

UNITED STATES DISTRICT COURT
District of Kansas

Bench-Bar Committee Meeting

MINUTES OF MAY 13, 2021, 9:00 A.M.

MANHATTAN, KS

IN ATTENDANCE:

HONORABLE ERIC F. MELGREN, JUDGE, CHAIR
HONORABLE JULIE A. ROBINSON, CHIEF JUDGE, *Ex Officio* (via ZOOM)
HONORABLE DANIEL D. CRABTREE, JUDGE
HONORABLE JOHN W. BROOMES, JUDGE
HONORABLE JAMES P. O'HARA, CHIEF MAGISTRATE JUDGE
HONORABLE TERESA J. JAMES, MAGISTRATE JUDGE
HONORABLE DALE SOMERS, CHIEF BANKRUPTCY JUDGE
DUSTON SLINKARD, ACTING U.S. ATTORNEY
MELODY BRANNON, FEDERAL PUBLIC DEFENDER
HONORABLE MARLA J. LUCKERT, CHAIR, KANSAS BENCH BAR (via ZOOM)
JOHN W. SHAW, ESQ. (via ZOOM)
STEPHEN H. NETHERTON, ESQ.
PATRICIA E. HAMILTON, ESQ.
RYAN KEITH MEYER, ESQ.
DAVID PRELLE ERON, ESQ.
BRADLEY T. WILDERS, ESQ.
BRANDEN SMITH, ESQ.
TIMOTHY M. O'BRIEN, CLERK OF COURT
KIM LEININGER, CHIEF DEPUTY
SKYLER B. O'HARA, DIRECTOR OF COURT ADMINISTRATION
JEFF BREON, DEPUTY DIRECTOR OF COURT ADMINISTRATION

NOT PRESENT:

BRYAN C. CLARK, ESQ.

1) APPROVAL OF MINUTES

Judge Melgren asked the committee if they noted any corrections or changes to the November 10, 2020 minutes. It was moved and seconded to approve the minutes as written.

Judge Melgren asked if there was any discussion, hearing none he called for a vote and the minutes were approved unanimously.

2) UPCOMING CHANGES IN THE COURT

Judge Melgren introduced Kim Leininger as the new Chief Deputy and announced that Tim O'Brien plans to retire later in the year and the process to select a new Clerk of Court is in the early stages. Judge Melgren also announced that Skyler O'Hara was selected as the Director

of Court Administration in the spring of 2020, replacing Ray Waters. Judge Melgren informed the committee that Chief Magistrate Judge James P. O'Hara plans to retire around November or December. The Court will soon begin the process to select a new magistrate judge for the district. Judge Melgren explained that Judge O'Hara is the senior most magistrate judge in the district and his departure will leave a huge gap in the district. Finally, Judge Melgren reported that Chief Judge Robinson will take senior status in January, although she is stepping down as Chief Judge in November and Judge Melgren will take over as Chief Judge.

Judge Melgren explained that Judge O'Hara has been very involved in local rules and with his departure we must rethink how we approach the process of changing our local rules. Tim O'Brien explained that if you look around the ninety-four districts, every court seems to do it differently. Some courts have a standalone committee separate from the Bench-Bar Committee, while others have a rules committee that functions as a sub-set of the bench-bar committee. Our district has addressed rule changes on an ad hoc basis. Mr. O'Brien agrees with Judge Melgren that it is worth exploring our rules approval process to determine if there is a better way or if our way is working just fine. Judge O'Hara agrees that the rule approval process should be institutionalized. Judge O'Hara mentioned that Casey Tourtillott has been the court's key player when it comes to amending our local rules and has an exceptional eye for being able to tighten up the rules. The court does have a committee to look at existing local rules and to examine how we handle civil cases and some of the standard forms and orders. That committee was close to the finish line when the pandemic hit and stalled progress. Judge O'Hara explained that they would like to get a consensus from the district judges as to pre-trial orders and how they should be structured to make it most useful for processing summary judgement motions and presiding over trials. Judge O'Hara also discussed the need to review the local rules to trim them down and remove rules that are duplicative or no longer necessary. He believes that the Bench-Bar Committee, or perhaps a subcommittee of it, should be involved in the process of changing our local rules.

Judge Melgren asked for the committee to provide input as to how to best structure the local rules modification process. After some discussion among committee members, the consensus was that, whether or not the committee is a subcommittee of the Bench-Bar Committee or an independent rules committee comprised of judges and attorneys, it should be relatively small; made up of members both new and more experienced; and, required to review civil and criminal local rules on a set schedule that could be tethered to the federal rules approval process. Judge James recommended that Ms. Tourtillott should be part of the rules committee regardless of the structure due to her knowledge and institutional experience. Judge Melgren agreed that Ms. Tourtillott will absolutely be recruited to be on the rules committee.

