IADC COMMITTEE NEWSLETTER

TRIAL TECHNIQUES AND TACTICS

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IN THIS ISSUE

Time limited trials are on the rise – a look at the reasons why and strategies for your next "shot clock trial."

Up Against the Clock – Time Limits in Civil Trials

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice.

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The clock is counting down; it's tense; the sweat is building on your brow. You're running out of time. Are you a basketball star trying to make a buzzer-beating winning shot? No - you're a trial lawyer!

One of the more novel trial innovations over the last 5 to 10 years is the time-limited trial -- also known as the "shot clock trial." Of late, there are judges who use an actual clock to track and limit a party's time to put on their case.[1] When their use was first implemented, the tactic was applied infrequently and flexibly. As their use has increased, we have seen the flexibility decreasing.

Shot clock trials come in a variety of forms but all, including the concept itself, come with a common set of pros and cons.

I. The History

Shot clock trials have been around for many years now, but their popularity is on the rise. The first known use was in 1977 by Judge Jon Newman in the U.S. District Court for the District of Connecticut case, *SCM Corp. v. Xerox Corp.* [2] *SCM Corp.* was a private antitrust case involving 30,000 allegations of fact and when the time limit was finally implemented, had already dragged on for over three-and-a-half months and resulted in a 12,322 page transcript. In all that time, only two principal witnesses had been called by plaintiff. In an order limiting the remainder of plaintiff's case to an additional seven-and-a-half weeks, Judge Newman noted that although the evidence had included "highly probative material, counsel [had] not been content to introduce only such material, but [had] introduced additional portions that contribute little, if any, significant new information."[3]

At that point, the plaintiff was on track to complete his case-in-chief after seven months, three months beyond what was initially estimated.[4] Judge Newman determined he had a duty to limit the length of the trial for the proper administration of justice. He noted that both the Federal Rules of Civil Procedure and the Federal Rules of Evidence considered time relevant in litigation, pointing specifically to FRCP 1, which states that the rules are to be construed for the "'just, *speedy,* and inexpensive determination in every action.'" *Id.* (emphasis in original). Furthermore, FRE 403 permits the exclusion of relevant evidence when its probative value is outweighed by "'undue delay,'" and "'waste of time.'" Quoting *Wigmore on Evidence*, Judge Newman further stated that "'it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim. . . the rule should merely declare the trial court empowered to enforce a limit when in its discretion the situation justifies this…'"[5] Finally, Judge Newman also discussed the fairness to the jury to keep them impaneled so long, and the limits on the amount of

[1] We have not heard of a glowing red shot clock (yet), but we have experienced timers like those used in a chess match and virtual clocks for several parties tracked, to the second, by the court clerk.

[2] 77 FRD 10 (D Conn 1977)

[3] *Id.* at 12.

[4] *Id.* at 13.

[5] *Id.* at 14.

evidence a factfinder can reasonably be expected to take in.[6]

The use of trial time limits has expanded significantly since Judge Newman's ruling and has spread to both state and federal courts. Application of time limits does not always dictate the entire length of the trial. It can be limited to only certain parts of the case – for example, voir dire, openings and closings or limiting just the evidentiary portion of the case.

In its 2015 survey on various jury trial innovations, The Civil Jury Project at NYU Law School described time limits as "the most promising innovation."[7] In a survey looking only at jury trial time limits, the Project found that 67% of the judicial advisors to the project had set time limits on jury trials. It is possible judges participating in the Project are more open to testing alternative trial methods, but with more and more courts citing time limits as a best practice, that is probably not the case.[8]

II. Justification and Usage

What is the appeal, from the court's perspective, of placing time limits on trials and how do they justify it?

Judge Newman relied on a very broad FRCP 1 for his authority to set time limits in *SCM Corp.* Since 1993, federal judges have not had to exercise their authority under a catch-all. FRCP 16(c)(2)(O) was amended in 1993 to expressly authorize the court to set a "reasonable limit on the time allowed to present evidence."

