

BY HON. KEVIN J. CAREY (RET.)

Reflections on a Judicial Career

I am told that I was assigned more than 12,000 cases during my time as a bankruptcy judge for the U.S. Bankruptcy Court for the District of Delaware and presided over at least 43 large public company cases. I am also told that the debtor companies, on average, spent about 350 days in bankruptcy and had almost \$3 billion in assets, around \$1.3 billion in annual sales and more than 5,000 employees. For reasons that I will explain shortly, I am somewhat disquieted to learn that I leave behind more than 250 written decisions found on the Westlaw database.

But let me start at the beginning. I was initially drawn into bankruptcy because of the money. I was offered a work-study summer job after my second year of law school by the professor from whom I had taken bankruptcy and secured transactions courses. I stayed in the field because, beginning with my first professional job as a law clerk to a bankruptcy judge, the subject grabbed my attention and has managed to keep it for 40 years, a path I have never regretted.

After my clerkship and a stint for a year as clerk of court for the Eastern District of Pennsylvania at the tender young age of 26, I headed into private practice. In practice, I worked at large-, medium- and small-sized firms doing corporate transactional, commercial lending and real estate law, but I never lost touch with bankruptcy practice. Indeed, I practiced at no fewer than five firms before my appointment to the bankruptcy bench in the Eastern District of Pennsylvania. I'll never forget that in my interview at the Circuit Council for the position in Philadelphia, one court of appeals judge remarked that I had been with a number of firms. I replied lightly that it seemed I was unable to hold a job. No one in the room laughed, and my heart sank about as low as a heart can sink. Turns out I received the appointment anyway. (Some of you who appeared before me might have noticed that I sometimes exhibit what I like to think of as a mild case of warm-hearted mischievousness.)

But what attracted me to the bench in the first place? It began with my time as a law clerk to Bankruptcy Judge Tom Twardowski, who sat in Reading, Pa., for 31 years. I was his first full-time, paid law clerk, an improvement that came with the passage of the current bankruptcy law. Until then, bankruptcy judges had to rely on volunteer help (mostly law students). The experience as his law clerk was an exceptional learning experience. I sat in the courtroom with him every day and drafted

every opinion he signed in the time I was with him. I helped him prepare for contested hearings, sat in on settlement conferences and did some administrative work. The judge was unfailingly polite to all (he never embarrassed a lawyer in front of his client). He was completely unbiased and without any agenda, except to do the right thing. I thought that if I could emulate that kind of judging, I knew I would enjoy it, and with experience could fill that role. After I left my clerkship, becoming a judge was always at the back of my mind.

Shortly after taking the bench in 2001, I received a call from my law school classmate, Hon. **Mary F. Walrath**, who had taken the bench in the Delaware Bankruptcy Court a couple of years before. She told me that due to their heavy case load, the court was "borrowing" bankruptcy judges from around the U.S. and asked if I wanted to help. I said "yes" and ended up spending one week each month for a year commuting to Wilmington, Del., but when the year was over, I had held onto all my pre-confirmation cases until their conclusion. It seems I cannot resist a challenge, but more on that later.

Eventually, Congress added four new bankruptcy judgeships to Delaware, so in 2005, I applied and was fortunate enough to receive yet another appointment. I was initially concerned that the circuit would not view my application favorably because, after all, I had been appointed to serve in Philadelphia, and I did not want to be seen as continuing my "job-hopping." Fortunately, the circuit understood that I was not running from Philadelphia as much as I was reaching for my next challenge. Apparently, I hadn't visited in Delaware long enough to have dissuaded those concerned from having me permanently. Now, 15 years later — and less than a year away from having retired from the bench — I can look back over my career and experience on the bench and understand why I found it so rewarding.

As an initial matter, just the job itself is the best reward. Now, having said that, please understand that taking the bench in the morning, day after day, when so many of the hearings involve so-called "bet the company issues," and when so many of the professionals in the courtroom might be smarter and more experienced than the judge, can be daunting. But any nervous energy I ever felt turned quickly into an energetic drive to find the right answer. In addition, I never worried about whether a decision would be appealed. I never followed my appeals, and I learned of a result only when I received the appellate court's decision or the parties informed



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me there had been one. I've always believed that if I were to worry about an appeal, the anxiety of it would unduly hamper my decision-making — an unnecessary burden, when the decision to do what is right can sometimes be burden enough.

