Baseball, Apple Cake, and Civil Case Management

by Hon. Jack Zouhary

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Anyone fortunate enough to be confirmed as a federal district court judge has, at some point, been asked the question: "What do you do?" The answer might start out simply: "I am a judge." Then you get the next question: "What kind of a judge?" And then you answer: "A federal judge." Then you receive a comment that might range from "Ooh" or "Wow," or "So, when were you elected?" or "What kind of cases do you hear?" And so on.

You might also sometimes be posed a more difficult question to answer: "So, what exactly do you do?" My answer to that question is: "Every day is a new adventure." Really, no two days are the same. That's because no matter how the clerk's office categorizes each case filed on my docket, no two cases are alike. Sure, the subject matter might be similar—a wrongful termination, a patent dispute, a breach of contract—but facts are different, lawyers are different, parties are different, and the legal issues can be quite different. All these differences make each case unique.

So what is it we do as district judges? (Manage cases.) How often do we preside over jury trials? (Too few.) What are we trying to accomplish? (Get it right.)

Chief Justice John Roberts describes our role as umpires—calling the balls and strikes—and that certainly is part of what we do. We do that when we decide motions or make courtroom rulings. But our job is so much more. To continue with the baseball analogy, district judges are more like the team manager—the team usually consists of a judicial assistant, courtroom deputy, and law clerks. And while each of us has a different position with the team, pinch hitting for each other should be encouraged. A team manager tries to make the right in-game decisions, but also to have a winning season. What's a winning season? For judges, it's shepherding cases to a successful conclusion, whether that conclusion be a trial, a decision on a dispositive motion, or a settlement.

Sure, the sexiest part of our job might be publishing an opinion on a case of first impression or weighing in on a legal issue that has yet to be resolved among the circuits. The best day might be an affirmance by the Supreme Court or having a decision quoted favorably. But the everyday satisfaction in our job occurs when we manage a case in a timely manner, and the parties or the lawyers walk out of chambers and say to us: "Thank you, Judge, we appreciate your efforts." Or after the jury has been sent out to deliberate, when we step down from the bench to shake hands with trial counsel, and are told: "No matter what the outcome, Judge, you have been fair."

How do we want to be remembered? Perhaps the greatest compliment is that we addressed each case with enthusiasm and allowed the parties to achieve a measure of justice. How do we do that? The best advice I received as a baby judge was: "Jack, not every case requires a law review article. Sometimes the lawyers just want a decision." What that advice really told me was that case management is an important part of my job, and I must strive to maintain the promise of Rule 1: the just, speedy, and inexpensive determination of every proceeding.

For example, when a motion to dismiss is filed before I even have a chance to manage that case, the parties may go down a path from which retreat is difficult. So if the motion is based on "*Twiqbal*," we pick up the phone and have a conference with counsel. We ask plaintiffs if they want the opportunity to amend the complaint to address some or all of the concerns raised by the motion. If they do, we dismiss the motion as moot and without prejudice. With a "new and improved" complaint, we have a shorter path to the merits. That's just one tool that keeps a case moving while providing the parties a full opportunity to litigate legitimate claims.

Case management is more than just a rote application of federal or local rules. It is neither efficient nor smart to send out an automatic case schedule before the judge attempts to understand the issues. Our role as judges is to get to know the case so that we can help bring it to a conclusion after nine innings—understanding not only that those nine innings might take a shorter or longer time than other cases, but also that sometimes extra innings are needed when post-trial motions are filed. But we can't do any of that unless we are engaged, involved, and prepared to live by a firm and reasonable

timeline agreed to by the lawyers and enforced by the judge.

A judge cannot do it alone. Part of our job is to effectively train our chambers team to service the cases on our docket. What does that mean specifically? It means you need to meet on a regular basis with your team, review the status of your caseload and prioritize those cases that need the most immediate attention.

Judges are increasingly using law clerks to help with case management. A law clerk's job should be more than just legal research and drafting opinions. Law clerks can assist trial counsel with procedural questions so that when a lawyer has a question, they get an answer quickly. We should train our chambers staff on how to handle phone calls from lawyers, identifying which issues can be dealt with by staff and which require an immediate decision from the judge to keep a case moving.

