UNDER PRESSURE:

THE FOUR-DAY TRIAL

BY PATRICIA STAMBELOS AND ALEX W. CRAIGIE

Trial looms; it is just a few short weeks away. You represent the defendant in a serious sexual harassment case ("serious" meaning allegations of sexual assault and battery). Discovery has been challenging, but fruitful. The parties identified and interviewed or deposed over 30 witnesses. Notebooks contain mountains of documentary evidence, including "juicy" email exchanges, investigation materials, therapist notes, company policies and expert reports. Trial has been a long time coming, and, approaching counsel table for the Final Status Conference, you fully expect the court will agree with the parties' joint assessment that it is reasonably going to take three weeks to try the case to verdict.

To your surprise, however, the judge, a seasoned Federal District Court jurist with nearly 30 years on the bench, has completely ignored the parties' trial estimate. He announces, as the conference gets going, "I don't see this as a three-week trial. I'm going to give both sides four days to try the case." And he means it.

A few weeks and exactly *four days* later, you finish closing arguments as the judge stops his timer for the last time and begins instructing the jury. Yes, he used a *timer* throughout trial to ensure the lawyers adhered to his strict time limits. Each side was given exactly 20 minutes to present their opening statement, a specified number of minutes for all witness direct and cross examination, and 40 minutes per side to present closing arguments. Fortunately, your opponent was less prepared, less organized and, frankly, had the weaker case. After just a few hours, the jury returns a verdict in your client's favor. You've won!

Though elated at winning a defense verdict, you find yourself trying to make sense of what just happened. It's all a bit dizzying. *Did we really try all those issues in just four days?*

While courts have long employed various procedural tools to streamline judicial efficiency, there is scant empirical evidence indicating whether courts are increasingly forcing parties to "compress," or substantially abbreviate, their presentation of evidence at trial. It is clear that progressively fewer cases are actually being tried in our courts,[1] and some jurisdictions have experimented with "expedited" one-day jury trials of certain kinds of cases.[2] Only a fraction of the disputes that ripen into litigation, however, may be amenable to an expedited one-day trial.

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This article explores the concept of a "compressed" jury trial — where a trial judge drastically abbreviates both parties' time for presenting their case. The authors tried and won a compressed case similar to the circumstances described above and, indeed, came away dizzy but invigorated by the experience.

We begin by examining a judge's discretion in this area. Did our seasoned District Court judge push the envelope, thereby making the defense verdict vulnerable on appeal? We next look at reasons why, in certain cases, drastically condensing trials might be just the right prescription for loosening the judicial log jam and making jury trials — the most democratic method of dispute resolution — both more accessible and user-friendly. We consider, for example, how litigants might get both a better jury pool and fresher jurors if more courts condense trials.

We also explore ways that trial lawyers who are better prepared and organized can capitalize on this abbreviated evidence presentation. In conclusion, we argue that, as more courts will hopefully adopt this kind of "compressed" trial format for cases in which it may be appropriate, smarter trial attorneys will not just reluctantly comply, but actually embrace this approach as a way to bring back the vanishing art of the jury trial and provide their clients with better access to justice.

Judicial authority to control the duration of a trial

Trial judges enjoy tremendous discretion in controlling the processes in their courtrooms. There is no question that this discretion includes the power to limit the duration of a trial.[3] While discretion is not (or should not be) synonymous with absolute authority, a losing party challenging the trial judge's limitation of time to present evidence, even a drastic limit, will find little in the way of helpful authorities.[4]

But while a trial judge clearly has authority to force parties to drastically shorten their evidence presentations, the question becomes whether this is the right thing to do. Interestingly, it turns out there are some pretty good reasons why setting tight, even drastic, time restrictions on evidence presentation can be a good, even game-changing idea.

Access to justice and the "vanishing" jury trial

Trial lawyers, both newly minted and experienced, lament the fact that fewer and fewer disputes are submitted to a jury for resolution. Perhaps the glory of presenting a case to a jury is over-romanticized, but it is telling that there are senior litigation partners in AmLaw 100 law firms who have never examined a witness before a jury. Not every litigator longs for trial experience, but many do.

The real issue, however, is not whether trial lawyers get to ply the trade which drew them into law school, but whether our clients are getting adequate and timely access to justice. As state and federal budgets tighten, we hear more and more that courtrooms are remaining vacant. Judges retire and are not replaced. Non-judicial court personnel face furloughs. Yet while public funds for courts and judges decline, there is little to stem the flood of litigation. New cases are filed every day. A steady stream of lawsuits with a declining availability of staffed courtrooms means it gets harder, and takes longer, for a dispute to wend its way through the judicial system.

