by Hon. Jack Zouhary

Ten Commandments for Effective Case Management

Does active judicial case management mean that a judge is on the backs of the lawyers throughout the case? Not at all. Active judicial management means "hands off" in those cases where experienced lawyers are able to work together professionally, and "hands on" when they or their clients are misbehaving. I have found that the more time I spend on a case at its outset, the more time I end up saving later on (and money saved for the clients). Case management is all about prioritizing time and resources—devoting attention where needed. It "takes a village" to case manage, and a judge's chamber staff is intimately involved. We try to meet biweekly to review a decisional list—our bible—which outlines those cases that need attention, particularly those with key dates for motion deadlines, rulings, and trials.

1. One Size Does Not Fit All

Each case is unique. The justice system needs to be flexible and considerate of lawyers and parties so that cases can proceed efficiently and cost effectively. These principles guide my case management. Judicial accessibility binds these principles together. This means a judge should be available throughout the life of a case—especially early in the process. How early? My staff reviews the complaint when it hits the docket. We review it for jurisdiction, making sure the case is appropriately brought in federal court and for any likely issues with service. Our standard order asks the lawyers to exchange information and documents, and it asks them to be prepared to discuss the case in some detail at the initial conference. We also make an assessment of whether settlement talks might be productive at the initial conference and, in this regard, inquire of counsel whether there already have been settlement discussions and if they would like to set aside extra time at the conference to either begin or continue such discussions.

2. In Defense of Disclosures

To ensure a meaningful conversation about a case schedule, I usually require Rule 26(a) disclosures *prior* to the initial conference. These disclosures cannot be superficial. Since documents and names are exchanged and each side's cards are laid out on the table, this allows for more realistic input into scheduling dates. It also minimizes litigation expense by avoiding ritualistic or form discovery requests. By reviewing the pleadings beforehand and often asking counsel to rank claims and defenses, I too am prepared. "Speaking" complaints and answers—those that contain factual details—are helpful in fully understanding the case. In addition, I encourage the presence and participation of parties so that they have a firsthand view of my role and how the case will be handled. Counsel of course are free to recommend or request that party presence be excused to save costs or because in-person settlement talks are premature. Counsel can attend by phone if necessary to save costs.

3. E-discovery Made Easy

Complex cases, such as class action, patent, and antitrust are not amenable to early full disclosure. In those cases, disclosures are allowed in stages, and we require that e-discovery has parameters so that it does not delay (or worse, overtake) the case schedule. It is helpful to focus in terms of key players, not documents, and the computers they use (office computer, home laptop, Blackberry, etc.) and key phrases for the search. As long as information is preserved, a review can be postponed until necessary—a significant cost savings. I urge proportionate discovery in traditional cases and especially for complex cases—balancing the need for information with the burden, expense, and potential importance of that information.

4. Civility

To further minimize litigation cost, I strongly encourage cooperation among counsel. Studies have shown that collegiality among lawyers minimizes expense and allows for more efficient case handling. In this regard, I encourage counsel to abide by the American College of Trial Lawyers (ACTL) Code of Pretrial and Trial Conduct, copies of which sit in our chambers reception area. (Copies were provided to attendees at the recent U.S. Court of Appeals for the Sixth Circuit Judicial Conference.) I

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also make it mandatory reading for lawyers who wish admission *pro hac vice*. If I detect excessive or combative filings, I will initiate a phone conference to address expectations.

5. Firm Trial Date

Dates that are set at the initial conference are not "dictated" by me; rather, they are agreed upon by all counsel. I adhere to the recommended track set forth in the local rules. This means if the case is designated "standard," the trial date will usually occur within 15 months from the filing of the complaint. At the initial conference, we set the target month (and year) the trial will be held. Everyone knows there is a finish line. I tell the parties that I respect the importance of their case and that their trial date will not be "kicked" for another case. Later, when we agree on an exact date, I may offer a backup date within two weeks, depending upon the docket congestion. I have yet to disappoint. Trial lawyers and their clients appreciate a firm trial date and a ready judge.

6. Hold That Motion!

Summary disposition motions are not appropriate in every case, although some lawyers (or clients) feel otherwise. I usually do not assign a dispositive motion date at the initial conference. Litigants rarely know whether there is a disputed issue of material fact until at least some discovery has taken place. On the other hand, where there has been some pre-suit discovery (e.g., administrative proceedings in a wrongful termination case), the parties may already know there are disputed facts. We address the need for a dispositive motion date at a later telephone status where I inquire if the movant, after discovery, has a good-faith belief in the success of such a motion. I may encourage the parties to go straight to trial—bringing the case to conclusion quicker and at less cost than briefing motions. Sometimes a motion date is set as early as the initial conference—if there is a narrow legal issue that makes sense to decide while discovery is stayed. Again, Rule 16 allows for flexible approaches.

7. Pick and Choose

Not every motion requires a "law review" opinion. Frequently, lawyers prefer a prompt decision so the case can move forward (or not). Sometimes this is handled at the initial conference, a later telephone conference, or a hearing with a decision "spoken" from the bench followed by a brief order. This is especially true for discovery disputes, many of which can be resolved during a telephone conference. Our Local Rule 37.1 prohibits the filing of a motion to compel unless the parties represent that they have in good faith attempted to resolve their differences. And then, we require only a faxed joint letter setting forth the position of all parties. We follow up with a telephone call usually that same day or the next. On the rare occasion where the discovery dispute deserves briefing, we of course allow it. The key is to make every effort to prevent such a dispute from lingering or disrupting the case schedule.