Having chambers staff prepare these types of "scouting reports" can set cases up for success. This is especially useful before the initial case management conference (CMC). Have the parties discussed the case before the filing of the lawsuit? Do they want to talk settlement at the CMC? Are there jurisdictional issues that need to be addressed before we invest too much time in the case? Has an LLC been properly identified to determine diversity jurisdiction? Can the CMC be held by phone to save time and money? Or should parties and counsel be required to attend in person so counsel, who have never met before, can begin to establish a personal relationship? An effective scouting report will ensure the court sets aside enough time at the CMC for that particular case and the judge is prepared to dive into the issues.

Beyond chambers staff, you have the use of magistrate judges. They need to factor into your chambers equation effectively—whether by handling discovery disputes, settlement conferences, or providing other pre-trial assistance. You also have colleagues in your division or district. Many courts around the country are collegial and cooperative, helping another judge when that judge's caseload needs it. They are part of the team, too.

The new Federal Civil Rules package effective December 2015 helps the judge to flexibly manage the docket. Chief Justice Roberts called these changes a "big deal," and for some districts it definitely will be a game changer. For other districts, the thrust of these new rules has already been in place, informally, and has proven successful. Efficient case management knows that "one size does not fit all" and that time spent early on in a case can save even more time later. Judges therefore should be prepared to address each case—not unlike a manager who approaches each baseball game with a strategy and perhaps a different lineup. The new rules, with an emphasis on collegiality among counsel, proportionality in discovery, and an engaged judge, provide an opportunity to greatly improve our civil justice system with the judge playing a key role.

Another common question we receive as judges is: "What's the best part of your job?" For many, it is holding a trial with good trial lawyers or receiving favorable comments from a jury about how impressed they are with our justice system and how they now appreciate the role of an independent judiciary. It might include a compliment and request for the recipe of the apple cake I bake for the jury deliberations. While we bemoan the decline of trials, really the most important thing we do as judges is what we try to do every day: help litigants resolve their disputes. So call it what you will—whether it's civil case management or umpiring the game—each of us is the face of justice for the parties and lawyers that comes before us. We have given them their day in court—whether it be a settlement conference, hearing, or trial—whatever that particular case needed. In short, we work to meet the promise of Rule 1. That, my friends, is some of what we do as district judges. ⊙

In-House Insight *continued from page 9*

Here, the contracting officer for the Department of Veterans Affairs (VA) utilized the Federal Supply Schedule (FSS), which provides for government agencies to purchase certain goods and services through a streamlined process at pre-negotiated prices.[8] After discovering that this had been done on a regular basis without adhering to the Rule of Two, Kingdomware filed a bid protest with the Government Accountability Office (GAO), which found that the VA's actions were unlawful. When the VA defied the GAO's nonbinding judgment, Kingdomware filed suit for declaratory and injunctive relief.

Overall, the Supreme Court had jurisdiction to accept the case. Moreover, the most striking provision of the Court's opinion was, "On the merits, we hold that § 8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals or on the ground that the Department has placed an order through the FSS."[9] This mandatory requirement gives the VA far less latitude and discretion; therefore, giving greater protections to veterans.

Conclusion

The Court's opinion is crucial for veteran business owners to read, as well as for counsel who advise them. *Kingdomware* is a very complex case involving a variety of federal procurement statutes. In order for veterans to seize the opportunities provided to them with "set aside" contracts, two or more entities need to ensure that "the award can be made at a fair and reasonable price that offers best value to the United States."[10] Overall, this is a significant win for veteran-owned businesses. ⊙

Endnotes

[1]U.S. Census Bureau, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners* (Mar. 2012), *available at* www.sba.gov/sites/default/files/393tot.pdf.

[2]Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. 106-50 (Aug. 17, 1999).

[3]*See* Facts about veteran owned businesses, Veteran Owned Business, www.veteranownedbusiness.com/veteran-owned-businesses-facts.php.

[4]*Kingdomware Techs. Inc. v. United States*, 136 S.Ct. 1969, *available at* www.supremecourt.gov/opinions/15pdf/14-916_6j37.pdf.

[5]Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. 109-461 (Dec. 22, 2006).

[6]*Supra* n.4 (citation omitted).

[7]579 U.S. at 1.

[8]*Id.*

[9]136 S.Ct. at 1972.

[10]38 U.S.C. § 8127(d).