3) LOCAL RULES

a) **Proposed Amendment to LR 83.6.2 - Discipline of Attorneys**

Kim Leininger referred the committee to the agenda book and the memo explaining the proposed rule change along with two charts showing how discipline cases are processed in the District of Kansas. Ms. Leininger explained that our disciplinary records have been sealed, however the proposed rule change provides transparency to our disciplinary process and allows us to be consistent with the state of Kansas and other courts by making our disciplinary records available to the public.

Mr. O'Brien explained that our disciplinary rules were primarily developed in the 1980s and 1990s and our rules are more extensive than other district court rules around the country. Our reciprocal discipline process is straightforward since we get those records from the state of Kansas's disciplinary authority. Those records should be available to the public in our court since they are already public records in state court. Disciplinary matters originating in the District of Kansas court are rare, but the rules were written to keep preliminary documents sealed until the disciplinary committee determines if there is good cause to move forward with the complaint process. Mr. O'Brien explained that we have an attorney look-up page on our website that lists attorneys as either active or inactive. With this rule change, we plan to update our website to

mimic the state's attorney look-up page which shows the attorney's actual status, to include listing attorneys as disbarred.

Judge Crabtree proposed a friendly amendment to subsection B(2) to substitute the word "who" for "that", so that it reads "This file must contain orders of discipline or other disposition originating in this court for active attorneys **who** are listed and available to the public."

Judge Melgren asked if there are additional comments, hearing none, Melody Brannon moved to approve the rule amendment with Judge Crabtree's modification. The motion was seconded by Duston Slinkard and approved unanimously by the Bench-Bar Committee. Mr. O'Brien added that he plans to seek court approval right away, so that the change can be made prior to his departure.

b) Proposed Amendment to LR 83.5.5 - Withdrawal of Appearance

David Prella Eron suggested that when the court puts in place a structure for approving local rules, it should consider putting a member of the bankruptcy bar on the committee because the district court rules often impact bankruptcy practitioners. Regarding the proposed amendment to local rule 83.5.5, David described one bankruptcy case that involves tangentially fifty-percent of bankruptcy practitioners in the state of Kansas. The case was filed five years ago and there are nearly one hundred lawyers who are getting e-mail notifications every time something is filed. There are three-thousand docket entries in the case which is not extremely unusual in bankruptcy cases. Mr. Eron went on to explain that of those receiving notice, some are retired, some have changed firms or have left the practice entirely, and at least one is deceased. In most of these cases, the attorneys are representing creditors in small matters. Mr. Eron explained that he was representing Oracle America in the case and had a small matter at the beginning of the case that was resolved and he has been in the case since then because the federal court rules effectively require bankruptcy practitioners to sue their clients to get out of the case by serving them with a notice. The rule was fashioned to prevent attorneys from leaving their clients without counsel, however it does not contemplate the impact on attorneys who have minimal involvement in a

bankruptcy case. The proposed rule change would allow for an ex parte withdrawal that must be approved by the court. It would require certification by the attorney that there are no pending adversarial proceedings and no pending contested matters involving the client; the client has consented; and, an address is provided so the client can continue to receive notice. One friendly amendment Mr. Eron would like to add is that this rule does not apply to adversary proceeding.

Judge Somers explained that he supports this rule amendment and believes it will be well received by the bankruptcy bar because, while it is not a world class issue, it is an irritant for bankruptcy practitioners. Judge Somers then moved that the Bench-Bar Committee adopt the amendment with the proposed change and the motion was seconded by Stephen H. Netherton. Judge Melgren asked if there was any additional discussion. Judge Crabtree asked what the phrase “ex parte” means in this context. Mr. Eron explained that it means without having a requirement for a notice or a hearing, it is just between the filing attorney and the court and the rest of the case participants are notified by the CM/ECF notification. Judge Somers asked if the term ex parte is required and thinks the term can be stricken. Judge Broomes agrees that ex parte is not the proper term. It was suggested to add ‘without the requirement for a notice and hearing’ and remove ‘ex parte.’ Judge O’Hara asked if the main concern here involves the process of securing a certificate of service from the client. Mr. Eron explained that in addition to that issue, the current rule creates an adversarial process to withdraw from representing your client. Judge O’Hara asked if the cost of providing that document is an issue and Mr. Eron agreed that is part of the problem, especially for firms with a large number of bankruptcy cases. After further discussion, Judge Melgren stated that the rule should now read:

(f) Withdrawal of Attorney for Non-Essential party in Bankruptcy Cases. In a bankruptcy case (other than an adversary proceeding), the appearance of any attorney for a party other than the debtor or the trustee may be withdrawn by filing a motion certifying that 1) the client has consented to or requested the withdrawal, 2) there are no pending adversary proceedings or contested matters affecting the client, and 3) that the address for all future notices

to the client is set forth in the motion and the client has consented to accept notices and service at that address for all purposes in the case upon the withdrawal of the attorney. Such motion must be delivered by mail or CM/ECF notification, as applicable, to all attorneys of record, and any pro se parties who have appeared in the case, but without the requirement for notice and hearing. The withdrawal shall be effective only upon the entry of an order granting the motion.

