

## **DOCKET MANAGEMENT**

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An attorney for whom I have a great deal of respect recently stated, "Private litigants should determine when their cases go to trial and not the courts." This was once my view. Experience on the bench, observations of society and practical considerations have made me a strong advocate of active docket management by trial courts.

### **Public Perception of the Court System**

Probably long prior to Charles Dickens' celebrated portrayal of an interminable lawsuit in Bleak House the public has been dissatisfied with delays in the judicial disposition of litigation. In our own day legislatures and courts of final jurisdiction have promulgated laws and rules designed to move cases more swiftly through our courts. Nevertheless, the public continues to view the courts of this country as inefficient and too slow to respond to the needs of litigants for quick resolutions of disputes. Some gentle unspoken criticisms of the court system's failure to quickly resolve disputes are becoming institutionalized. Arbitration, mediation, mini-trials and other means of dispute resolution have arisen because of the failure of the court system to expeditiously handle its traditional task. It is well known that the expense of litigation is extremely burdensome upon corporations and individuals alike. Recently, national attention has been brought upon President and Ms. Clinton's heavy personal financial burden defending themselves against claims of wrongdoing in security trades and employer-employee relationships. While the number of new case filings continues to rise, the public as a whole has become distrustful of a court system perceived as dilatory, cumbersome, and financially devastating to those who become entangled within it.

### **Goals of Docket Management**

The purpose of a court's docket management system is to provide the least burdensome, most efficient means of resolving disputes within a traditional legal framework. The traditional legal framework provides for hearings and trials in which legal and factual disputes are resolved within guidelines provided by constitutional, legislative and common law. The best interests of the parties are not considered individually but in terms of broader public policy. The decision of a court is not founded upon what a judge or jury may believe to be in the best interest of the parties but upon what the rules of society expressed in law deem to be the proper resolution of the dispute. The individualized best interest of the parties is better served in settlements between the parties than through the invocation of the judicial process. For example, produce company A may have breached its contract with retailer B for the delivery of bananas on June 15 causing damages to B in the amount of \$5,000.00. B most certainly could bring a lawsuit and sue for the \$5,000.00. B would, in time, recover the \$5,000.00. Public policy requires this result when the matter is referred to the courts. Instead of the lawsuit, A may give B a special deal on watermelon because of a good

deal that A has received that will make B a \$10,000.00 profit. If done timely and under the proper circumstances, A has lost no money, B has made an additional \$5,000.00 profit and the commercial relationship between A and B may be strengthened instead of destroyed. I know of no system of laws that would reach the more desired result found by A and B. It is only when A and B cannot individualize their settlement to their mutual advantage over that offered by the law that the matter should be referred to the courts. The expectation of A and B should be that upon referral to the courts the case will be expeditiously resolved in accordance with the rules of law. If the matter can be resolved by the parties without the imposition of a court's judgment, the matter should not be filed. The cost of litigation to A and B should be considered prior to an action being filed. It is becoming more and more common for insurance companies and tort claimants to seek mediation prior to filing a lawsuit. This is proper. It allows individualized settlements to be reached without adding the level of expense generated by the filing of a lawsuit.

When the decision has been made to seek redress in the court system, the filing of the lawsuit should be an affirmation that the parties cannot individualize a settlement and they are seeking the imposition of public justice. The filing of the lawsuit places its resolution in public hands. The private wishes of the parties become subordinated to public policy and the best interests of society. The filing of a lawsuit to compel settlement is a waste of public resources. This does not mean that settlement should be discouraged once a lawsuit is filed. Most lawsuits do settle prior to trial and there is nothing wrong with that. It means that the public interest in the resolution of the dispute has been invoked and will be controlling over the special individualized interests of the litigants. The parties to litigation have publicly certified that they are unable to resolve their differences and are asking for the relief provided by law. This is a point that is easily missed and if it is missed, the role of the court and the litigants can be confused. Individualized settlement is still desirable but in many states the court plays no role in the settlement. Experience in the federal courts teaches that practice may differ and judges sometimes engage in attempting individualized coercive mediation. In some states it is contrary to the code of judicial conduct for the court to become directly involved in the settlement process.

