrate Judge Reports

Judge Bazis provided the following updates:

Criminal

- The magistrate judges are conducting all of the initial appearances, arraignments, detention hearings, and detention review hearings by videoconference. If videoconferencing is not available, teleconferencing is used.
- The court is conducting pleas and sentencings. However, the district judge must find that the plea or sentencing in the case cannot be further delayed without serious harm to the interests of justice. A motion must be filed for pleas, and a sample motion is available from the courtroom deputies.
- The magistrate judges are currently taking the pleas for all of the district judges, subject to the capabilities of the correctional facilities. There is not a set time each day or week for these hearings. For the most part, these are going well.
- Judge Bazis acknowledged the adjustments attorneys are making to use different software, such as Jabber and WebEx, which varies by facility.
- Prior to COVID-19, the court began a pilot project giving attorneys sealed access to pretrial reports. Judge Bazis reminded attorneys who have been retained by a defendant to get an entry of appearance on record as soon as possible so that the pretrial report is available to them prior to the initial appearance.

Civil

- There has been a slight uptick in continuances for progression orders due to COVID-19. The most common request is to extend a deposition deadline because the deposition cannot be taken in person.
- Attorneys were reminded to be as specific as possible when requesting extensions of progression deadlines.
- Judge Bazis commended attorneys for conducting depositions by videoconference where possible.

Trial Settings

- Judge Bazis reminded attorneys that the court is no longer setting trials at the beginning of a case. The majority of the time, the trial date will be set at the status conference that occurs at the end of discovery but before any dispositive motions are due to be filed.
- In cases where no dispositive motions will be filed, attorneys may wish to reach out to the court to request a status conference. The judge can then look at setting the trial date. In addition, the judge will likely ask about settlement discussions at the status conference.
- Judge Bazis reminded attorneys that all of the magistrate judges' progression orders have been updated as to the written discovery deadline. This includes Rule 45, so subpoenas need to be completed by that written discovery deadline.
- Regarding case progression deadlines, Judge Nelson noted that even if the parties have filed a motion jointly requesting an extension, the judge must still make a good cause finding. Attorneys who wish to have an order

entered without a telephone conference should take care to provide details on why a deadline cannot be met.

Judge Bazis next addressed a question e-mailed by a meeting participant. Citing FRCP 30(b)(4), the participant asked whether the court anticipates asking parties to default to remote depositions if they are technically feasible. If not, the participant suggested that the court do so at the scheduling order stage.

Judge Bazis stated she is not ordering parties to default to remote depositions when she issues the initial progression order, and would not be inclined to issue a blanket order to that effect. Judge Bazis suggested that determinations regarding the need for remote depositions be made on a case-by-case basis. Judge Zwart agreed with Judge Bazis, adding that in document-intensive cases, attorneys tend to prefer in-person depositions. Judge Nelson also agreed with Judge Bazis. He encouraged attorneys to anticipate the potential need for remote depositions when meeting and conferring to prepare their Rule 26(f) report. If the attorneys anticipate a dispute, they may wish to consider requesting a telephone conference at the very beginning. A telephone conference would be required if a conflict exists before a motion is filed pursuant to Rule 30(b)(4).

Judge Buescher thanked the magistrate judges for leading the efforts that have enabled hearings to be conducted remotely.

c. Federal Judge Comments

Judge Smith Camp provided an update on the 2020 Eighth Circuit Judicial Conference scheduled for August 5, 6, and 7 at the Omaha Hilton. Judge Smith Camp has been in communication with Chief Judge Lavenski Smith, Circuit Executive Millie Adams, and Michelle Braun, who manages logistics for Eighth Circuit conferences. Registration materials were scheduled to be sent in March. However, in light of the COVID-19 pandemic, a decision was made to delay sending the materials.

Judge Smith Camp emphasized that while Nebraska remains committed to hosting the conference, the decision on whether it moves forward, whether it is modified, or whether it is cancelled rests with the Eighth Circuit. If it moves forward, the conference will be held in the Hilton conference facilities, rather than the CHI facilities. Current plans are for the registration materials to be made available on June 1. Attorneys who are signed up for CM/ECF will receive a notification through that system. Other attorneys and judges may register through the Eighth Circuit's website. The federal judges will receive their registration materials sooner because their portion of the conference begins earlier.

