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THE ROCKET DOCKET

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TEXT:

[*48] In the 1994 box-office smash movie, *Speed*, a mad bomber has wired a Los Angeles City bus with explosives set to detonate if the bus reduces its speed below 50 m.p.h. In order to avoid being blown up, Sandra Bullock must maintain the bus's speed while Keanu Reeves tries to disarm the bomb. To keep the bus above 50 m.p.h., she ignores the rules of the road and all other traffic.

Litigation in "the Rocket Docket," the moniker the U.S. District Court for the Eastern District of Virginia has earned, is a lot like that bus ride. As any regular practitioner before that court will tell you, the normal rules of the road simply do not apply. A comparison of two very similar criminal prosecutions bears this out.

On June 30, 1987, perennial presidential candidate Lyndon H. LaRouche, Jr., along with various associates, was indicted in a Massachusetts federal court on charges of credit card fraud and conspiracy to obstruct justice. Trial began in December 1987, but, after five months and with no end in sight, a mistrial was declared in May 1988 due to the hardship imposed on the jury by the length of the proceedings. In what may have foreshadowed recent events in the O.J. Simpson trial, the defense buried the court with an avalanche of motions and consumed trial time with exhaustive cross-examinations of prosecution witnesses and lengthy evidentiary hearings.

On October 14, 1988, LaRouche again was indicted, this time in the U.S. District Court for the Eastern District of Virginia. He faced similar charges of mail fraud, conspiring to commit mail fraud, and conspiring to defraud the Internal Revenue Service. Notwithstanding the similarity of issues presented and a similar defense strategy, that case went to trial *a mere five weeks after indictment* and resulted in convictions after a trial lasting only four weeks.

How can this difference in both the process and the result in two such similar cases be explained? The answer is the commitment made by the Eastern District of Virginia to speed cases to and through trial.

The U.S. District Court for the Eastern District of Virginia is one of the fastest courts in the nation. This is not by accident or the result of any statistical anomaly. Rather, the court deliberately places an almost overarching emphasis on speed. For example, in the LaRouche trial in Massachusetts, the jury selection process consumed 12 days. In the Eastern District of Virginia, a jury was impaneled in less than two hours. This emphasis on speed -- found in both the court's Local Rules and internal operating procedures -- has earned the Eastern District of Virginia a nationwide reputation as the Rocket Docket, a term of endearment to some, derision to others.

A Varied Docket

Other than the velocity at which it disposes of cases, however, the court is fairly typical of federal district courts across the nation. The Eastern District of Virginia encompasses what has been referred to in Virginia as the "suburban crescent." It includes all of Northern Virginia (essentially, the Washington, D.C. suburbs), continues down the I-95 corridor to the Richmond metropolitan area, then on to the Tidewater cities (Norfolk, Hampton Roads, and Virginia Beach) in the southeastern corner of the state. Thus, the court's geographic scope and population size is neither large nor small. The district includes decaying urban centers such as the City of Richmond, suburban sprawl such as Virginia Beach, and rural areas in the state's Northern Neck. Its caseload over the past quarter century has been consistently above average, with the mix of civil and criminal filings typical of the federal court system nationwide.

The Eastern District of Virginia also has had to confront the same problems that have clogged other federal district courts. It has been plagued by a dramatically increasing drug-prosecution docket and burdened by a corresponding increase in *pro se* prisoner cases. The court also has had to cope with a number of mass-tort cases, including the A.H. Robins [*49] "Dalkon Shield" litigation and thousands of asbestos-related cases arising out of the Newport News/Norfolk shipbuilding industry. Moreover, during the 1980's and early 1990's, the Eastern District of Virginia experienced the same judicial vacancy problem (actually, the judicial vacancy level in the district was greater than the national average) as many district courts. In short, the Eastern District of Virginia is very much a prototypical federal district court -- except for the blinding speed with which it disposes of cases.

But litigation has not always raced through the Eastern District's docket. Indeed, there was a time when the Eastern District of Virginia did not enjoy its current reputation as the Rocket Docket.