If the parties allow a case to languish on a court's docket, the purpose of the court is frustrated. The worth of the public remedy provided by the court is demeaned. The failure of a court to bring any case to a speedy conclusion is an implied statement of the meaninglessness of judicial remedies. Whether or not one approves or disapproves of the coercive settlements sometimes obtained in federal courts, it cannot be denied that the movement of the case by the court adds to the perceived effectiveness of the federal court system.

Sometimes the argument is made that "the case will take care of itself" if allowed to remain on the docket for a period of years. What happens to the case is the plaintiff rightly begins to think he or she will not obtain relief from the court, the defendant remains anxious about the case, and the lawyers on each side are probably afraid of looking foolish and losing if the case is brought to trial. If the relief sought by the plaintiff is just, justice is not served by delay. If the defendant will be vindicated by a trial, justice is not served by delay. If, as is most often the case, there is some merit in each side of

the case, delay will only make the case more costly for the litigants as they are compelled to provide more and more discovery information which generally becomes less and less valuable as time passes. The settlement of the very old case is no more probable than the settlement of the new case if the new case is pushed to trial by the court. There are very few cases which cannot be or in reality have not been evaluated by the plaintiff and defendant within sixty days of the attorneys being hired. Delay is sometimes the whole purpose of a lawsuit. Plaintiffs (petitioners) sometimes seek to maintain the status quo in one arena to allow the completion of their agenda in another. For example, a temporary restraining order may be obtained and an injunction sought for the purposes of tying up one company while the plaintiff knowing the defendant's (respondent's) resources are tied up obtains its competitors business in another arena. During the recession of the middle 1980's defendants frequently applied dilatory tactics to obtain time to attempt to either exhaust the plaintiffs or divert resources to other projects that might prove productive. Neither of these approaches falls within the purpose for which the court system exists. These are manipulations to subvert the application of public justice to disputes and they should not be tolerated by the courts. The defeat of these tactics may be obtained by active docket control. Only the most extraordinary case should be allowed to sit on the court's docket without the court actively working to bring the case to trial.

### **Docket Management Theory**

Every court required document must be drafted, printed, delivered, read and filed. In some instances documents require responses which in turn repeat the process. Every court appearance causes the utilization of a courtroom, court staff, attorneys' time and client and taxpayer money. Thus the most efficient litigation system is the one that requires the least amount of paper work and the fewest number of courtroom appearances to complete the public resolution of the lawsuit.

It has been recognized by most courts that the amount of paperwork and courtroom time required for the disposition of cases will vary based upon the complexity of the litigation. Some courts have tried to actively identify complex and simple litigation and create separate rules for each. Other courts have taken the *laissez faire* approach and have allowed rules of civil procedure and the litigants to determine the course of the lawsuit regardless of the complexity of the litigation. The first approach accepts the assumption that rigid and inflexible rules are necessary to push litigation toward its conclusion. The second approach assumes either that litigants are motivated to move cases as expeditiously as the case will allow or that there is no public interest in seeing the case moved. The problems with the first approach are:

1. Justice will be subordinated to procedural hurdles. For example, evidence may be excluded for extremely technical reasons that bear no relationship to the fairness of the proceeding. Attorneys are encouraged to participate in procedural gamesmanship.
2. Simple cases will be mischaracterized as complex resulting in unnecessary expense and delay. The mischaracterization may be made

purposefully by the litigants in an attempt to delay the case or unintentionally by the court.

3. Judicial time must be spent evaluating each case and determining its characteristics when in all likelihood the case will settle.

4. Once the case is characterized as simple or complex, all simple cases will be treated the same and all complex cases will be treated the same. This assumes all simple cases are equally simple and all complex cases are equally complex. This is a false assumption. Rather than being categorical, the complexity of cases of cases is more lineal. Even a lineal approach does not create an entirely accurate model since complexity is a function of more than one axis. For example, a case may be logistically complex with multiple parties residing in various states while at the same time it may be simple factually and legally. Any given case can be complex or simple in one or more of its logistical, legal, or factual elements.

The second approach which relies upon the efforts of attorney to move cases through the court system has the following shortcomings:

1. Not all attorneys desire to see their cases move quickly through the system. Some desire delay for business or tactical reasons which were briefly illustrated above. Others desire delay because they are genuinely afraid to litigate any case. This is far more common than the public would surmise. Other categories of dilatory lawyers are alcoholic, drug addicts, suffers of mental illness and depression, those who see a stockpile of cases as being long term income security and those who are simply lazy.

