

LIMITING THE LENGTH OF TRIALS—  
THE SHORTER THE BETTER

Texas Bar Advanced Civil Trial Course  
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I. In civil cases, in virtually every jurisdiction, the court has the power to limit the length of the trial.

A. A growing number of courts around the country are doing so. Many more federal than state, but those of us that have been around long enough remember that the innovation actually pioneered by Judge Bunton here in the WD of Texas, in Midland of all places. Those of you who dabble in patent infringement cases, know that the federal judges of the Eastern District have honed the technique to a science, trying multi-billion dollar infringement cases in 5 days.

B. And this creates new challenges to the trial lawyer

II. Why is it being done—myths and reality

## A. Myths

1. *Court don't have time to conduct long trials:* recent studies show that the number of days judges, state or federal, spend in trial has drastically shrunk over the last few decades
2. *Trials are too expensive:* even without time limits, jury trials are less expensive than judge trials and any trial is less expensive than arbitration

## B. Reality

1. *The shorter the trial, the better the jurors:* all of us have seen the kind of jury you get when the Court tells the panel in advance that the trial may last more than a few weeks
2. *The shorter the trial, the sooner the trial:* a favorite tactic of a defendant dreading trial is to

tell the court how long it will take to try the case; we all know how far out judges have to go to set lengthy trials.

3. I have a hunch that a shorter trial is a fairer trial because it forces the lawyers to focus on what really matters and keeps the jurors from losing interest.

4. I am certain, however, that a shorter trial does not produce a less fair result, particularly if both sides are competently represented

a) Mock trials prove me right on that score

b) Cases that normally take weeks to try are mock tried in a day, and the reason they are mock tried is that trial lawyers have discovered that these exercises are powerful predictors of the outcome

C. When I find judges who are reluctant to set time limits, it is usually because they either are genuinely concerned about being fair to clients whose lawyers cannot present their cases quickly or because it is difficult to teach old dogs new tricks.

1. As to the former, I uniformly hear from judges who set time limits that the lawyers rarely use up all the time they are given and that the judges almost never have to give someone more time.

2. As to the difficulty of getting courts to try something new:

a) My firm was involved in two trials in Los Angeles this week. In one, the lawyers had agreed at the start of discovery (using my Pretrial Agreements) to number all exhibits sequentially so that nothing would need to

be renumbered at trial, deposition references would match trial exhibit numbers and you didn't have to say "plaintiff" or "defendant", just "exhibit". The Judge insisted that the exhibits be renumbered, only for the reason that that's the way he always did it. The Judge actually admonished me not to try to bring Texas innovations to CA.

- b) In another case, the trial judge announced a rule that unless the parties stipulated otherwise, if any part of a deposition was played to the jury, the entire thing had to be played. You can imagine that no depositions were played at all.
- c) I still have trouble convincing federal judges that it makes sense to instruct the jury before

rather than after the lawyers present their final arguments.

III. But let's assume you are before an enlightened judge who sets time limits—here are some ideas to make it work better

A. Courts should tell the parties, before discovery starts, when the case will be tried and how much time they will have. It is plain wasteful to take 100s of hours of depositions when you are only going to have 15 hours to put on your entire case, including live testimony.

B. The time should always be evenly divided and should be counted against the lawyer standing up or reading or playing deposition designations.

1. I would exclude voir dire because too much happens beyond a lawyer's control

2. I would also set separate time limits for openings and closings because I think it is important that

both sides have the same amount of time. Where the time for receiving evidence is limited, it probably makes sense to allow more fulsome opening statements

3. The court should announce and adhere to set hours for taking testimony and breaks, so that lawyers can plan when their next witness will be on the stand

C. Counsel should reach agreements on the following:

1. A time, well in advance of trial, for providing each other with realistic will-call live witness lists. When my opponent abuses this by listing more witnesses than he can possibly direct in his allotted time (which should be roughly 50% of the time allotted to him to be questioning witnesses), then I ask the Court to threaten to

make him call every witness he lists. That tends to produce a winnowed list.

2. Juror notebooks that contain a glossary, cast of characters, chronology and key documents, and an agreement that jurors can look at their notebooks whenever they are in the jury room
3. The pre-admission of all unobjected to exhibits
4. Preliminary jury instructions on the substantive issues
  - a) Lawyers overestimate the importance of repetition as a teaching tool, but it is true that in a trial that proceeds quickly, there is some danger that the jurors may not get it till it's over.
  - b) Whether that's true or not, there is some fear on the part of lay litigants that they have

more to explain than can be accomplished in a short time

c) The use of teaching aids of any kind improves both jury comprehension and our perception thereof

5. Another technique that is said to increase juror comprehension in an abbreviated trial is to allow the lawyers to make interim arguments that count, of course, against their allotted time
6. Advance notice of the order of all witnesses and then of each witness actually called the next day
7. A system for having depositions designated, counterdesignated, objected to and ruled on in time for playing video clips
8. A protocol for jurors to ask questions

9. Timekeepers on each side who meet and confer and then report to the Court on how much time was used per side

IV. Once the rules are for time-limited trials have been set, the lawyers have to carefully plan how to use their time.

A. I use a trial plan, or budget, that assumes that the cross will last as long as the direct of each witness

B. I then determine who my live witnesses will be and how much time I will have to question each one.

1. In this process I eliminate a lots of witnesses that might otherwise be on even a good-faith will-call list

2. I also eliminate almost all depositions

C. I then insist that everyone on my side who is conducting a direct, prepare a written Q&A that can be

timed and tested to fit within the time limit assigned to his witness.

- D. At the end of each day, we determine whether we have stayed within the budget and make adjustments going forward
- E. Cross-exams of each witness are also assigned time limits and rigidly enforced among the trial team: the result is invariably better quality crosses that go right for the jugular.