When Judge Walter E. Hoffman was appointed to the Norfolk Division of the court in 1954, more than 1,300 civil cases were pending in the Eastern District -- an extraordinary number in the 1950's, when there were only three judges on the court. By 1962, the backlog had increased so dramatically that the Norfolk Division of the court alone (with only one District Judge) had more than 750 civil pending cases. Judge Hoffman decided that something had to be done.

During his first few years on the court, Judge Hoffman served on a judicial committee chaired by Judge Alfred P. Murrah, then the Chief Judge of the 10th Circuit (the Federal Building in Oklahoma City, bombed on April 19, 1995, was named after Judge Murrah). Judge Murrah was a leading advocate of reforming judicial administration to expedite cases, and Judge Hoffman decided to adapt some of his ideas to the Eastern District of Virginia's practice, in an effort to gain control of that court's burgeoning docket.

Folklore among long-time practitioners before the court holds that in 1962 Judge Hoffman met with Judge John D. Butzner, Jr., of the Richmond Division, and Judge Oren R. Lewis, of the Alexandria Division. The three jurists agreed to commit to the implementation of docket management practices that would accelerate cases to trial. On July 31, 1962, Judge Hoffman wrote the attorneys in practice in his division of the court:

With an excess of 750 civil and admiralty cases pending on the dockets . . . it is apparent that there must be a dramatic change in procedure relating to the preparation of cases for trial in order to effect a saving in court time, jury expense, last-minute settlement, expenses of expert witnesses, and many other factors.

The next day, Judge Hoffman issued an order that implemented a series of reforms designed to move cases to trial more quickly. With that order, the Rocket Docket was born.

Since 1962, the rules and practices of the Eastern District of Virginia have evolved to accommodate changes in the Federal Rules and the increase in case filings, but their emphasis on moving cases to trial as quickly as possible has remained. The effect on the administration of justice, as revealed by records maintained at the Administrative Office of the U.S. Courts in Washington, D.C., has been dramatic. By 1972, the average backlog of cases for each judge in the District was reduced to just 288 total pending civil and criminal cases. By 1982, this average had been reduced further

to 279 total pending cases. It has remained constant ever since, with the 1994 average being 276 total pending cases per judge.

Even more startling has been the reduction in time to trial. In 1965, the median time from issue to trial in a civil case in the Eastern District of Virginia was 10 months. By 1975, it was reduced to 7 months, and by 1981, the median time had been cut just to 5 months (half of what it had been when Judge Hoffman first set out to quicken the court's pace). That figure has remained relatively constant ever since.

This means that half of all civil actions brought in the Eastern District of Virginia that go to trial are tried *less than 5 months after an answer* has been filed. By comparison, the national median time to trial for a civil case in 1994 was 18 months, more than three times as long. For the year ending September 30, 1994 (a year in which the District's median time to trial bloated up from 5 months to 7 months for the first time since 1980), the Eastern District of Virginia was the fastest district court in the country in getting civil cases to trial.

The Eastern District's speed is not limited to the conduct of civil trials. The median time from filing to disposition (termination of a case whether by trial, summary judgment, or other means) of a civil case was only 4 months (down from 10 months in 1965), the second fastest pace in the nation in 1994. And, the median time from filing to disposition of a criminal case was only 4.1 months, the fifth fastest pace in the nation in 1994.

These case management statistics are truly remarkable. They are attributable in substantial part to the evolution, since Judge Hoffman's time, of Local Rules, standing orders, and internal practices that have as their central tenet judicial control over the court's docket. As Ray Old, acting Clerk of the Court and a 30-year veteran of the Office of the Clerk of the Court for the Eastern District, noted: "Judicial control has been what's kept us moving." Indeed, any experienced litigator knows that when the attorneys handling a lawsuit are left in the driver's seat on case management, there is a very real chance they will ride the brakes, since delay usually benefits [*50] one side (and sometimes both). In the Eastern District of Virginia, however, the court institutionally has decided that the judges will control the docket and scheduling -- and will do so with a rigid efficiency and strict compliance with schedules that would make most bus companies envious.