2. Lawyer control makes dockets meaningless and erodes the credibility of the courts. When lawyers are allowed to place and withdraw cases from dockets at their whim, serious litigants are penalized. A docket consisting of fifty or more jury settings in which the parties in twenty of the cases are serious about litigating requires those twenty to issue subpoenas to witnesses, pay experts for their time, and do all of the last minute preparation that is always required at great expense to the litigants. The serious litigant is left to gamble with the expense of preparation versus the probability of being reached for trial. It is not difficult to find instances in which despite wanting to go to trial litigants find themselves obtaining continuances under lawyer controlled docketing systems because they do not believe their case will be reached and do not feel preparation expense is justified. The uncertainty of lawyer controlled dockets adds expense and delays trials even among willing litigators.

3. There will be many instances in which a court's entire docket will collapse leaving the court's courtroom time unutilized. There is a likelihood that the cases not heard will be reset. This will make the next docket larger making it less likely that litigators will be able to make

informed decisions on trial preparation. The inefficiency of the system promotes greater inefficiency.

In short, dormant cases create the equivalent of an administrative log jam impeding the flow of cases for which a speedy resolution is sought.

The courts actively attempting to characterize cases as simple and complex have recognized not every case requires the same amount of judicial intervention to move the case toward finalization. Those courts have also recognized that the less complex a case is the less time and money should be expended upon the case. This is the one of the primary considerations of docket management. The primary considerations for successful docket management are:

1. Recognition that different cases have differing needs for discovery time, pretrial hearings, and preparation time. The means of efficiently docketing criminal, family and general civil cases differ greatly.
2. Recognition that the ability of attorneys to rely upon cases being heard when set saves money and time for litigants and courts.
3. There should be a purpose behind every court imposed appearance and filing. Unnecessary appearances and filings cost attorneys, clients and the public money.
4. The expectations of the attorneys regarding how long it will take for a case to be heard will determine the readiness of the litigators.
5. Most sanctions require show cause hearings that place greater burdens upon the courts and can result in congesting dockets. Most sanctions also carry detrimental implications for the parties themselves that threaten the fairness of trials. Alternatives to sanction hearings may be effectively used to gain compliance with court docketing procedures without jeopardizing the fairness of trials.

### **Designing a Docketing System**

The type of court will largely determine the format of the court's docket. For example, jury trials will occupy a large portion of a criminal court's time and very little of a family law court's time. A general jurisdiction docket must allow for the conflicting requirements of family, criminal and general civil cases. A typical criminal court could allocate every day of the week for jury trials with pleas, non jury trials and pretrial matters heard from 8:00 A.M. to 10:00 A.M. every day. A family law court could operate efficiently without any regularly scheduled time for jury trials. Jury trials in family courts could be set whenever the need arose with non jury matters trailing the jury setting. Non family law civil dockets could be handled much like criminal dockets. Each day of the week could be utilized for jury trials with pre trial matters heard from 8:00 A.M. until 10:00 A.M every morning with non jury trials trailing the jury docket. In instances in which it appeared there may be some difficulty completing non jury matters on criminal or civil dockets while jury trials were occurring, the jury could be delayed until 1:00 P.M. each day to allow as much as 2 1/2 days per week for non jury matters. This would still allow the completion of almost all criminal trials in one week and over half of the typical

civil jury trials. The more likely scenario is the non jury case could be completed on an afternoon while the jury is deliberating.