Judge Melgren asked if there was any additional discussion, hearing none, he called for a vote and the committee unanimously approved the rule change with the proposed amendments.

b) Proposed Amendment to LR 38.1- Random Selection of Grand and Petit Jurors

Melody Brannon stated that the proposed rule change is simple, and many other districts already do this as well as our state courts. Ms. Brannon explained that to increase the diversity of the jury pools, the Federal Public Defender's office is proposing to draw grand and petit juror names from driver's license and state identification rolls as well as voter registration. She explained that by doing so we will broaden the diversity of our jury pools. In writing this rule change, she consulted with Tim O'Brien and offered that he could expand on the proposal. She shared that only twenty-nine percent of Kansas Citizens are registered to vote and stated that she has some clients who won't go to trial because they think the jury will be all white. She explained that it is not uncommon to have a juror pool that has very few people of color and she hopes this rule change will make a difference.

Judge Melgren offered that about fifteen years ago, Judge Vratil formed a task force of the Bench-Bar Committee members, led by Tim O'Brien and Toby Crouse, to examine jury diversity. At the time, the committee did not recommend expanding our jury pool to include the voter registration rolls. Mr. O'Brien said that decision was made based on the best information they had at the time, but he believes there is now a lot of evidence to support making this rule change. Mr. O'Brien explained that the jury diversification committee devised a substitution process whereby when summons were not returned, or returned as undelivered, the jury staff would pull additional names from the same zip code and send summons to potential jurors to

replace them. It was thought that this zip code replacement method would allow the court to better capture the transient student populations and the inner-city minorities that tend to be more transient. It was proposed and adopted by the court and it is the method we currently use. Mr. O'Brien said that although we saw an increase in minority representation for a while, it leveled off and now those numbers have reduced. At the time his committee examined the literature on using driver's licenses as a source and it was not as good as people thought anecdotally. Since then Mr. O'Brien said there is evidence refuting their initial thinking and he supports this amendment. Mr. O'Brien explained that the jury staff sends the state of Kansas voter registration list to a processor who weeds out addresses that are not good and removes duplicate names. Mr. O'Brien recommends that after this rule is in place for a couple of years, we bring in someone to analyze the data to determine the benefits gained. Mr. O'Brien explained that we align our refill process with the presidential election and we are currently in the process of refilling our wheel. Since our next wheel refill will not be until 2023, he believes the implementation of this new rule gives us time to seek approval from the court and the 10th Circuit Judicial Council.

Chief Judge Robinson stated that she continues to be concerned about the racial diversity, socioeconomic diversity, and geographic diversity of our jury panels. She has noticed in Kansas City that we get very few people from Wyandotte County. Chief Judge Robinson shared that seventy-five percent of non-Hispanic whites are registered to vote, while just over fifty percent of the black/Hispanic population are registered to vote. She is confident that this rule change will add to the diversification of our juries.

Mr. Slinkard moved to approve the amendment and it was seconded by Judge O'Hara. With no further discussion, the proposed amendment was approved unanimously.

4) BAR FUND UPDATE

Jeff Breon referred the committee to the information in the agenda book showing the bench-bar budget compared to actual expenses through the end of March. He explained that this chart shows that the income to date is less than the budgeted amount because our annual

registration period doesn't open until June. Overall, expenses are down because of COVID resulting in fewer payments to the Federal Public Defender's second chair program and court appointed attorneys. Jeff explained that we are requesting an increase in the Attorney Wireless – Maintenance line item from \$5,000 to \$30,000. This increase is necessary to renew the software licenses for an addition five years and to install and wire additional access points. Jeff also mentioned that Judge Crow's biography is completed and in the process of being printed. He anticipates that Judge Vratil's and Judge Lungstrum's biographies will soon be completed, and Judge Robinson's portrait is underway.

Judge Melgren asked if there are any questions. Mr. Eron moved to approve the proposed increase and it was seconded by Ryan Keith Meyer. There was no further discussion and the motion unanimously carried.

5) COMMITTEE MEMBERSHIP

Judge Melgren explained that we plan to advertise the vacancy created by the departure of Corliss Scroggins Lawson. Since we typically receive a paucity of names, committee members should encourage others to apply so that we will have a good list from which to choose at the fall meeting.

Judge Melgen announced that Judge Crabtree will be conducting the fall meeting. Judge Crabtree expressed appreciation for Judge Melgen's role as the chair of this committee and appreciates the energy and devotion he brought to the task.

6) NEW BUSINESS AND NEXT MEETING

Judge Melgren informed the committee that the Federal Bar Association (FBA) has agreed to provide a summary report of the district's civil jury trials. The FBA will pull from the pretrial order and from the verdict form to create a summary and will share the summaries in an e-mail newsletter. According to Judge James, the FBA plans to initially send the summaries out to the entire bar, but later to only FBA members, hoping to entice the bar members to join the FBA.

Judge Crabtree announced that he would set the date for the next meeting soon and to let him know if anyone has a location suggestion.

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

Respectfully submitted,

s/

Kim Leininger