Though the proponents of time limits offer many reasons for the use of the practice, it is primarily rooted in two considerations, one related to juries, and one to the courts – promoting juror satisfaction, comprehension and participation in the legal system, and preserving court resources.

A. Benefit to Jurors

According to Andrew Ferguson, Associate Professor of Law at the University of the District of Columbia School of Law[9], only 20-25% of summoned jurors nationwide show up for jury duty.[10] As a result, courts and scholars have examined strategies to increase juror participation. A key focus is decreasing the burden on jury service by limiting jurors' required time commitment. Roughly half of the states currently permit local courts to establish maximum terms of jury service.[11] About a quarter of all states limit jury service to one day/one trial or two to five days.[12]

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[6] *Id.* at 14, 15.

[7] https://civiljuryproject.law.nyu.edu/scholarship/jury-trial-innovations/

[8] *See, eg.,* Ninth Circuit Jury Trial Improvement Committee Report, http://cdn.ca9.uscourts.gov/datastore/uploads/jtic/FINALSecondReport.pdf; Stephen Susman and Thomas Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Case*, 20 VOIR DIRE 16 (2013) noting the practice has been adopted by the Eastern District of Texas; Nora Freeman Engstrom, *The Trouble With Trial Time Limits*, 106 GEO. L. J. 933 (2018).

[9] Professor Ferguson is the author of "WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION"

[10] Interview with Diane Rehm, "Jury Duty In America Today," American University Radio, aired Nov. 3, 2014.

[11] Hon. Gregory E. Mize et al, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007), National Center for State Courts, at 10, 11.

[12] *Id.* at 10

As trial lawyers, our experience tells us that a significant number of our civil cases would, if left to our own devices, go on for *much* longer than five days. In comes the shot clock.

In his article "Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: WWJD – What Would Jurors Want? - A Federal Trial Judge's View," Judge Mark. W. Bennett, a senior judge with the Northern District of Iowa shares the knowledge he has gained in nearly thirty years studying juries from the bench. Judge Bennett's experience is not simply anecdotal; he made it his practice to not only debrief jurors after every trial, but he also provided each with a questionnaire to fill out and return. Consistently, the jurors' number one complaint is that lawyers waste their time with repetition.[13] In Judge Bennett's experience, time limits avoid juror "frustration, boredom and disengagement."[14] Judge Bennett's experience is supported by the National Conference for State Court's 2018 survey wherein 50% of the responders described state court systems as "inefficient."[15]

In addition to addressing juror satisfaction and participation, juror comprehension has also been cited as a reason for setting time limits.[16] As noted in the *SCM Corp.* case, jurors simply cannot be expected to retain all the information they are presented with in a week long, or even longer, trial.

Finally, shorter trials arguably result in a jury that is more representative of the jury pool since most jurors able to sit for longer trials are typically retired or unemployed.[17]

B. Court Resources

Another justification for the use of time limited trials is that keeping trial time, at a minimum, is best for limited court resources and promoting judicial economy. Our court systems, particularly our state court systems, struggle with finding sufficient resources to shepherd their considerable caseloads. The ABA has called the lack of funding to our court systems "one of the most critical issues facing the legal profession.[18] Curbing the length of a trial has a positive impact on limited court resources by permitting them to resolve more cases.[19]

III. A Personal Anecdote

I had my first experience with a time limited trial four years ago in federal court. Prior to the trial, and after some discussion with each party about how long it needed for its case, the judge gave everyone a certain number of

[13] Bennett, Hon. Mark W., *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: WWJD – What Would Jurors Want?-A Federal Trial Judge's View,* 48 ARIZ. ST. L. J. 482, 493-94 (2016).
[14] *Id.* at 498.
[15] National Center for State Courts, The State of State Courts, 2018 Poll, https://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide/2018-State-of-State-Courts-Survey.aspx p. 3
[16] Schwarzer, William W., *Reforming Jury Trials,* 1990, U. CHI. LEGAL F. 119, 123 (1990).
[17] *Id.* at 124
[18] American Bar Association, "Task Force on Preservation of the Justice System," https://www.americanbar.org/content/dam/aba/publishing/abanews/1306428613about_task_force_revised052411.authcheckdam.pdf
[19] David Bissinger & Erica Harris, *Working on the Clock: The Advantages of Timed Trials,* Texas Lawyer, April 2, 2012

hours to put on their case. The time was divided equally between the plaintiff and defendants, though all defendants (there were two third-party defendants in addition to the defendant) had to split the defense portion of the time.