Jury and non jury cases would be set for trial on either Fridays or Mondays. The order of trial would be established for the jury and non jury trials for the week with the understanding that the parties will be given at least 1/2 day notice of the time the case will be heard. The presumption is that each non jury matter on the docket will last in excess of one hour. Matters that are to take one hour or less should be set at specific times. It should be made clear to the litigants that no more than one hour will be allocated to their matter and matters that will utilize in excess of one hour will be recessed and trail the docket until they are reached or they will be reset. This procedure effectively lowers the cost of litigation in that it is extremely rare that a litigant will be required to wait for more than an hour to be heard and most commonly the matter will be reached in twenty minutes or less from the time set. Setting matters at intervals of less than an hour intervals seems to result in delay more than efficiency. This is so because the exact length of time to be utilized by any single short hearing matter cannot be accurately gauged. It may happen that three of four nine o'clock settings announce agreements and the fourth will take forty five minutes. When the agreed matters are taken up first by the court, the entire docket will be concluded before ten o'clock. If each of the matters is scheduled fifteen minutes apart, there will be wasted court time along with the possibility, unless the forty five minute matter is fortuitously scheduled first, that the business will not be concluded until perhaps as late as 10:30. Additionally, if the forty five minute matter is placed anywhere other than at the 10:45 slot, the litigants in the matters which have resolved will find themselves waiting to be heard.

No single docketing system will work under every circumstance. The Number of courts in the county, the size of a court's docket and the nature of the case load heard by a court all must be considered. The most important factor in efficiently docketing cases is to forget tradition and look to the actual time allocation needs for jury and non jury matters, prove up, plea, and discovery matters. It may be necessary to establish a docketing system for a court with 2,500 cases that differs greatly from that of a court with 750 cases. However, once the court with 2,500 cases has substantially reduced its case load, the system should be reevaluated to deal with the changed circumstances. The docketing system described has created a general jurisdiction docket of less than 1,000 active cases in a county in which the other four general jurisdiction courts have between 1,650 and 2,000 pending cases.<sup>1</sup> Ninety eight percent of the pending divorce cases are less than one year old and over ninety percent are less than nine months old, ninety one percent of the entire civil docket is less than one year old.<sup>2</sup> Meaningful jury settings can be obtained for any case sixty days from the date of request and meaningful non jury settings may be obtained within the shortest time period permitted by the Texas Rules of Civil Procedure or statute. The most important aspects of docketing cases that will take one hour or less are to make sure the cases will be reached promptly with a minimum amount of time spent waiting in the courtroom and

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<sup>1</sup>Statistics for the District Courts of Denton County, Tx.

<sup>2</sup>Statistics for the 16th District Court of Denton County, Tx.

allowing no more than one hour to conclude the matter. This causes problems initially. Litigators at first will underestimate the time they will take to try a matter or will only consider how much time their side of the case requires. Since it is not proper to rule on cases until each side has been given all of the time necessary to present its side of the case, when the case has exhausted its hour, the remedy is to have the case then trail the cases docketed for longer periods of time. Experience has taught that once the bar is convinced an hour is sixty minutes and no more, much chaff is removed from presentations and many matters that formerly would have taken several hours are tried in less than an hour. The hour format can save litigants much money in that they do not have to pay their attorneys to wait around the courthouse and presentations are far more efficient. The critical factors in docketing longer cases are to be able to give at least one half day notice to the litigants and to reach the case within three days of the Monday setting (If such cases are set on Mondays.). It is necessary that the participants in the longer matters be present on the day of the original docket call. This avoids claims of lack of notice, unavailability of witnesses or misunderstanding about the time the case will be tried. A last and sometimes first opportunity is also available for the parties to reach a settlement. The reality of trial is perhaps the greatest catalyst for settlement.

Whatever form a docketing system takes, the determining factors for its success are:

1. that each setting is meaningful;
2. time is allocated in a flexible way that corresponds to the requirements of each type of case;
3. the expectations of the judge and court staff are recognized as requirements by the bar.

### **Other Considerations**

The most ingeniously designed docketing system will not work efficiently unless it is applied in an aggressive manner. It was often said that while the civil rights of Soviet citizens were being trampled the Constitution of the Soviet Union was one of the more protective of civil liberties. There was a serious gap between constitutional application and design in the former Soviet Union. It is easy for the same design and application problems to arise is docket management.

### **Continuances**

Where the expectation that continuances will be freely given exists, continuances will be frequently requested. When continuances are frequently requested and granted, the certainty of trial is diminished and requests for continuances increase because the necessity of trial preparation is less real to the litigators. Without a doubt continuances are frequently needed for various good reasons. The problem is how to fairly handle continuances without diminishing the expectation of trial and without requiring trial preparation in those instances in which a motion for continuance should be granted.

