

UNITED STATES DISTRICT COURT
District of Kansas

Bench-Bar Committee Meeting

MINUTES OF APRIL 4, 2019, 9:00 A.M.

COTTONWOOD FALLS, KANSAS

IN ATTENDANCE:

HONORABLE ERIC F. MELGREN, JUDGE, CHAIR
HONORABLE JAMES P. O'HARA, CHIEF MAGISTRATE JUDGE
HONORABLE TERESA J. JAMES, MAGISTRATE JUDGE
HONORABLE DALE SOMERS, CHIEF BANKRUPTCY JUDGE
KIRK REDMOND, ASSISTANT FEDERAL PUBLIC DEFENDER
STEPHEN R. MCALLISTER, U.S. ATTORNEY
WILLIAM L. TOWNSLEY, CHAIR KANSAS BENCH-BAR
BLAKE A. SHUART, ESQ.
RYAN C. HUDSON, ESQ.
LARKIN E. WALSH, ESQ.
STEPHEN H. NETHERTON, ESQ.
PATRICIA E. HAMILTON, ESQ.
KELLIE E. HOGAN, ESQ.
RYAN KEITH MEYER, ESQ.
BRYAN C. CLARK, ESQ.
INGRID A. CAMPBELL, CHIEF DEPUTY
JEFFERY L. BREON, FINANCIAL MANAGER

NOT PRESENT:

HONORABLE JULIE A. ROBINSON, CHIEF JUDGE
HONORABLE DANIEL D. CRABTREE, JUDGE
JOHN W. SHAW, ESQ.
TIMOTHY M. O'BRIEN, CLERK OF COURT

1. APPROVAL OF MINUTES

Blake Shuart moved and Judge O'Hara seconded the motion to approve the October 25, 2018, minutes. The motion carried unanimously.

2. DISCLOSURE OF JUROR NAMES

Judge Melgren shared that following a criminal trial of his, the press had contacted Tim O'Brien about releasing juror names and that D.Kan.Rule 38.1, *Random Selection of Grand and Petit Jurors*, raises two possible issues. One is that the rule allows that:

“the names of petit jurors drawn from the qualified jury wheel may be disclosed to the parties, the public, or the media on the day following the drawing upon leave of the court and the request of any party, member of the public, or the media. But the court in which any of the prospective jurors concerned are expected to serve may, by special order, require that the clerk keep these names confidential where the interests of justice so require.”

Judge Melgren said that an inquiry was made to the Administrative Office about the policy and that essentially it is in part up to the local governance or rules of each district court. Steve McAllister expressed concern about releasing juror names in advance of trial noting the possibility of pretrial juror contact or potential harassment. Mr. McAllister said that it is his preference that juror names not be disclosed to the media.

Mr. Shuart stated that he believes the interests of the jurors strongly outweigh any media requests. He also pointed out that the media is always able to acquire names by attending voir dire. Judge Melgren said he could not think of any good reason why the press needed the juror names in his case and following discussion said that it was his sense that the committee does not think it is a good idea to release juror names to the press. Mr. McAllister agreed stating that he is not as concerned post trial but releasing juror names to the media pretrial presents problems in communities where people know one another. Kirk Redmond agreed saying he did not think the position of the Federal Defender's Office would be any different.

Judge Melgren suggested revising the local rule and posed the question of whether there should be a provision which allows names to be released post trial only upon application to the judge? Or should the rule simply just be that the court will not release juror names? Mr. Shuart said he is in favor of the latter. Mr. McAllister suggested operating similar to the grand jury rule where the names of petit jurors drawn from the qualified jury wheel must not be disclosed to the public except upon order by the judge in charge of the case - or something similar. Judge Melgren asked that a revised rule be drafted along the lines of what had been suggested, that is, that names of jurors will not be released pretrial and post trial only upon order of the court for good cause shown or in the interest of justice.

The second issue is the timing of when juror names are provided to the parties. Judge O'Hara interjected that it is his sense that the judges all have different views and practices about how far in advance of jury selection to release juror names to counsel. Judge Melgren reported that it is done differently across the district. He said that it appears some judges in Kansas City automatically provide the names of jurors to the attorneys in advance of trial. In Wichita, however, the judges only provide

names in advance of trial when requested and he reported that Wichita seldom receives requests. Judge Teeter in Topeka is just getting started and has not yet established a procedure. Judge Melgren said that the court will want to keep in the rule that the parties will be provided the names in advance, upon request, but maintain a very different procedure for the public and the media.

