Federal Practice Committee Meeting Minutes
January 12, 2006

A meeting of the Federal Practice Committee was held on Thursday, January 12, 2006 in Kansas City, Missouri. Committee members in attendance were Lajuana Counts, Chair; Lynn Bratcher, Denise Henning, J.R. Hobbs, John Applequist, Wallace Squibb, and Philip Greenfield. Tim Van Ronzelen participate via conference call the Pat Brune, Clerk attended as scribe.

The meeting was called to order at 12:15 PM by Lajuana Counts and the first agenda item was an update from the sub-group working on the review of the Early Assessment Program with Wallace Squibb reporting. Wallace had met with Kent Snapp, EAP Administrator, and discussed the charge the Court en banc had given the Federal Practice Committee to review the early assessment program. Kent suggested working with Donna Sinestra from the Federal Judicial Center (FJC) and Wallace called her. She offered the resources of the FJC for the study and expressed appreciation for being asked to participate. She also suggested using data from CM/ECF and offered to assist in the generation of the survey tool to be used. Wallace then recommended to the Committee that the next step be reporting to Judge Dorr who is the contact Judge on this issue followed by firming up the working relationship with the FJC. The Committee agreed. (A written report was also circulated by Michael Berry and a copy is attached to this minutes.)

Lajuana then brought up the next agenda item: electronic discovery. As stated in the September minutes of the Federal Practice Committee, Judge Laughrey had asked the Committee for assistance with the D. Brook Bartlett Lectures with this as a possible topic and also for assistance with possibly crafting a Local Rule on Electronic Discovery. J.R. Hobbs recommended a speaker he had heard recently named Shirley Goza, an attorney now working with a litigation support firm who could possibly assist in both ways. Tim Van Ronzelen had confirmed the name of the Judge from New York who several of the members have heard speak on the topic; Judge Shira Scheindlin. (In an email he also referenced an article written by the Judge in the Boston College Law Review - 41 B.C. Rev. 327 March 2000.) The Committee asked the Clerk to approach Judge Laughrey with this information to see if assistance with speakers was still needed and to get guidance about involvement with the creation of a possible Local Rule.

J. R. Hobbs reported that he had been approached by Chris Harlan, Chair of the Federal Practice Committee for the KCMBA, about how the two committees might work together. After some discussion it was agreed that he would ask Chris about a member of this group being appointed to the KCMBA group as a liaison. Wallace indicated that he had been asked to do something similar with the Greene County Bar and that relationship was in the works as well. The Clerk suggested that something comparable be worked out with Cole County.

The members were reminded of the invitation to a luncheon meeting at the Whittaker Courthouse on January 25, 2006 at 12 Noon with the Court and a visiting professor from China.

The next Federal Practice Committee Meeting will be held on Thursday, March 9th @ 12 Noon in Kansas City.

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January 11, 2006

VIA E-MAIL AND HARD COPY
Wallace Squibb
P.O. Box 4043
1355 E. Bradford Parkway, Suite A
Springfield, MO 65808

Re: Early Assessment Program

Dear Wallace:

Attached please find a memorandum prepared by Tim Van Ronzelen and me addressing the early assessment program. We gathered this input from members of the bar in the Central Division, and added from our own experiences as well. I wouldn't call our survey scientific or complete, but we sought representative views from lawyers who handle federal cases for the plaintiff and the defense, and from those in government practice. The input we got was, if anything, consistent.

I will be unable to attend Thursday's meeting of the Civil Practice Committee, but have sent a copy to the rest of the committee via e-mail.

Very truly yours,

MICHAEL G. BERRY, L.L.C.