So now let me expand on how I feel about my written decisions. In a way, what a judge leaves behind in the way of written opinions is the judge's most visible, and perhaps most lasting, contribution that he/she can make. But I've always believed that the most value I could contribute is in the courtroom, guiding the stakeholders to a place where they can reach consensus about how to divide estate value and agree on an exit to a chapter 11. Of course, a judge must sometimes make certain decisions so that the parties can move on to the next step of emerging from the bankruptcy. I've often told new judges that litigants will extend many invitations to a judge to make decisions, but not every invitation need be accepted. I tried to make those decisions involving issues the resolution of which were central to advancing the case, and to defer or avoid making those decisions likely to expend, unproductively, time and treasure, including judicial time, without moving the case toward an exit. So, while the assessment will ultimately be left for others to decide, I do not see my legacy (if there is one to be had) in my written work. Rather, I'd like to think I was most helpful in shepherding parties to a fair and prompt resolutions of their disputes.

Of course, there is so much else I loved about the job, but perhaps foremost among the reward of it all were the opportunities that might not otherwise have been available to me. I sat on a judicial conference committee (an appointment by the Chief Justice) for six years and taught at two law schools (and still do with my former colleague, Hon. **Brendan L. Shannon**, in the LL.M. program at St. John's University School of Law in New York). I was president, then chair, of the Turnaround Management Association, which gave me the opportunity to visit many of its chapters around the world. I learned that while insolvency schemes vary considerably from place to place (although many foreign jurisdictions are now incorporating many parts of U.S. chapter 11 into their regimes), restructuring a distressed business follows uniform principles no matter where in the world the business is located. This was truly a highlight of my career. There is so much to learn outside of the courtroom.

I now serve as ABI Vice President-Membership and am fully engaged in its mission: to connect bankruptcy, insolvency and restructuring professionals with the relationships, insights and resources they need to be successful. In today's environment, this is more important than ever. I still participate in and enjoy conferences for a number of professional associations.

My staff would frequently tell me that I had to stop saying "yes" when asked to do something. I felt then, and still feel, that opportunities may open once, then may never reappear. I decided that I did not want to come to the end of my judicial career, look back and regret missing an opportunity to experience something new, something challenging or the opportunity to contribute when I had the ability to do so.

Someone once said that we live for what we love to do. And I loved it all.

Since leaving the bench, I have been asked, "What was your favorite case?" I typically respond to anyone who is a parent, "Who is your favorite child?" I found interest in every case, whether consumer or business, whether what I did as a judge had a direct impact on someone's life or affected the economic well-being of a business or its stakeholders.

How did I come to leave the job I loved as much as a person can love a job? A number of things, actually. Since taking the bench, I've always believed that I have at least one more professional challenge left. Certainly, practice offers that! My wife of 27 years wanted to retire, and the change offered financial reward, which eased the path to her retirement. While those in restructuring have anticipated an economic slowdown for some time, none could have anticipated that this would come as a result of a global pandemic. But it does look like I returned to practice at a time when my experience will be useful. To my great fortune, I found an ideal home at Hogan Lovells, which has a culture well-suited for me and a global practice, much like what I saw in my courtroom, where I first saw the lawyers who (I did not know at the time) were to become my future partners. I travel frequently (the firm sent me first to its Hong Kong office) and am based in the firm's Philadelphia office, a convenient commute from my home, close to New York and an easy jumping-off point for world travel.

Who could have anticipated that I would be working at home for weeks on end (at the time of this writing, the end of home confinement is not yet known). I have a comfortable work space, since I bought my desk and bench chair from the government and had it delivered to my home just before the stay-at-home orders came. But there are challenges, first among them the loss of daily in-person contact with others, including colleagues and clients. For example, it is particularly challenging to conduct a mediation remotely or virtually. Holding all-hands calls with mediation parties is a good start, then following with individual mediation parties one on one or in smaller groups can be helpful. A large, multiparty mediation can involve dozens of participants when the number of lawyers, financial advisors, investment bankers and principals are added up. There is nothing so effective as sitting across a table from a recalcitrant mediation party and being able to look them in the eyes — and for them to see yours — if arm-twisting is needed. There is no adequate substitute for actual physical proximity to another human being from whom you would like a result, so I look forward to resuming personal interaction (yes, even with social distancing).

Since my wife has retired and I am now home for an extended period, this is a kind of pre-retirement test to see if we can live together in harmony as we had hoped to be able to do once I am retired myself. I am glad to report that the other day, she turned to me, the surprise evident in her eyes and voice, and said, "I thought you might get on my nerves [but haven't]." So far, so good. But check back with me in a month. **abi**

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