3. ADDICTION AND RECOVERY CONFERENCE UPDATE

Judge Melgren reported that Judge Marten had intended to provide an update but got tied up trying a case for Judge Teeter in Topeka. He referred the committee to Tab 3 of the agenda book which provides some general information about the Addiction and Recovery Conference (ARC). Judge Melgren said that Judge Marten is concerned that depending on the speakers he ends up with, it is possible there will be a need to supplement the budget somewhat. Jeff Breon added that \$187,000 was originally approved for the ARC.

It will be held in October 2019 and as a result most of the expenses will be incurred in fiscal year 2020. \$20,000 was budgeted for any hotel deposits, speaker fees and/or travel costs incurred during 2019. However, during subsequent planning meetings it was determined that several speakers will seek reimbursement for their airfare prior to the close of FY 2019, and the \$20,000 currently budgeted may be insufficient. Therefore, Judge Marten is requesting that the FY 2019 line item budget of \$20,000 for ARC be increased an additional \$25,000 for a total of \$45,000. Mr. Breon stated that the modification is reflected on the enclosed FY 2019 Budget to Actual Report (see Tab 6). See agenda item #6 for further discussion.

4. PROPOSED RULE AMENDMENTS

a. Local Rule 5.4.7, Retention Requirements (Bankruptcy)

Chief Judge Somers explained that the current rule requires filing users to maintain in paper form all electronically-filed documents that require original signatures of non-filing users until six years following all time period for appeals expire. He said there are a number of bankruptcy lawyers who by following the rule are ending up with voluminous files. They are asking if the retention period can be reduced to three years but Judge Somers suggests reducing it to one year or eliminate the rule completely.

He feels that with 15 years of electronic filing experience, everyone now keeps their documents electronically.

Judge Somers moved to eliminate the rule. Judge Melgren said the question is - does the court have an interest in wanting any retention requirements? Judge O'Hara suggested that before abandoning the rule altogether, he would be interested in reviewing the history and purpose of the rule.

Judge James moved and Patricia Hamilton seconded the motion to recommend to the judges to do away with the district court and corresponding bankruptcy rule, pending additional research and recommendation to the contrary by Judge O'Hara. The motion passed unanimously.

b. Local Rule 83.5.5, Withdrawal of Appearance

Mr. McAllister noted that the requirement for substitution of counsel when withdrawing from a case makes sense in a lot of contexts but can be a problem for the U.S. Attorney's Office and Federal Defender's Office, who has joined in this proposal. The problem arises when there is a sudden departure of one of their lawyers and they have to go chasing someone to try to get their signatures on dozens and sometimes even hundreds of cases. He proposes adding an exception to the rule which applies to the U.S. Attorney and Federal Defender Offices (see proposed amendment 83.5.5(d) under Tab 4(b) in agenda book).

Judge O'Hara moved and Mr. Redmond seconded the motion to amend the rule as proposed. The motion carried unanimously.

c. Local Rule 83.7.1, Social Security Appeals

Mr. McCallister, carrying the water for the Social Security Administration (SSA), explained that an answer is supposed to be submitted when a Social Security appeal is filed in district court but that the SSA is proposing to submit a certified copy of the relevant administrative record in lieu of filing a separate answer. Judge Melgren said he had two comments which come from the Administrative Office. One is that there is some concern that the Federal Rules of Civil Procedure themselves require an answer and the local rules are supposed to supplement, not replace, the federal rules. The issue is whether district

courts can adopt a local rule contrary to the federal rules. Secondly, the Administrative Office is working on some fix to the rules which would treat Social Security cases more like habeas cases. He is not sure what the effect would be but believes the idea would be to try to create a different process to address the issues which have been identified.

Ingrid Campbell said that she and Tim O'Brien had spoken to an individual at the Administrative Office who reported that this is a national issue which their office is in the process of trying to resolve. Judge Melgren suggested it would be appropriate to hold this issue in abeyance until the Administrative Office can make a determination. Mr. McAllister and the committee agreed.

d. Local Rule 79.3, Trial Exhibits, Sealed Documents

Ms. Campbell reported that the proposed amendments to Local Rule 79.3 are needed in order for the rule to reflect the court's current practice regarding the custody and disposition of trial exhibits. She explained that it used to be the court's practice to keep exhibits through trial until after the time for appeal had run but had not been the case for many years. The current practice is for the parties, rather than the court, to maintain custody of trial exhibits through the time for appeal.