Michael G. Berry

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Enclosure
cc: Judges Whipple, Wright, Laughrey, Knox; Pat Brune (hard copy w/attachment)
Federal Practice Committee Members (via e-mail w/attachment)

MEMO ON THE EARLY ASSESSMENT PROGRAM (EAP)

From: Michael G. Berry and Timothy Van Ronzelen
To: Members of Western District Federal Practice Committee
Re: Early Assessment Program
Date: January 10, 2005

We have done some surveying of the local bar on the early assessment program. This has consisted of discussing the issue of early assessment with some members of the local bar whom we know to have considerable business in this Court, and who have indicated that they have some experience with the program. We forwarded a draft of this memo to contacts within several of the larger local law offices, and to the Attorney General's Office.

Based on the response, here is what we have found.

The idea of early assessment is accepted and nobody expressed opposition to the idea. The least support came from people representing plaintiffs. But one defense attorney called it the "too early assessment program." Most people recommended some means of selecting the cases for inclusion in the program, and modifying the current "one size fits all" approach in order to improve results.

Early assessment is not likely to resolve a case which has already failed in mediation at the EEOC or in private mediation. There should be a way of exempting such cases from the EAP, either automatically or upon request of either party.

Some cases have a good chance of settling in early assessment before there has been any discovery beyond initial disclosures. These are more likely to be cases which are not factually complex or in which the material facts are not in dispute; which lack emotionally charged issues; which have small amounts in controversy; and which do not have a government agency involved as a party. Examples would include personal injury claims without serious permanent disability; first party insurance disputes; and cases turning on statutory or contract interpretation.

Cases which have less chance of settling before meaningful discovery include those which are more complex than the ones above, and in addition, those which have a statistically higher chance of a summary judgment. For example, any random Title I ADA case is likely to have at least one case-dispositive issue on which summary judgment is a realistic possibility. So long as a party believes its chances of prevailing on dispositive motions is good, that party will not likely make substantial compromises toward settlement. Such cases are more likely to settle after most of the discovery is finished and the lawyers and parties can better appreciate their risk and the expense of deferring settlement discussions.

When early assessment conferences fail to bring about meaningful movement toward settlement this frustrates the litigants, particularly the plaintiffs. For instance, a defendant knowing it hasn't enough information to accurately assess its liability in a complex case will not come to an early assessment conference prepared to offer much more than a nominal sum to settle. The plaintiff, on the other hand, is usually motivated to settle and comes expecting that the other side will participate in the same way. When the defendant offers only a small amount to settle, the plaintiff will often take this as being in bad faith and it negatively colors the plaintiff's view of the opposing party and its counsel throughout the case, and makes the plaintiff feel "jerked around" by the system, particularly if the plaintiff has traveled any distance or rearranged a personal schedule to attend. Likewise, defendants often feel unfairly pressured to offer money before fully understanding their cases.

The choice of mediator was also mentioned as being important to the chances of successful early assessment. The simpler cases which stand the best chance of settling before discovery may be better suited for mediation by a law school mediation program. Cases which turn on more complex issues probably benefit from having input by a sitting U.S. Magistrate, or a mediator with substantial trial experience such as a former judge or trial attorney. Most lawyers agreed that the input of a law school mediator seldom impacts an attorney's risk assessment in a case. An experienced trial attorney is much more influenced in making settlement recommendations by the input of somebody who has spent considerable time in court or knows the applicable substantive and procedural law well. The law school programs are good for those cases where getting the parties talking constructively is the most important part of getting the case settled. They are not so good when the key is getting the parties to fully appreciate the risk of failing to settle.

One recommendation for better targeting cases for the program was to let the parties suggest their respective EAP preferences and reasons for them in the proposed scheduling order. Then, the scheduling order can direct the parties to arrange the first settlement conference with a magistrate, a law school program, or a different mediator, and to do so either before discovery, after discovery is underway but before the dispositive motion deadline, or to have no EAP and defer any settlement conference until later when dispositive motions are either filed or ruled. This approach has the downside of adding yet another step in the process for the parties and the Court. Having the first court-supervised settlement conference at the best time, and with the mediator best suited for the case, should result in settling more cases than the current system, and will thereby result in an overall time savings to the Court and to the parties in the long run, even if it creates some more work at the outset of each new case.