The case involved significant scientific evidence and was one that could have easily gone three weeks. The judge essentially gave us six days. It was certainly an ambitious schedule, but the judge was very clear with the attorneys, parties, and jury from the start as to how long the trial would last.

Each day, the clerk diligently kept track of the amount of time any party used, whether putting on its own witness or cross examining another's. The "clock" only ran when that party was using time to avoid any attempt to "run out the clock" by stalling or using up time. Each day, she let us know how much time we had left. Though my trial team and client were anxious about the restriction at first, it forced us to do three things: 1) take a very hard look at what we *needed* to put on to defend our case; 2) weed out what could have been redundant or inessential to the jury's deliberation; and 3) keep our examinations pinpointed and moving in the courtroom. In the end, my perception was that most, if not all, involved felt it resulted in a tighter, more focused, and efficient trial, with a more engaged jury.

Of course, not all experiences with time limited jury trials are the same. Critics argue that in some cases, time limits can impact the fairness of the trial, sap attorneys of their ability to exercise their own judgment and ultimately, alter the outcome of the case.[20] As Professor Nora Engstrom of Stanford Law School points out, the potential cons of trial time limits may be much greater than their possible rewards. When applied inflexibly, they "incentivize strategic gamesmanship," "slant the playing field," and shift "authority from the advocate to the adjudicator and from the juror to the judge."[21]

There is a wide spectrum in how time limits are applied at trial. At their best, arguably when they are applied with the input of parties and counsel and in a flexible way, accommodating for unforeseen events, they can be very effective at narrowing the issues for a more focused case. However, there is always room for abuse in any system and when applied rigidly, they may cause real harm.

IV. Strategy

If faced with the potentially more damaging type of time limit, what is a savvy defense lawyer to do?

First, seek to participate in the determination of the time that will be allowed and how it will be divided. Unless each party's trial activity counts only against it, the process is open to abuse and gamesmanship. For example, if defendant is allotted three days for its defense, and plaintiff's time is not tracked independently, then plaintiff's counsel has an incentive to make baseless objections and draw out cross-examination. If the time is only attributed to a party when they are actively engaged, the incentive to slow the process down is removed. If, for instance, the

[20] Engstrom, *supra* n. 8, at 949.

[21] *Id.* at 982.

court in my case had assigned three trial days to plaintiff and three to defendants, there would have been a baked in incentive to stretch out witnesses during cross examination and use up each other's "day." With the shot clock, you only effected the overall time you had during trial. If defense counsel "wasted" too much time cross-examining plaintiff's witnesses, they would leave precious little time for direct examination of their own clients.

Second, examine every aspect of your planned case: work smarter and pare down. Is there a witness you planned on calling that is not essential to your case? Is there a more efficient way to present your evidence? Can one witness offer evidence on more than one issue?

Third, if either the time allotted or the method of calculating its use is unfair, preserve your appeal. Object to the order. And if the worst happens and you run out of time to put on your case, make an offer of proof of the evidence you would have put on had there been more time. An attorney in a civil rights case failed to make that offer of proof and the court of appeals upheld the trial court, finding that although the lower court turned a "federal trial into a relay race" by applying inflexible time limits, the party failed to preserve the issue by not showing what it would have done with more time.[22]

Finally, embrace it. It is the closest you might get to the feeling of hitting a buzzer-beating shot.

[22] *McKnight v. General Motors Corp.,* 908 F2d 104, 115 (7th Cir. 1990)

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