Timed Trials
Worth a Try

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"I don't know whether it's fair or not, but I do know that at the end of the day it will be over." So said the late Judge Dickinson R. Debevoise of the District of New Jersey in convening my first timed trial back in 1984. Judge Debevoise was a meticulously fair jurist, and his comment was, as was his nature, self-deprecating. In reality, the hearing was both fair and efficient, and it began what has been, for me, a career-long preference for timed trials.

The 1984 case was a preliminary injunction hearing in which Judge Debevoise gave each side three hours to present its case, including argument and direct and cross of witnesses. The hearing started at 9:00 am and, low and behold, when we got to 5:00 pm, after morning and afternoon breaks and an hour for lunch, the hearing was, indeed, over. Judge Debevoise issued an injunction shortly thereafter, and the case moved forward expeditiously.

Since that time, I've had more than 20 timed trials and all of them have worked well, satisfying both the ends of justice and the legitimate needs of clients.

I've never really understood the reasons against timed trials other than the dislike that many lawyers have of being limited in the presentation of their cases or, occasionally, the reluctance of the judge to control the proceedings in his or her courtroom. But timed proceedings are a fixture of our judicial system. Certainly, no one would tell the Supreme Court that the red light on the podium means nothing. Timed trials have even more advantages than timed oral arguments. Here they are:

Convenience of the jurors. If the trial is scheduled to take eight trial days, the jurors can be told at the outset they are being picked for a trial in which the evidence will be presented in eight trial days. (Deliberation time is the only element that cannot be budgeted.) That enables the jurors to plan for other events in their lives, starting with when they will return to work.

Convenience of witnesses. If a trial is timed, then the parties can make reasonable estimates about when a witness will appear and when one party will rest its case. That, in turn, allows witnesses to know when they should be available to testify. This is particularly important for expert witnesses or those coming from out of town, but every witness can benefit from fair notice about when he or she is needed.

Convenience of the court. When a trial is timed, the court may schedule other proceedings with reasonable assurance that its schedules will be met. Judge Sue L. Robinson in the District of Delaware has long used timed trials in civil proceedings. She has more than once commented from the bench that if she were not allowed to use timed trials, she would resign her judgeship. The ability to schedule other proceedings with certainty benefits not only the court but also the parties in those other matters.

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Convenience of counsel. Like everyone else, counsel can plan their lives around a trial of a knowable length. It is a great convenience for busy lawyers to be able to say that they can be available for a conference two weeks from tomorrow because the trial is scheduled to be completed by then.

Sharpening the focus. Although the convenience offered by timed trials is great, it is in my view the least important reason to have timed trials. More important is that time limits squeeze the fat out of cases and result in trials that are focused on the real issues. Lawyers hate to abandon arguments. Good ones know that too many arguments are harmful, not helpful, because they cause their case to lose focus. But even the best attorneys are sometimes reluctant to let go of a peripheral issue that they have lovingly nurtured through years of discovery and development. Timed trials force lawyers realistically to confront what actually matters to winning their case. And when they do that, guess what? They may suddenly discover that an issue they thought was important really doesn't matter very much.

In one of my early timed trial experiences, the parties to a complicated false advertising case appeared before the late Judge William C. Conner of the Southern District of New York. The case was the culmination of the so-called aspirin wars between the makers of Tylenol and Advil, and it raised an almost endless list of issues involving the safety and efficacy of both drugs. The plaintiff sought 12 weeks for trial. Our side, the defendant, sought eight weeks. Judge Conner shook his head and discounted both sides' arguments about the many issues that simply must be tried. Six weeks will do it, he said. And it did.

What got left on the cutting floor? Side issues that belonged there. If you've ever complained about a movie that ran an hour too long, you know the benefits that editing can bring to any presentation. That discipline works wonders at trial. The trial before Judge Conner was easily completed on time, and the opening lines of his opinion give a hint of the endless dispute that the parties would have tried had he not intervened and imposed some limits:

> This lawsuit represents a major battle in an endless war between two titans of the over-the-counter ("OTC") drug industry. . . . Small nations have fought for their very survival with less resources and resourcefulness than these antagonists have brought to their epic struggle for commercial primacy in the OTC analgesic field.

