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'Trial by the Clock': Has the Time Come?

BY JEFFREY G. WEIL AND ISSA MIKEL
Special to the Legal

WEIL MIKEL

JEFFREY G. WEIL *is chair, and* **ISSA MIKEL** *is an associate, of the commercial litigation department at Cozen O'Connor.*

A few weeks ago, we had a trial in federal court. The case involved alleged misrepresentations in connection with the sale of auction rate securities and was relatively complex. There had been 25 depositions, and over 500,000 documents were exchanged. Liability was vigorously contested, and damages were complicated because the principal damage was lost liquidity — not a readily calculated drop in the security's price.

The two sides whittled their combined witness list down to 15, which included five experts. We prepared for what both sides thought would be a moderately lengthy jury trial. But the court had other ideas. Instead, just days before trial started, the court ordered a "clock trial" limiting us to half the time we had planned.

The case involved the sale of a relatively obscure security called an "auction rate security." Given the subject, it would take some explanation for the jury to understand the case. After all, most jurors have no familiarity with the securities business — and it would be especially so with auction rate securities.

After analyzing how best to present the case, counsel for both sides agreed that it would take two weeks to try the case — and so informed the court. Much to our surprise, the judge said, "No way."

He ordered us to choose a jury on Friday morning, give openings that afternoon and to finish by the following Friday morning — so he could charge the jury Friday afternoon. He went so far as to assign specific hours to plaintiff and to defendant — to use as they please — but not to exceed the total. The plaintiff was given a few more hours than the defendant.

So we were forced to squeeze a two-week jury trial — with 15 witnesses, openings and closings — into five trial days. The case settled on day two of the trial, but it made us wonder: Is this constitutional? Does it violate due process? Is it an abuse of discretion? Or, in the end, is it an effective and positive use of judicial power that forces economy on counsel and encourages settlement by parties?

What do we conclude from our "clock trial" experience and our review of the law? We have two overriding conclusions. First, although there are times when counsel abuses the process and plans inefficiently for trials, for the most part "clock trials" should be avoided. The courts exist for the purpose of trying cases. And when parties wait a long time for their "day in court," the system fails them if it arbitrarily forces the parties to forgo evidence that they deem important or to limit cross-examination for the mere sake of saving time. Rather, it seems more appropriate for the court to monitor the trial's progress on an ad hoc basis, watching the trial unfold before making judgments about possible inefficient conduct by counsel.

Second, despite our practitioner's concerns about being hamstrung in how we try our case, the law is solidly on the court's side on this issue. Trial judges are given wide berth in regulating the conduct of trials, and the Constitution's due process clause provides safe harbor from overly active trial judges in only the most extreme of judicial storms.

Federal courts have uniformly held that trial judges have broad discretion to manage their trials and that such discretion includes the imposition of reasonable time limits. A leading 3rd Circuit decision is *Duquesne Light Co. v. Westinghouse Electric Corp.*, decided in 1995. The 3rd U.S. Circuit Court of Appeals held that although there is no express rule allowing courts to impose time limits on trials, the federal district court has "inherent power to control cases before it."

This general authority is anchored in the Federal Rules of Civil Procedure themselves, which provide in Rule 16 that "the court may consider and take appropriate action on ... establishing a reasonable limit on the time allowed to present evidence ... ." One nearby federal court, in the Middle District of Pennsylvania, has a local rule expressly empowering trial judges to impose limitations on trial. In addition, the Federal Rules of Evidence allow judges to exclude even relevant evidence in deference to "consideration of delay, waste of time, or needless presentation of cumulative evidence."

There is good reason for granting such discretion to trial judges. First, the courts are often overworked, and our judicial system is resource constrained. Second, there are frequent instances where counsel "gild the lily" at trial, seeking to persuade the jury through redundant testimony. In these instances, the trial judge must have the ability to limit the presentation of testimony and enforce some modicum of efficiency in the proceedings.

But what about due process? Surely it provides counterweight to what some may see as unbridled judicial discretion in managing trials. To our surprise, the due process counterweight proves light. Indeed, we could find no cases overturning "clock trials" on due process grounds. The closest is a 5th Circuit opinion finding that the time restrictions unfairly impinged on the plaintiff's right to trial, but the court then concluded that a longer trial would not have changed the outcome — rendering the error harmless. In another case, a federal court in Texas held that nine hours per side did not violate due process, especially where the parties did not timely object, request more time or even use their full allotment of time.