During the last week of April, Judge Smith Camp will send updates regarding the conference to the lawyers planning committee, the judges planning committee, and to all of the speakers, panelists, and auxiliary participants. Judge Smith Camp noted that no speakers or participants have asked to withdraw or expressed a desire to see the conference cancelled.

d. Bankruptcy Court Report and Comments

Judge Buescher introduced Judge Brian Kruse, who was sworn in on March 17. Judge Kruse thanked court personnel for a warm welcome and reported that things have been business as usual in the bankruptcy court. He noted that the bankruptcy court has been conducting hearings by telephone for many years, and this method continues to be used. Judge Kruse stated that Judge Saladino has offered video trials for certain proceedings, but some attorneys are hesitant because they may not be able to sit next to their client during trial. As a result, there is a slight backlog of trials. Judge Kruse stated the bankruptcy court expects an uptick in filings in connection with the pandemic and its impact.

e. Federal Public Defender Report

Dave Stickman reported that the Federal Public Defender's Office is open and operating. Most employees are teleworking, with the exception of one or two persons in the office. Hearings are being conducted by video or telephone as necessary, as are meetings with clients. Dave alerted CJA panel attorneys that processing of CJA voucher payments is up to date. He stated the district judges have all indicated a willingness to entertain interim payments during this period. The public defender's office will process the payments as they come in.

Attorneys in the public defender's office are available to answer questions from the practicing bar about the procedures in criminal cases during the pandemic, as well as at any other time.

In response to a question e-mailed by a meeting participant, Dave stated there have been no changes to how CJA attorneys are appointed during the pandemic. All of the panel attorneys are still available to represent people in federal court. Dave added that there has been a reduced number of appointments because the grand jury did not meet in April and will not meet in May. Some appointments have been made because the Federal Public Defender's Office is allowed a maximum of 75 percent of the appointments. Judge Gerrard added that panel attorneys should prepare for a wave of cases in June and July.

f. U.S. Attorney Report

The U.S. Attorney was unable to attend the meeting.

g. Civil Practice Report

Committee Chairperson Dan Klaus thanked the judges and staff for their efforts to keep things running smoothly during the pandemic. Regarding the Eighth Circuit Conference scheduled for August, Dan stated that if it goes forward, the Federal Practice Committee will be responsible for encouraging and generating interest among the practicing bar to attend. Dan urged meeting participants to be aware of developments

regarding the conference and emphasized the importance of strong attendance from members of our district.

If the conference takes place, the education programs on the agenda would likely satisfy CLE credits that attorneys may need. If the conference does not proceed, the committee will evaluate whether it can organize and prepare a CLE program for the fall.

4. Business Meeting

a. Approval of Minutes

Committee members approved the [minutes](#) from the August 23, 2019, meeting.

b. Review of Federal Practice Fund

Jeremy Reece reviewed the Federal Practice Committee's financial reports. The reports reflect that, as of March 31, 2020, the Federal Practice Fund balance is \$261,276.88. As of March 31, pro hac vice fee income is \$5,400 and biennial assessment income is \$800. Expenditures year to date are \$25,023, and \$25,000 of that amount was for the upcoming Eighth Circuit conference. Projected expenditures are just under \$50,000.

Judge Smith Camp explained that the \$25,000 expenditure was the amount our district made in a general contribution to the Eighth Circuit, which is standard for the host district. Other districts make somewhat smaller contributions to the general fund for the conference. In addition, there was an expenditure for an American Bar Association exhibit on the 19th Amendment. It consists of standing banners that have been ordered and will be delivered to the Hilton.

Finally, Judge Smith Camp stated that the hospitality committee, chaired by Joe Howard, has made selections for gift bags. The gift bags are for the speakers, panelists, and other participants such as the League of Women Voters, Girl Scouts, and others who are volunteering their time. Judge Smith Camp suggested that whether or not the conference proceeds, the gift bags be given to these individuals out of courtesy and to show our gratitude to those who made commitments and have already spent a considerable amount of time in preparation for the conference. Jeremy Reece confirmed for Judge Smith Camp that \$35,000 was budgeted for the conference.

c. Update on 2020 Eighth Circuit Judicial Conference

See section 3.c. above.

d. Cease Biennial Assessments

Judge Buescher stated the court decided to discontinue the \$20 biennial assessment charged to attorneys enrolled in the court's bar. The court will continue to charge a pro hac vice fee.