#### **First Motions for Continuance**

Let it be known that first motions for continuance will generally be granted absent extraordinary circumstances such as the impending death of a party or a special

setting having been obtained to accommodate out of state witnesses or experts not otherwise available. If this expectation is met, there are few demands for hearings on first motions for continuance. Being more restrictive on first motions for continuance is counterproductive. A restrictive policy on first motions for continuance does not allow for the realities of law practice. That is, that no one is perfect, there are cases that are not prepared when they should be prepared, lawyers have families and other obligations that too often are neglected because of professional responsibilities and sometimes a lawyer can be a hero if the lawyer is able to schedule around a client's conflict. A failure to grant first continuances as a matter of course also encourages additional hearings and deceit.

### **Second Motions for Continuances**

If a second motion for continuance is requested, it should be generally be known that it will not be granted absent an agreement of the parties evidenced by the signatures of the parties and the lawyers on the proposed order. This procedure destroys the myth that it is the court that is responsible for trial delay and in a period of a few months to a year eliminates second motions for continuance that are not agreed upon by the parties themselves. The unavailability of second continuances acts as a deterrent to the filing of first motions for continuances.

**Filing Requirements for Motions for Continuance** Filing requirements for motions for continuance are necessary to prevent continuances from interfering with the expectancy of trial. The requirements should differ depending upon how cases are docketed. When the matter sought to be continued is on a non jury docket allowing a limited amount of time, the number of witness will be small and the witnesses can be expected to be easily available and everyone on the docket expects to be reached within an hour of the time assigned, it is not necessary that the motion for continuance be filed in advance of the hearing. In fact, since many of these hearings are "show cause" hearings, it is likely that the person seeking the continuance has had an insufficient length of time to obtain a setting on a motion for continuance prior to the hearing sought to be continued. Jury cases, non jury cases requiring more than an hour, and cases with other compelling circumstances should not have motions for continuance granted unless they are filed a specified number of days prior to the hearing. Filing motions prior to an announcement docket is probably adequate+ .

### **Attorney Conflicts**

Lawyers with conflicting settings are not a significant problem if a court is actively involved in docket management. If an attorney has a conflicting setting, local rules should require notice to the courts having the conflict. There are statutes or rules providing for docket priorities where conflicts exist in most jurisdictions. When federal courts are involved, the statutes and rules do not apply but the conflicts are still seldom a problem when properly addressed. It continues to be true that most civil cases will settle and most criminal cases will plead. Continuances should not be required when conflicts exist. The conflicting case should remain on the court's docket, the conflicting court should be contacted and priorities between the courts established. The non priority court should not reset the case but should wait to see if the priority case settles or pleads. If there are extraordinary circumstances, most federal and state judges are

happy to work with other judges to alleviate difficult situations. Not requiring or granting continuances because of conflicts maintains the integrity of a one continuance rule and allows cases to be tried or settled when they might otherwise be continued.

### **Afterword**

Docket management is not an adversarial device pitting judges against lawyers. Good docket management lowers the cost of litigation, eliminates delay and improves the public perception of public justice. Public justice is the goal of the judicial system while individualized settlements should be the goal of good attorneys. Individualized settlements are more likely to occur when the judicial system quickly performs its task of administering public justice. Good docket management can be obtained through the study of individual dockets and modifications of docketing systems that manage time and resources in such a way that attorneys know the expectations of the court system, recognize that the expectations are real and react in a manner that is consistent with the swift administration of public justice. "The way things have always been done," is not necessarily the best way of doing things. Docket management needs to be considered from a systemic perspective rather than a, "What would happen if we changed this part?" approach. Mediation and many other alternative resolution techniques have arisen in part because of the failure of the judicial system to efficiently manage its dockets. Alternatives to litigation are valuable in reaching individualized settlements, but unless the court system more efficiently manages its dockets to lower the cost of litigation and increase the speed of the process, public justice will cease to be a meaningful social concept and an important and carefully woven part of our social fabric will have been destroyed. Lawyers have shown themselves unwilling to shoulder the responsibility for timely concluding litigation and so the responsibility must fall upon the shoulders of the judiciary. Historically, commerce, technology and other events moved more slowly than they do today and perhaps in the past there was a tolerance for the slow pace of public justice. That day, if it ever existed, exists no longer.