

## **TRIALS IN “ROCKET DOCKETS”: MORE THAN JUST A LEGAL STRATEGY**

by  
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American businesses operate under a terrible misconception. Embroiled in dispute, their instinct is to exhaust every possible alternative to going to trial. Even where the risks are acceptable, they assume that the costs in time and money are not. As a result, they agree to settlements that do not maximize their interests. Or, they pursue arbitration, and other forms of alternative dispute resolution, that do not provide case finality, are not governed by totally settled methodologies, and are not backed up by governmental enforcement.

By contrast, in the right circumstance, and in the right venue, a trial can — from a business standpoint — be the most cost-effective solution. Such apparently counter-intuitive strategy is best obtained in the “rocket docket.” These are the six jurisdictions that have mandated strict time controls on every facet of the litigation process. Lawyers cannot force tactical delays. There is no judicial bureaucracy to bog down the case. Delay is simply not permitted. File a suit in a rocket docket and you'll be at trial in short order.

In the Eastern District of Virginia, the most famous of the rocket dockets, when a case is filed, a realistic trial date is set — and it is kept. Of equal importance, the rules of procedure demand that a non-dispositive motion be answered no later than one week after it is filed. It is then argued before the court three days later. Virtually every motion is decided at the argument. In non-rocket dockets, this ten-day process could take months.

The legal profession has done a wonderful job in setting the rules and implementing the six rocket docket systems. In addition to the Eastern District of Virginia, the others are: the Western District of Wisconsin, the Eastern District of Oklahoma, the Western District of Oklahoma, the Western District of Arkansas, and the District of Maine.

Cases can be filed in a rocket docket if the facts of the case arguably arise within the jurisdiction. For example, copyright and patent cases are the ones most commonly found in the rocket dockets, since intellectual property rights violations often occur nationally and the same protections are applicable throughout the United States. It therefore doesn't matter if the disputants are both in New York. The issues at hand apply equally to eastern Virginia, western Oklahoma, etc. So why not file in one of those courts if it means the speediest possible resolution?

The rocket docket process mandates experienced trial lawyers. If your lawyer is a litigator but not a trial lawyer, you'll find yourself in serious trouble. You must be able to quickly and efficiently proceed to trial in order to survive in the rocket docket world.

***Stark Contrast.*** Consider the alternatives. The more time lawyers have, the more time they spend. Such instinctual foot-dragging is a universal human failing, not just a problem among legal practitioners. But, since lawyers usually bill by the hour, it's a particularly expensive and wasteful failing for their clients. Worst of all, the

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labyrinthine time delays make for unfair practices. Deep-pocket litigants, who may be either defendants or plaintiffs, can fight wars of attrition and wear out the other guy's resources. The very contemplation of those bottomless pockets persuades many smaller companies and individuals to settle fast and get out while the getting is good. A lot of litigation in this country isn't litigation at all. It's blackmail.

By contrast, the rocket dockets offer an obviously controllable cost picture. It also forces a salutary measure of self-control on the lawyers. Their interrogatories don't include dozens of meaningless questions answered by a lawyer trained in circumlocution. Depositions don't cover witnesses' high school transcripts or their favorite restaurants.

Smart businesspeople might ask, "But don't the rocket dockets disincentivize my lawyers? Why should they want to do this when it's money out of their pockets?" There are at least three good answers.

First, it's not necessarily money out of their pockets. Rocket docket cases require intense and focused practice. Lawyers can't be juggling twenty cases in a rocket docket, with your case fifth or tenth or twentieth on their priority list. Instead, they must really *work* your cases. As a result, they may still bill a reasonable number of hours during that compressed period.

Second, even if they are billing fewer hours, they're still working more efficiently. They can wrap up your case and move on to the next one. They don't have to mark down the value of their time if the client balks at waste or delay. There's improvement in what's called their "realization" rates — *i.e.*, the percentage of billed fees that they can actually collect. If they're good lawyers, there will always be a next case for them to move on to when yours is done.

Third, rocket dockets are a fillip to "value billing." By value billing, we mean fees based not on hours, but on success. The legal profession has been struggling for decades to institutionalize fixed fees, to agree on premiums for stellar work, or to apply the contingency model used in personal injury lawsuits to business litigation. But these efforts have often come-a-cropper because no one is really sure about the economies involved. Lawyers worry that any alternative to standard hourly rates will trap them in an arrangement where they're earning less over an indefinite period of time. Clients worry that they'll be paying more.

Value billing is risky in situations where it's difficult to assess the value of the case. However, with the strict rocket docket time controls in force, the clients can measure their potential liability as well as meaningfully telescope ancillary costs, including legal fees. The lawyers, meanwhile, know they'll be getting paid in six months or so, which minimizes the risk on their end. Remember too, there's a difference between litigators and trial lawyers. Among the former are attorneys who function mainly as clerks. Trial lawyers, by contrast, are masters of the art of advocacy. They are not trained to prolong trials. Quite to the contrary, the whole art of trial lawyering is to *get it done*. The rocket dockets are their natural *métier*.

***When in Doubt, Ask.*** For businesspeople, the first rule is: Ask! You will naturally be discussing the case with your lawyer in any event. Force that lawyer to either consider a rocket docket venue or provide a good reason why such a venue is not, in fact, an option.

Corporate managers should also realize that in-house counsel are not necessarily more astute than non-lawyers in identifying advantageous litigation strategies. It's not a negative reflection on them. Most in-house counsel are trained as business lawyers and it is the usual Fortune 500 strategy to ship out litigation to law firms. (Lawsuits often occur in cycles. Staffing litigators in-house therefore doesn't make sense for the periods when the caseload is light or non-existent.)

As such, even some of the profession's most sophisticated lawyers are not asking outside counsel, "Hey, have we thought about taking this case to the Eastern District of Virginia or the Western District of Arkansas?"

You're not just asking about how to solve an unwanted problem. You'll also be exploring a business opportunity — and that is the highest form of client service.