Hostility to Timed Trials

In my experience, most judges have been receptive to some form of timed trials. And even if the judge does not explicitly agree to time the trial, if the judge allocates a fixed number of days for the trial, I have often been able to agree with my adversary

to keep time and divide it between the two sides. That is just a practical way to get the trial completed on time.

But some judges are hostile to the idea. Years ago, I had an old-school judge in Chicago who presided over a series of bitterly contested trials. I tried to get him to impose time limits, but the other side objected. The judge rejected my request for limits, saying that he trusted lawyers to try their cases and to decide on their own what evidence to present. The result was, in my view, an incredibly expensive waste of time. The case had begun with a one-day preliminary injunction hearing in Delaware, which we won. The case then went to Chicago for the trial on the merits. With no limits, witnesses were on the stand for days, not hours. The exact same case that took one day to try in Delaware took three months to try in Chicago—and it yielded the same result. After two more trials in the series each went on for many months, the other side finally relented and, in the final trial in the series, agreed to time limits. That final trial went reasonably expeditiously and was completed on time.

In only one case have I heard a judge express unhappiness with a timed trial after the fact. That was a case in Florida, where, in hindsight, the parties had agreed on more time than was necessary. As a consequence, when both sides rested, there was ample time remaining. The judge was an excellent trial manager who ordinarily liked to control the courtroom and move things along when he thought they were dragging. He had refrained from interfering at this trial because he thought the nature of the timed trial was to relinquish that control. He said he would never do it again. I think the better answer is that a judge has every right to remain an active judge and to tell the parties to move on when they are spending too much time on something, but that is no reason to discard the very idea of a timed trial and its tremendous advantages.

How Do Timed Trials Work?

The most important ingredient in a timed trial is setting the time at the outset. Typically, judges hear from both sides and come up with a time somewhere in between. When that is the premise for the time limit, it invariably works. Sometimes judges set a time limit that is lower than either party proposed, as Judge Conner did. In that case, the litigant is relying on the judge to have a fair-minded assessment of the needs of the case and to set a time limit that can work. In my experience, I have only had one occasion in which a time limit was too short, and that was at least in part my own fault. The case was in the Eastern District of Texas, notorious for reducing complex technological

cases to the bone. Knowing that would be the judge's preference, I agreed to five days for a trial that, in hindsight, should have been eight to 10 days. (I lost the trial, but won on appeal.)

Once the time limits have been set, the parties have the job of implementing them. I have occasionally encountered judges who have preferred to keep their own time, usually by having a clerk run the clock. Most commonly, however, the time-keeping assignment has been delegated to the parties. While this seems like a risky proposition, given the acrimony often present in litigation, I have found that it works well. A paralegal on each side is assigned the task of keeping time. The rules are simple. If a lawyer for a party is standing up and talking or examining a witness, the time is charged to that party. This includes objections, oral arguments, statements to the jury, and examination of witnesses. Sometimes courts time only presentations to the jury; arguments on objections don't count. Sometimes judges will decide after the argument who to charge the time to. In any event, the timekeeper's job is simply to record when a lawyer starts talking and when he or she stops.

It is crucial that the timekeepers on both sides compare notes at every break. In most courts, there is a break after every hour and a half or so of trial time, and so disagreements can quickly be identified and resolved. I have hardly ever experienced a disagreement over more than a minute or two. At the end of the day, the tallies are totaled and compared again. Typically, the tally is then presented to the courtroom clerk. Or, if the court clerk is keeping time, the parties compare their end-of-day time record with that kept by the clerk. In this approach as well, disagreements are typically minor and usually resolved.

A side note on deposition transcripts. There are sometimes disagreements about whether depositions should count against the time limit. In jury trials, there is no dispute: Depositions must be read (or the video played) to the jury, and so, of course, the time they consume counts. For simplicity, all that one party designates counts against that party's time; all that the other party counter-designates counts against that party's time. In bench trials, some judges allow parties to submit as many pages of deposition transcript as they want, without regard to the time limits. To my mind, this destroys the discipline of the timed trial and lets a party insert too much extraneous material into the record. Even if the judge takes the transcript to read, rather than listens to it read aloud (or played) in the courtroom, I think the better rule is to assign some time value to each page so that, for instance, each page that is designated counts for three minutes of a party's time. That restores control and discipline to the process.

