Tick Tock:
The Case on the Clock

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TICK TOCK: THE CASE ON THE CLOCK

"On the clock." It's a phrase no one wants to hear, and connotes a sense of urgency—and pressure—to perform. In the NFL draft, "on the clock" signals the start of the limited time team management has to sort through a myriad of choices, contingencies and analysis before making personnel decisions that may affect a franchise—for better or worse—for years to come. Professional golfers are put "on the clock" when their pace of play becomes so slow that officials follow them with a stopwatch and enforce rules governing the time allowed between shots. In both contexts the message is the same: get it right, but do it faster.

Increasingly, trial lawyers are being put on the clock by judges who are overworked, understaffed, overwhelmed with criminal and civil dockets and impatient with lawyers who "overtry" their cases.

Pilot projects, local rules and judicial eccentricity can all promote the idea that a case—even complex cases with multi-million dollar exposures—can and should be tried on a tighter schedule.

This presentation discusses how to adapt your trial presentation to meet these new rules, and how embracing the rules might actually make for a better trial "on the clock."

I. THE SOURCE OF THE TICKING

Statistics show that judges presiding over our federal courts increasingly have little prior civil trial experience, and are unlikely to get substantial experience on the bench. In 2010, there were 309,361 civil cases filed. Only 3,309—1.1%— were resolved through trial, and roughly two-thirds of that number were jury trials. Of the civil cases tried, more than 75% lasted three days or less. More than half were 1-day trials, and 60% were bench trials.[1]

[1] 2010 Annual Report of the Director: Judicial Business of the United States Courts.

One commentator has noted that, on average, a U.S. district judge tries fourteen cases per year (civil and criminal combined), which last an average of 4-5 days—resulting in 300 days a year the average judge is not presiding over trial. Thus, federal judges "are now more like administrative agencies than trial courts" in disposing of their cases.[2] Part of that administrative judging involves reducing the length of trials, so the judge can return to the daily task of mediating discovery disputes, increasingly those dealing with electronic discovery.

This trend has resulted in efforts to both trim the scope and nature of discovery through "pilot projects" and other administrative tools, such as extensive Pretrial Order forms and checklists.[3] For example, in the U.S.D.C. D. Colo., many judges require the parties to estimate the length of time for both direct and cross-examination of each witness to be called at trial. Those estimates are added, become the hours set aside for trial, and each side is allotted 50% of the total. A chess clock kept by the court clerk ticks down each side's precious minutes, forcing trial attorneys to make tough decisions about what to present—and what not to present—and how.

While this approach can bring certainty to the proceedings for all involved (judge, juror, attorneys and clients), it can impinge upon a litigant's due process rights if taken to the extreme. One FDCC member had a federal judge allow a mere 7.5 hours for presentation of trial evidence in defense of all 16 named defendants accused of breach of fiduciary duty—less than 30 minutes per defendant—despite multi-million dollar compensatory and punitive damages claims. Not surprisingly, this required a Petition for Mandamus to insure the clients' right to a fair trial.

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[2] Higgenbotham, P., The Present Plight of the United States District Courts, Duke Law Journal (2010).

[3] *See, e.g., In re: Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York.*

This is an extreme example, and most courts' time limitations simply seek to strike a balance between allowing parties to have their day in court, without turning that day into weeks or months. Once trial counsel has insured his client's due process rights have been protected, the challenge becomes structuring the trial presentation to insure that you not only stay within the court's limitations but hopefully use them to your client's advantage.

II. YOU CAN'T FIGHT CITY HALL—OR CAN YOU?

Courts have broad discretion in setting even strict time limits on the length of trial. Federal Rule of Civil Procedure 1 states the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Similarly, Federal Rule of Evidence 102 tells judges to administer every proceeding "fairly," but to "eliminate unjustifiable expense and delay...." Federal Rule of Evidence 403 gives the trial judge wide discretion to exclude even relevant evidence, and Rule 611 provides that "the court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to...avoid wasting time." Federal common law is in accord, and expressly endorses trying cases "on the clock."[4]

However, it is just as clear than an inflexible and overly restrictive application of time limits can deprive a litigant of its constitutional right to a fair trial. *Lemons v. Skidmore*, 985 F.2d 354 (7th Cir. 1993). Even the dean of law and economics, Judge Posner, noted that to "turn a federal trial into a relay race is to sacrifice too much of one good—accuracy of factual determination—to obtain another—minimization of the time and expense of litigation."[5] Thus, the Fifth Circuit criticized a trial judge who, in a trial involving claims of sexual harassment and

[4] *See, e.g., Duquesne Light Co. v. Westinghouse Electric Co.*, 66 F.3d 604 (3rd Cir. 1995).

[5] *McKnight v. General Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990).

retaliatory discharge, gave the litigants 5 minutes each for opening statements and 5 hours combined to present evidence.[6]

Thus, trial counsel must be careful to preserve his client's due process rights, even while trying to play within the court's rules.