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In the opinions upholding "clock trials," there is an implicit bias that gives great weight to the interests of the trial judge in avoiding lengthy trials. The same result can also be justified in a less self-interested way by noting the inconvenience that a lengthy jury trial causes jurors or by emphasizing that in bench trials the court's experience eliminates the need for repetitive or tediously detailed evidence.

There is also the unstated pressure that a "clock trial" creates to settle a case. Anything that alters the plans of counsel or upends the expectations of a party creates some pressure to settle. That is especially true if the "clock trial" is imposed midtrial or just before trial, rather than weeks or months ahead of trial.

The "clock trial," then, serves several salutary purposes. It conserves limited judicial resources, forces distillation of evidence upon counsel, spares jurors the inconvenience of lengthy trials and creates momentum for settlement. But at what cost? Despite the systemic benefits resulting from a "clock trial," a party's interest in having a "full" trial should not be understated. The right to jury trial is a constitutional right, and as a practical matter most litigants wait two or three years after a case is started for their day in court. An artificially truncated trial is an improper systemic reward to a litigant who already feels let down by the slow and expensive course of pretrial proceedings.

The best approach, then, is one of balance. Trial judges should sparingly use their authority to impose "clock trials" on litigants. As the 3rd Circuit observed in *Duquesne*, "a district court should impose time limits only when necessary, after making an informed analysis based on a review of the parties' proposed witness lists and preferred testimony, as well as their estimates of trial time. And the court must ensure that it allocates trial time evenhandedly."

In short, if a court decides to restrict counsel's presentation of testimony before the trial has even started, it is best done several weeks in advance and after a reasoned analysis of the case and discussion with counsel about their trial plan. If the court concludes that counsel's plan is inevitably redundant, inefficient, or wasteful of limited court resources and jury time, then it may issue a carefully crafted order, setting forth reasonable time limits, and giving each side adequate time to prepare for the shortened trial.

And what should counsel do? If lawyers wish to avoid court-imposed time limits, they should work cooperatively with opposing counsel to propose a reasonable trial schedule. Lawyers should demonstrate to the court that they can cooperate to conduct an efficient trial without judicial intervention. They should also know whether their judge has previously used "clock trials" and be prepared to show that their own trial plan renders a clock trial unnecessary.

What if that's not enough and the court orders a clock trial? First, be sure everyone understands before trial what the time limits are and how time is to be measured. Judges vary greatly in what they charge toward time limits and against which party it is charged. Some judges count everything, including opening statements and closing arguments, direct and cross, objections, side-bars, breaks and voir dire. Others count less. Make sure everyone is clear on the rules from the outset.

If the plaintiff is given three days for his case, does that mean his case must start on Monday and end on Wednesday? If so, the

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defendant can effectively shorten the plaintiffs' time with extended cross-examination. So the fairer approach is — as happened in our recent case — an allotment of hours. That way, an extended cross-examination of the plaintiff counts against the defendant's time, not the plaintiff's. And should the party with the burden of proof get more time than the other party? Or should each side get the same time? Courts differ on this, and it might be a decision best determined by the facts of each case. Where all things are equal, perhaps the party with the burden of proof explanation and trial time.

Once the ground rules are established and understood, counsel can't fall asleep at the switch. There is more to do. Remember to have a reliable method for keeping precise track of time. Counsel should confer with each other, and the court, at the end of each day to tally the time used by each side and avoid discrepancies. People, even judges (and certainly self-interested lawyers), make mistakes. Never allow yourself to be surprised.

Also, if during the course of trial you believe the time limits have been applied unfairly or are having adverse effects on your case, object early and often. Ask the court to modify its original plan to meet the changing experiences of trial.

rejected objections to time limits where counsel was not able to state specifically what evidence they would have presented, how much time they would need to present it and why their case would be prejudiced without it. Do so in a reasoned manner, without reference solely to generalities about "complexity" and "prejudice." Give the judge specific details about evidence foreclosed and cogent arguments about why you need additional time to present your case fully.

"Clock trials" are not very common, and for the most part that is a good thing. But in the right circumstances they are a useful management tool — and one that not only impresses discipline on counsel, but encourages settlement. In today's world, counsel should be aware of the possibility of a clock

should have more time. But often a plaintiff can put its case in easily, and it is the defense that is complicated and requires more

Finally, a party objecting to time limits must be ready to articulate what harm the time limits cause. Courts have repeatedly

trial. Counsel also should know how to minimize the risk of it happening and how to respond if forced into that situation. •