Judge O'Hara moved and Stephen Netherton seconded the motion to amend D.Kan.Rule 79.3 as proposed. The motion carried unanimously.

e. New Rule 80.1, Use of Transcripts

Judge Melgren explained that during his terrorism trial both parties were frequently citing to realtime records, provided by but not certified by the court reporter. The court reporters became concerned by this practice because the parties are citing to the record of which the court reporters have not reviewed and verified the accuracy. Judge Melgren said that several other courts have rules which limit or restrict the use of non-certified records and the court reporters felt it would be wise for this court to adopt such a rule.

Mr. Shuart asked whether this rule - specifically the language "only certified transcripts may be quoted from" - would be interpreted as prohibiting him from quoting from the record during closing

argument? Judge Melgren responded that Mr. Shuart had a valid concern. Judge James questioned whether the first sentence was overbroad and if Mr. Shuart's concern could be addressed by simply eliminating the first sentence of the rule. Larkin Walsh suggested restating the rule more positively to read, "Absent prior court authorization, only certified transcripts may be quoted from or filed with the court. Any transcripts quoted from or used in any pleading must contain the title page" Mr. McAllister noted, though, that by deleting the first sentence no explicit mention is ever made of realtime transcripts. Following further discussion, Judge James suggested, and Judge Melgren and the committee agreed to refer the rule to a subcommittee made up of Ms. Walsh, Mr. Shuart, and Judge Melgren's court reporter.

f. Local Rule 67.1, Registry of Funds

Judge Melgren said this arose from an inquiry he had made to Mr. O'Brien some time ago about Local Rule 67.1 which, absent a court order, directs the clerk to deposit registry funds in a non-income bearing account. An attorney had raised the question and Judge Melgren was surprised to learn that money was being held in a non-interest bearing account. Jeff Breon researched the issue and learned that Federal Rule of Civil Procedure 67(b) states that money must be deposited in an interest-bearing account. As a result, Mr. Breon is proposing an amendment to D.Kan.Rule 67.1 which is modeled after other Tenth Circuit court rules.

Judge Somers' moved and Judge O'Hara seconded the motion to amend Local Rule 67.1 as proposed. The motion carried unanimously.

5. BENCH-BAR SCHOLARSHIP REIMBURSEMENTS

Mr. Breon presented a proposal (see Tab 5 of agenda book) to increase the maximum mileage rate an intern can claim from \$600 per fiscal year to \$2,500 in Kansas City and Topeka, and \$4,000 in Wichita. He explained that there is a line-item in the bar fund budget to sponsor interns in all three cities and reimburse them for mileage.

Mr. Shuart moved and Ms. Hamilton seconded the motion to increase mileage rate for interns as

proposed. The motion carried unanimously.

6. BAR FUND UPDATE

Mr. Breon reported that all expenses are within their budgeting categories and the only request is to increase the ARC line item by \$25,000. Judge O'Hara moved and Mr. Shuart seconded the motion to increase the FY 2019 line item budget of \$20,000 for the ARC by an additional \$25,000 for a total of \$45,000. The motion carried unanimously.

7. SOLICITATION OF NEW MEMBERS

Judge Melgren said that when the time comes to solicit applications, which takes place in middle to late July, he would like current members to encourage members of the federal bar to apply to serve on the committee.

8. NEW BUSINESS AND NEXT MEETING

Mr. Shuart provided a brief update on the Teachers' Institute. He reported that Judge Melgren, Judge Gale, Judge Birzer, Whitney Novak, and he had met a couple of times and they have had good feedback from their local school district that they should be able to reach their target of 30-35 teachers. They are looking at a half day program probably sometime in October and similar to what has been done in Kansas City.

Ryan Hudson distributed a summary of *Proposed Amendments to D. Kan. Local Rules* which came out of a November 11, 2018, Federal Courts Advocates Section of the KCMBA CLE at the Kansas City, Kansas, courthouse on the Local Rules and Bench Bar Committees for both the District of Kansas and the Western District of Missouri. He reported that a lot of the focus was on the fact that civil discovery consumes the vast majority of time and resources. Mr. Ryan said he had spoken to Judge Melgren about the possible need for a subcommittee to take up some of the proposals for discussion.

Judge Melgren responded that this reminded him of the Rule 1 Project the court undertook 6-8 years ago and that it was a good opportunity to build from that and take another comprehensive pass through the rules. He said he was inclined to appoint a committee of both plaintiff and defense

practitioners, as well as judges to take a look and work on the project. Judge Melgren said he would consult with Chief Judge Robinson and Mr. O'Brien to put together a committee or possibly refer the matter to the Civil Rules and Case Management Committee chaired by Judge O'Hara.

The meeting, having convened at 9:00 a.m., adjourned at 11:30 a.m.

Respectfully submitted,

s/ Ingrid A. Campbell

Ingrid A. Campbell