Several of the Eastern District of Virginia's Local Rules, all of which are designed as a whole to reduce delay (with the ancillary benefit of minimizing expense), are singled out as particularly important at stemming the gridlock afflicting other district courts. For example, in recognition that pretrial discovery often is responsible for the most significant delays and greatest waste of resources in civil litigation, Local Rule 11.1 (A.1) limits each party to no more than 30 written interrogatories, including all parts and subparts. Local Rule 11.1(B) limits each party to no more than five depositions of nonparties. Neither of these limits may be waived by agreement of counsel.

Local Rule 11.1(D) also endeavors to discourage and quickly resolve discovery disputes by requiring that any objections to an interrogatory or document request be filed with the court 15 days after service -- even though the Federal Rules of Civil Procedure provide 30 days to respond to such discovery requests. Once the court has ruled on a discovery dispute, Local Rule 11.1(H) requires that the answer or production must be made within 11 days. These innovations significantly reduce delays by forcing discovery disputes to the forefront earlier, leading to quick resolution. The Local Rules also reflect the court's distaste for discovery abuses by exposing parties to sanctions for unnecessary discovery motions and requests. The court routinely awards such fines. As Maria Hewitt, the Deputy Clerk-In-Charge of the Alexandria Division, noted: "The threat of sanctions motivates attorneys to comply with the discovery rules [of the court]."

Equally as important as the Local Rules are the internal operating procedures adopted by the court's divisions, of which the Eastern District of Virginia has four -- Alexandria, Richmond, Newport News, and Norfolk. Each division has adopted individual operating procedures to supplement the Local Rules and to meet the court's commitment to keep cases in the fast lane.

In the Alexandria Division, use of a standard scheduling order is the most significant device employed to clear the road to trial in civil cases. Once a case is at issue, the court enters such an order, which, among other things, sets a discovery cutoff approximately 75 days later and a pretrial conference within 90 days. A date certain for trial is set at the pretrial conference, which usually is only four to six weeks -- and no more than eight weeks -- later. Thus, the Alexandria Division's standard scheduling order contemplates that a civil case will go to trial only 5 months after it is at issue.

The Norfolk and Newport News Divisions are operated as one court with separate dockets under a combined administration. They employ a very detailed civil case management system derived from Judge Hoffman's 1962 order. A central feature is the use of a master calendar clerk who, under the direction of the Chief Judge, is responsible for the orderly scheduling of the calendar so that cases move expeditiously to trial.

According to Michael Gunn, who has been master calendar clerk since the late 1960's, two weeks after a civil case is at issue the court sets an initial pretrial conference. At this conference (which is usually conducted by a law clerk under the supervision of the master calendar clerk), a firm trial date is set for four to six months later, depending on the complexity of the issues. A pretrial schedule is then set working backwards from the trial date. A final pretrial conference is set for approximately three weeks before trial, at which all Rule 26(a)(3) disclosures are made, exhibits are marked, and a written stipulation as to uncontested facts is filed. An attorney conference to prepare stipulations and exchange information generally is held two weeks before the final pretrial conference. Unlike the single discovery deadline in the Alexandria Division, the Norfolk/Newport News Divisions use a rolling cutoff scheme, with plaintiff's discovery cutoff usually two months prior to the attorney conference, the defendant's discovery cutoff usually one month prior to the attorney conference, and the cutoff for *de bene esse* depositions one to two weeks prior to the attorney conference. The initial pretrial conference also yields briefing and hearing schedules for all pending or contemplated motions. Under this scheduling system, a civil case generally will reach trial five to six months after it is at issue.

Unlike the Alexandria and Norfolk/Newport News Divisions' master docket systems for case management, the Richmond Division uses an individual docket system. In that Division, each case is assigned at the outset to a particular judge who is responsible for everything that later arises. Notwithstanding this, the Richmond Division also is able to move civil cases quickly to trial, again, by each judge's practice of setting a firm schedule at the outset.

For example, Judge Robert R. Merhige, Jr., holds an initial pretrial conference within two weeks after a case is at issue, at which time he sets a discovery schedule, a final pretrial conference, and a trial date for not more than four months after the initial conference. Judge James R. Spencer sets an initial pretrial conference within 30 days after a case is at issue, at which time he also sets a firm discovery cutoff leading to a trial approximately four months after the initial conference.

Thus, the Local Rules and internal operating procedures in each division in the Eastern District rely on several fairly simple case management techniques to keep traffic moving:

- First and foremost, the judges control their dockets through the early setting of a discovery schedule and a firm trial date.