Besides the mechanics of keeping time, the lawyers on each side must then budget their time in order to try the case within the time limits. I am obsessive on this subject, and as the lead lawyer, I always assign to myself the responsibility of budgeting and keeping time. (One of my lessons is that the task of budgeting

time is one of the most important variables in a successful presentation and should not be delegated. When opposing counsel do not pay attention to time in a timed trial, they tend to spend it lavishly in the opening days and then wind up short of time when it matters.) At the start of every case, I create a time budget. For example, half an hour for my opening, two hours for the direct of our most important witness, 15 minutes for minor witnesses, etc. I will do the same allocating cross-examination time and summation time. And I always reserve some extra time for contingencies. To a large extent, I back into these allocations. For example, if I have 20 hours to try the case, I will carve out two hours total for opening and closing. That leaves 18 hours, which I split in half: nine hours for presenting our case and nine hours for crossing the other side's witnesses. I will then assign time budgets for each witness, both those we will present on direct and those for cross. I am ruthless in managing those time budgets during the trial. When a lawyer is within five minutes of the allotted time, I will put a warning note on the podium. When time runs out, my note says "sit down." No exceptions (well, hardly any).

Timed proceedings are a fixture of our judicial system.

With a time budget set, lawyers can work with their witnesses prior to trial to develop a presentation that fits their allocated time. In my experience, this works miracles. Every lawyer wants more. My very talented colleagues always want to present more information than will fit in their time allocation. I tell them to resist the temptation to squeeze in more by talking faster. Talking slowly, at a normal pace, gives them the right amount of information to present effectively to the jury. The effect is magic. Distractions and duplications disappear, and cases turn on what is actually important.

In court, I keep time carefully, noting when an examination starts and finishes for direct, cross, and redirect. It is rare for there to be a good reason for one of our trial team to exceed the allotted time in examining one of our own witnesses. Typically, that happens only if the cross has exposed an issue that needs more time to patch up on redirect than expected. Deviations from budget on cross-examination are more common. If the cross is going well and useful information is being elicited, I may let the examiner know, by slipping her a note, that she can go over her allotted time. That is why there is a contingency in the budget. But deviations must be carefully monitored or the budget will be blown. A blown budget can be a disaster; it will force shortening critical time necessary for other examinations later in the case. Each day, I tabulate the total time and compare it against the budget. When necessary, I rework the budget. Almost invariably, this results in my having enough time for summation with time left over.

What Happens When You Mismanage Time?

This has happened occasionally in my experience (to other parties), and the judges have been understanding yet strict. I have seen judges extend the time for both sides by a modest amount or, in one case, grant time to the other side for summation when it had run out of time. That case featured a single question on cross-examination from a party otherwise out of time that I thought was brilliant—but that wound up backfiring.

With essentially no time left, my adversary could not cross-examine my star expert witness whom I had recalled on rebuttal. Instead, he asked a single question that, at the time, seemed to me to be inspired. (These quotations are reconstructed from memory.) "Dr. Buller, I heard you testify for the last several days in support of Mr. Diskant's case. Is there anything that Mr. Diskant says that you disagree with?" In only one question, counsel had effectively suggested that the witness was just a mouthpiece for our side. What would the answer be? As it happened, Dr. Buller was an extraordinary scientist whose testimony was, no more and no less, exactly what he thought. And so, after a moment's reflection, he answered, "I always disagree with Mr. Diskant when I think he's wrong. For example, you put Dr. Jones on yesterday. I thought his testimony was completely valid and I thought Mr. Diskant's cross-examination was incorrect." Following up on this remarkable display of independence, but trusting my witness (and holding my breath), I asked on redirect, "Dr. Buller, I recognize you disagreed with my cross-examination of Dr. Jones, but does that have any effect on your opinion in this case?" Whereupon, Dr. Buller explained at great length why he thought we were right and should win. A brilliant witness. And we won.

My career has thrived with timed trials. I like the discipline it imposes on me and my trial team. By careful budgeting, I hoard time during the trial, and almost invariably, I have time left when the case is over. (I often joke that the inscription on my tombstone should read: "But I have time left!") But more than just the preference of one lawyer, I think timed trials serve the public interest in speedy and fair justice—fair to courts, juries, witnesses, counsel, and the parties. I urge lawyers and judges who have not experimented with timed trials to give them a try. ■