8. What's the Difference

Depending on the nature of the case, there may be one or more status telephone conferences. During these conferences, I receive an update from counsel, set additional dates, and address problems. I also use this time as an opportunity to slow down for a moment and determine whether parties wish to discuss settlement. It is my personal philosophy that whether a case settles or goes to trial is not as important as whether the parties at least consider settlement along the way. If the case is tried, the parties should know what their real differences are—is the gulf $1 or $1 million? And, of course, there are those cases

where the principle at stake demands a trial. A trial is not a failure of the system. After all, we are trial judges with courtrooms equipped with advanced technology and a jury box inviting use as envisioned by the Declaration of Independence and the U.S. Constitution.

9. Be Prepared

For me, the courtroom bench is my desk. One of my major disappointments has been the decline of the jury trial. As a consequence, when a case goes to trial, lawyers do not know what to do (e.g., how to effectively communicate with and persuade a jury). To provide lawyers with courtroom experience, especially young lawyers, and to keep the docket moving, I utilize hearings and oral arguments on certain dispositive motions. This allows lawyers the opportunity to appear in the courtroom and speak. It allows me an opportunity to resolve some sticky issues by pressing counsel at argument. I almost always send a list of questions to counsel before the hearing, and usually these questions help to focus the discussion. We do not use an appellate court format, but rather a point/counterpoint format that allows lawyers to reply directly and immediately to their opponent's comments. This also allows me to test the facts or law.

10. First Impressions

During trial, we come in contact with the public yet again, either as parties or as jurors. We reach out to jurors in questionnaires before they come to the courthouse for the trial. By striving for a court system that provides a favorable jury experience, we can help to educate potential jurors, while helping to combat the negative impressions that are often felt by jurors. Also, conversations between the court and counsel *before* a trial begins help to minimize down time *during* trial, which in turn helps me devote my full attention to the trial. This procedure reflects a basic respect for the jurors' time, as well as for the time and expense of the parties.

Conclusion

For those familiar with raising children, you know that each child is different, and treating them fairly does not mean you treat them each the same way. What works with one child may not work with another. The same can be said for cases on our docket. Each case is unique in some way, and may require different handling. And just as parents cannot take all the blame or credit for successful, well-adjusted children (whatever that means), neither can we as judges take all the blame or credit for successful case management. Trial lawyers and courthouse staff are an integral part of the team that must work together. Justice Stephen Breyer remarked recently that cases do not belong to the trial lawyer—they belong to the justice system. And the best perspective I have been given is that my courtroom is not mine—I am merely a placeholder until I hand the gavel to my successor.

We are, after all, a service industry, not unlike the family grocery store where I worked growing up. If we don't "sell well," customers will take their disputes elsewhere—outside the court system. This is exactly what happened over the past two decades with the rise of private mediation. But private mediation should be a supplement, not a substitute. Our court system, long admired and envied the world over, must be responsive to our "customers." The courthouse doors deserve a welcome mat, which is why we try to rule on pretrial motions and deposition objections before trial, why we try to have a draft of the jury instructions on counsels' table the first day of trial, and why I say to litigants at the last conference before trial begins: "My staff and I look forward to hosting you." ⊙

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Under laws comparable to the Whistleblower Protection Act that mandate hearings before ALJs, appellants routinely prevail in far greater numbers than do those whose hearings are held by MSPB attorney examiners. For example, under an array of whistleblower statutes administered by the U.S. Department of Labor, ALJs routinely decide in favor of appellants in one-third of appeals. ALJs acting under other types of statutes and in other agencies have similar records.

ALJs are far from perfect, and in fact are frequently accused of pro-agency bias. The primary motive for such alleged bias is that despite their statutory independence and professionalism, the ALJs are likely to identify with their employer, the government. Lacking such protections and qualifications, MSPB lawyers are far more likely to indulge such inclinations, in addition to other inherent biases they may share with ALJs, such as class and race.

Does the fact that the board and the court of appeals routinely affirm the administrative judges suggest that their initial decisions, biased or not, are correct? No, because MSPB administrative judges have broad discretion to determine legal and factual issues, to control discovery, to admit or deny evidence and witnesses, to rule on objections—in essence, to create the record that is before the reviewing tribunal. Further, their factual findings are upheld if there is "substantial evidence" in the record to support them.

Finally, and perhaps most significantly, findings concerning the credibility of witnesses are deemed "virtually unreviewable." Ironically, these highly deferential standards are taken directly from the APA standards of review as applied to hearings conducted by ALJs, and from appellate court rules regarding findings by U.S. district court judges.

Any reform that does not mandate hearings before qualified ALJs rather than agency lawyers, or at least eliminate appellate deference to the latter, will leave whistleblowers and other federal employees searching for due process and equal justice under the law.

Endnote

[1]5 C.F.R. § 1201.4(a) (2012).