- Second, once the schedule is set, virtually no continuances -- or even minor delays -- are allowed. "Continuances are few and far between," according to the acting Clerk of the Court, Ray Old. "Our judges take pride in moving cases and aren't going to allow the lawyers to slow things up."

- Third, discovery is limited to the bare necessities, and little tolerance is shown for the type of petty discovery [*51] disputes that have afflicted most federal civil litigation. Discovery disputes are resolved early, and sanctions for abuses are liberally doled out.

- Fourth, motions practice is also expedited. Although various techniques are used, the fundamental principle is that motions do not sit for very long *sub judice*. Decisions are made promptly, usually at the hearing on the motion.

These case management techniques dispose of actions at an unprecedented pace and prevent traffic jams. Why? Because since the time of Judge Hoffman, the Eastern District of Virginia has understood and followed the one immutable rule of civil litigation: The chance of settlement increases geometrically as a case approaches trial. Every litigator knows from experience that the best opportunity to settle a case is on the courthouse steps. The Eastern District of Virginia simply has tried to get the parties more quickly to the courthouse steps.

But these results cannot be achieved solely through adoption of appropriate Local Rules and operating procedures. Experience in the Eastern District of Virginia shows there must be a corresponding commitment on the part of the District Judges to keep their feet on the accelerator. For example, in 1994, the judges in the Eastern District of Virginia tried on average 48 cases (versus a national average of 27). This was the third highest average in the nation last year and is the direct result of the court's efforts to speed cases to trial. Although most cases settle as they approach trial, not all do. Any court adopting a "Rocket-Docket" strategy therefore has to be prepared for an increased number of trials each year.

Moreover, a trial must be a relatively short ride in any Rocket Docket, such as the Eastern District of Virginia, if a 48-trial-per-judge average is to be maintained. Indeed, Hewitt, who has worked in the Alexandria Division for 17 1/2 years, could not recall a single trial during that time that had been allowed to run beyond one month. "It would have to be a really unique case for any of our judges to let it run more than a month," she added.

There also has to be recognition that a Rocket Docket requires the court's administrative staff help the judges keep the pedal to the metal. Indeed, much of the credit for the success of the Eastern District of Virginia's case management system must be attributed to the commitment of the deputy clerks and staff in the Clerk's Office. "When new people come on board [at the Clerk's Office], we train them in the importance the court places on speeding cases to trial," said Old, the acting Clerk of the Court. Without such a commitment from the staff, Old said, adoption of a rocket-docket system simply would be unthinkable.

The adage, "Justice delayed is justice denied," appears often to hold true in the views of many litigants and their lawyers in the Eastern District of Virginia. Indeed, the jurisdiction has become a forum of choice for some.

For example, in early 1994, the American Trucking Association, concerned about new federal regulations mandating alcohol tests for truck drivers -- which would cost the industry millions of dollars -- decided to mount a challenge in federal court. Because the new regulations applied nationwide and would impact companies and drivers in virtually every district in the nation, the Association could have brought the lawsuit in almost any federal district court. After a national search, however, the Association brought the action in the Eastern District of Virginia specifically because it had the fastest civil docket in the nation. For the American Trucking Association, it was critical to obtain legal review of these new regulations as quickly as possible, because each day's delay would cost its members thousands of dollars in compliance expenditures.

Speed can be important for criminal cases too. For example, when William Aramony, former head of the United Way of America, and two associates were indicted on conspiracy, fraud, and tax-evasion charges relating to the misuse of United Way's money, the umbrella charity group suffered a severe blow to its reputation and ability to raise money. United Way officials praised the speed with which the case was brought to trial and was tried in the Eastern District of Virginia (where United Way is headquartered). The quick pace of the proceedings brought to light that the charity was the real victim and allowed it to begin to restore its reputation much sooner than would have otherwise been possible if the proceedings against Aramony had been allowed to drag out.