III. TIME IS ON YOUR SIDE—IF YOU PLAY IT RIGHT: PROCEDURAL TIPS

If you are put "on the clock" at trial, there are a number of ways to turn the court's own time restrictions to your client's advantage. In many cases, especially pattern litigation involving the same products, issues and experts, the client will pressure trial counsel to follow a well-established "script" which, in a particular case and/or jurisdiction, may not provide the best odds of winning. Having developed a robust "book" on an opposing expert for cross-examination, many clients expect their trial counsel to use all of that ammunition in each trial—regardless of how long it may take. In these cases, being put on the clock can be liberating, as "it requires counsel to exercise a discipline of economy choosing between what is important and what is less so. It reduces the incidence of the judge interfering in strategic decisions. It gives a cleaner, crisper, better-tried case. It gives a much lower cost to the clients. Finally, it will save months of our lives." *United States v. Reaves*, 636 F. Supp. 1575 (1986).

Below are some suggestions of ways to capitalize on a court's time limitations:

A. Introduce expert CVs as exhibits and establish the expert's qualifications and background by leading questions.

- Particularly useful if there is no *Daubert* challenge, or such challenge has been denied;

[6] *Sims v. ANR Freight System, Inc.*, 77 F.3d 846 (5th Cir. 1996). However, since the appellate court found the evidence presented in the extremely abbreviated trial was so overwhelming against the plaintiff, it affirmed the verdict for defendant and did not rule the trial court's time limitations were an abuse of discretion.

B. Make ample use of Rule of Evidence 1006 summary exhibits

- A good way to present key technical, medical, engineering and other data-intensive documentation through visually-appealing demonstrative charts that are easy for a jury to follow;

- Requires preparation and creativity: must provide backup data and supporting information to your opponent "at a reasonable time and place," likely well before trial. If opponent objects, make them identify the basis, and try to resolve before trial;

- Address summary exhibits through pretrial motions and at the pretrial conference, stressing to the court the time savings.

C. Use Fed.R.Civ.P. 16 and Local Practice Standards to Propose Procedures Which Save Time—And Help You Persuade

- Press hard to obtain a set of Stipulated Facts that the other side should—but doesn't want to—admit;

- Present deposition designations through written summaries read by the lawyers, and lodge the supporting testimony as a court exhibit;

- Propose progressive argument whereby each side may use a prescribed amount of time (say 60 minutes) throughout trial to address the jury directly about the importance of certain evidence and/or testimony.

IV. PITCH FROM THE STRETCH, HANDLE THE MERCHANDISE AND ROLL THE TAPE: SUBSTANTIVE TIPS

A. Pitching from the Stretch

Lawyers are often too fond of the warm-up, and lose jurors' interest by the time them make their "pitch." A good example is the lengthy qualification of expert witnesses, before getting to their key opinions in the case. Here again, the rules are your friend:

- Rule 705: "[A]n expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts."

- Rule 703: An expert can rely on facts or data that would be otherwise inadmissible, but those facts or data might be admissible after all—requires a Rule 403 analysis.

Consider getting the expert's key opinions and exhibits before the jury right away, then backfill with a more focused review of the expert's relevant case-specific experience, qualifications and supporting data, rather than building up to the ultimate opinions slowly.

B. Handle the Merchandise

A picture is worth 1,000 words—and props may be worth 10,000. With limited time to persuade a jury, providing visual anchors for your client's key points can make a bigger impact in less time that documents and testimony. Using the court's time limitations as justification, the trial lawyer can argue for presenting demonstrative evidence that might otherwise be excluded. For example:

- Ask to publish key evidence to jury (documents, medical records, products/components);
- Use blue ribbon exhibits that look important—and memorable;
- Use full-scale parts, mock-ups of products and, 3D animations (need court approval and opponent's consent);
- Ask to perform in-court demonstrations to illustrate key points.

All of these tactics can be met with objections that, if lodged during trial, may convince the judge more time is being wasted than saved. Get organized early, raise these ideas in the Pretrial Conference and, if possible, demonstrate to the court and counsel just how you intend to use these tactics to save valuable time.

C. Roll the Tape

As many presentations have stressed, jurors' attention spans are increasingly short and dependent upon visual stimulation. Give it to them. For key evidence, prepare short videotaped demonstrations. Lay the foundation as quickly as possible then show the videos. After getting the jury's attention, <u>then</u> have your witness explain the video's significance, and show it again for emphasis. If your time is limited, pick visual evidence that leaves a lasting impression.

V. CONCLUSION

Trying a case “on the clock” presents numerous procedural and substantive challenges, but may also present some unique opportunities to outlawyer your opponent. While trial counsel must protect the record to insure the client receives a fair trial, look for ways to use the ticking clock to your advantage.