Criminal Docket Speed

Not surprisingly, however, some criminal defense attorneys believe that the court's emphasis on speed is not always fair to defendants. They do not use the term Rocket Docket affectionately. William B. Moffit, a criminal defense attorney practicing in the Eastern District of Virginia for 20 years, has tried some of the more high-profile cases brought in that court and has been an outspoken critic of its rigid case management system. He defended a LaRouche associate in the 1988 Alexandria trial and represented Aramony at trial last year. "Although the LaRouche case has received the most publicity, it is not the most shocking case," Moffit said. "Most criminal justice [in the Eastern District of Virginia] is dispensed in less than an afternoon, with speed, not fairness, taking precedence." To Moffit, "When speed becomes the most important value in a [court] system, it works a real unfairness to most criminal defendants."

Whether it is popular or unpopular, many courts have taken note of the Eastern District of Virginia's serious commitment to speed cases to and through trial.

[*52] If the Eastern District of Virginia's Rocket Docket case management procedures do become the model for federal district courts across the country and a solution to the "litigation crisis," trial lawyers will face new demands to speed up every phase of litigation. Faced with this likely increase in the pace with which cases move to trial, what steps should a litigator take to meet the demands of a Rocket Docket case management system? Here are a few practice pointers that may help a trial attorney survive the rush-hour commute:

1. Prepare your case before it is filed. With the advent of computers, lawsuits relating to even the most complex commercial transactions can be filed on the very day that a lawyer is first retained. In the securities class action and mass tort fields, stories are legion of such one-day races to the courthouse. Experienced practitioners before the Eastern District of Virginia, however, seldom rush to file suit because the act of filing starts a very short countdown to trial. Before filing suit, they complete all factual investigations and thoroughly research every issue of law that might arise during the course of the case. (One might argue that Rule 11 requires this anyway, though in practice, in many civil cases, investigation and legal research prior to the filing of litigation is relatively limited.) If the case involves a complex or technical business or if scientific evidence will be important, you must master these intricacies before filing suit, not as discovery progresses. If there are third-party witnesses, interview them before filing. Anything you can do before the clock starts will save valuable time later.

2. Rule 1 not only applies to civil plaintiffs and prosecutors, but it also applies equally to civil defendants and criminal defendants. To criminal defense attorneys who learn a client may be indicted: Do not wait for the indictment to be handed down. Seek a preindictment meeting with the U.S. Attorney's Office to determine what the government's case will claim and what evidence it may already have. Then, roll up your sleeves and begin your own investigation to prepare for when the indictment is issued. In addition, it is critical to ask for discovery on the very first date that you are entitled to do so. Similarly, civil defendants frequently are aware that suit against them is imminent, usually because the plaintiff will make a settlement demand prior to filing. Seize upon such a warning to begin the factual and legal research you will need -- and may not have time for -- once litigation commences.

3. If during preparations you decide expert testimony will be useful or essential, interview and retain testifying or consulting experts prior to filing suit. Sometimes it will take months of interviews with dozens of potential experts before you find that one expert with the right blend of expertise in the field and jury appeal. In the Eastern District of Virginia, this is time you do not have after a suit is filed.

4. Based on your prefiling preparation, develop a discovery plan to be implemented as soon as the case is at issue. Keep it simple -- there is no time to spend on marginal depositions or document requests. Litigation in a Rocket Docket requires trial attorneys to focus carefully their limited discovery requests and time on the development of factual evidence that really matters to the outcome of the litigation. In developing your plan, also build in sufficient leeway to allow time to pursue sources of evidence that you

may only unearth during discovery.

5. Work with opposing counsel in a professional and cooperative manner. Like rush-hour commuters, the fast pace of a Rocket Docket subjects trial lawyers to intense pressures that may manifest (particularly for lawyers used to a more leisurely pace) in uncivil conduct. Resist the temptation. By working with opposing counsel to schedule depositions and hearings, you will find it possible to survive even the tight discovery deadlines imposed by the Eastern District of Virginia. For every instance in which opposing counsel needs a scheduling favor, be assured that you will need a reciprocal favor at some point during the litigation. Moreover, the Eastern District of Virginia takes seriously the obligation of attorneys to confer and endeavor to work out discovery disputes; turning to the court to decide such disputes truly is regarded by the bench as a last resort.

6. Hire a competent local counsel who regularly practices before the court, and listen to her advice. If you are from out-of-state and are asked to represent your client in the Eastern District of Virginia or another Rocket Docket, do not view the local counsel requirement merely as an employment guarantee for the local bar. Regardless of how you work with local counsel in other courts, in the Eastern District of Virginia it is critical that local counsel be more than a maildrop for your pleadings or an office at which you can conduct depositions. The District Judges and deputy clerks on the court repeat over and over that [*70] the only lawyers who experience problems with the court's case management system are out-of-state attorneys handling their first matters in the Eastern District of Virginia. As soon as you have the first inkling that you will litigate in the Eastern District of Virginia, retain a trial lawyer with substantial experience in the court's practices, and make her a real part of your trial team. In particular, listen to her advice about how the court will react to your discovery plan, motions practice, and trial strategy. Above all else, when she tells you that you will be in trial six months after the suit is filed or that the court will deny even a joint request for a continuance, believe it!

7. Prepare your client for the hectic pace with which the case will progress. Many clients, particularly sophisticated consumers of legal services such as Fortune 500 companies, are used to the leisurely pace common in other federal and state courts. As a result, they assume that a continuance is always available if they simply cannot get around to gathering documents by the deadline. Such an attitude on the part of a client involved in Eastern District of Virginia litigation will be fatal to its case. Impress upon clients at the outset that the Eastern District of Virginia requires of them an unusual degree of responsiveness and cooperation. If your client is a corporation, it must designate a single internal liaison to assist counsel in gathering evidence and interviewing witnesses. And, because clients must be prepared to respond quickly to requests from counsel for strategic decisions, it is often useful to sit down with the client, immediately after the court enters its scheduling order, to anticipate the types of decisions that may have to be made or actions taken at various points in the schedule.

Is speed the answer to the "litigation crisis" that seems to be gripping the federal court system? In the Eastern District of Virginia, the answer clearly is "yes." The court not only has kept pace with an increased civil and criminal caseload, it has steadily improved its ability to process cases. Although some questions of fairness are raised with respect to criminal defendants, most constituencies using the federal courts in the District appear to be satisfied that justice is being fairly dispensed without undue delay or unnecessary expense.

Could speed be the answer for other courts? The case management techniques utilized by the Eastern District of Virginia theoretically should work in any federal district court. The Eastern District of Virginia is as typical as any federal district court in the nation could be; so no such court should be able to argue that it is more urban or more suburban or more rural or whatever because the Eastern District of Virginia is all of these. Indeed, within the four divisions of the court, both an individual and master calendar docket approach are used, demonstrating that either of the two most common docket administration systems in use in the federal courts could benefit from these case management

techniques. Nor can the other courts argue that they cannot afford these case management techniques because the Eastern District of Virginia uses no automation to implement them; everything is handled manually by a small number of clerks. And, although the Eastern District of Virginia has been fortunate over the last few decades to be the regular recipient of judicial appointees of superb intellect and substantial trial experience, it is not these qualities that have been the linchpin of the District's success. Rather, the court's success at expediting cases reflects the willingness of new appointees to renew the commitment first made by Judge Hoffman in 1962 to maintain judicial control over the docket and to work hard to keep cases moving.

The experience of the Eastern District of Virginia over the past 30 years strongly suggests that the "litigation crisis" does not require a wholesale overhaul of the federal court system or the Federal Rules of Civil and Criminal Procedure; rather, the answer to the problems that do exist may be found in a few old-fashioned concepts that seem to have been lost over the years:

- Judicial control of the court docket;
- Early scheduling of trial;
- Zero tolerance of dilatory tactics;
- Strict attorney compliance with court rules and deadlines; and
- Prompt judicial decisions on motions or other issues presented to the court for resolution.

Following these simple principles in the Eastern District of Virginia has resulted in fair and expeditious resolution of cases filed in that court for several decades.

Therefore, it is likely that the pace of litigation in the Eastern District of Virginia will continue to be faster than the average federal district court. That [*71] means that litigators will not be able to carry on business as usual in the Rocket Docket. Woe be the trial lawyer who takes her foot off the gas pedal while litigating in the Eastern District of Virginia. Chances are -- just like the bus in *Speed* -- she will find her case blowing up in front of her eyes.