Most cases settle short of trial, and the declining availability of judges or staffed courtrooms is not the reason. Parties wisely evaluate the risks of relinquishing control over the outcome of a dispute by giving it to a jury (not to mention the cost) and, more often than not, one or both sides yield and a settlement is reached. Often, this is assisted by the involvement of a mediator or magistrate judge. A few cases resolve through dispositive motions. This leaves only a small percentage of disputes that would ever reach a jury.

But for the rare client or case that needs a trial to resolve the dispute, there is no question that the judicial "log jam" is a problem. It can take several years for a case to reach a jury in some jurisdictions. Not only is this frustrating for litigants, it is costly. Ultimately, it erodes the public's confidence in our judicial system.

There is reason to believe that severely shortening the duration of trials could help loosen the judicial log jam problem. But it will be a "trickle down" process. In our example, a trial estimated by counsel to last three weeks is shortened to four days, or less than one-third the original estimate. Put another way, almost three similar cases could be tried to verdict in the period originally estimated by counsel for one trial. This frees courtrooms and judges. An increase in the availability of courts and judges to try cases that were languishing and all but dormant will not only get parties into trial quicker, it will also bring them to the bargaining table sooner, as the threat of relinquishing control of the outcome of a case to a jury grows imminent. More cases getting to trial for shorter duration, combined with parties coming to the bargaining table sooner, should help to unclog the courts, which is a sound reason to further explore "compressed" trials.

This argument in support of compressed trials is subject to a very important caveat. It only makes sense to compress a trial that is reasonably and logically compressible. If it really will take several weeks for the parties to fairly present their case, then a compressed trial will cause more harm than good. Key witnesses and crucial evidence must not be suppressed purely in the interest of time management. Judges contemplating abbreviating a trial, particularly one involving complex issues, must give authentic consideration to this concern, even allowing briefing or argument by counsel if there is any question whether the trial of a case can appropriately be compressed.

Wake up, jurors! You'll be done in just a few days

Two considerations about jurors help make the case for more compressed trials. First, in a normal world, cases of any complexity are automatically expected to last two weeks or more. Depending on the jurisdiction, prospective jurors may need to be prequalified for any level of commitment beyond a week. While government agencies and large corporations may provide for 10 days or more paid jury service in a given year, the jury pool before prequalification typically includes small business owners and employees, sole proprietors, single parents and students, for whom the prospect of three or more full-time weeks serving jury duty ranges from a severe hardship to an impossibility.

As a result, trials requiring several weeks tend to yield a far different, less diverse jury pool from cases that can be tried in five days or less. Parties may reasonably worry about a "dilution" of sorts in the quality of their jury pool as the trial estimate grows. A compression from long to shorter duration trials will help reduce this dilution, because there will be more trials in the one- to five-day "sweet spot" when a wider variety of potential jurors could be available. An added benefit could be reduced burden on government agencies and large corporations, as formerly "long cause" jurors from their ranks are selected less frequently or serve on shorter trials and return to work sooner.

Juror attention should be another factor favoring shorter trials. This argument is twofold. First, it requires little thought to see that information imparted to a juror on the first day of a trial is less likely to be retained by day 21 than by day four: "Lengthy trials can tax even the most attentive (and retentive) juror's ability to remember testimony and exhibits."[5]

But this oversimplifies the point. The real benefit to juror attention comes not from fewer trial days, but from the fact that lawyers will be forced to streamline the quantum of information conveyed during the trial. Studies confirm that jurors tend to be overwhelmed by the amount of information presented during a trial, becoming bored, confused and frustrated.[6] Trial lawyers facing a judge with a stopwatch will either tighten their presentations or lose control of the evidence presentation as the judge cuts them off mid-stream.

Again, compressed trials will result both in reduced juror time commitment and a reduction in information overload. Both factors should lead to a more diverse body of mentally "fresh" jurors deciding cases. Even in court

Strategy Checklist for Compressed Trial

- Research your judge. Recognize early whether your judge is going to drastically shorten the parties' time for evidence presentation, and opening and closing statements.
- Tailor discovery, using requests for admissions, to make it possible to quickly introduce undisputed foundational or background facts that would otherwise waste time. Use requests to admit authenticity of documents. Try hard to stipulate to authenticity and document these efforts to show the judge.
- Carefully cut unnecessary witnesses and evidence, making your trial presentation more of a short story and less of a novel.
- Aggressively use mock trials as a tool. Do so even if done "on the cheap" or if it stretches the trial budget slightly.
- Set aside ample time to prepare client and friendly witnesses for trial testimony. Make the direct examination predictable without becoming mechanical.
- Liberally use pretrial motions to seek exclusion of your opponent's evidence. Such motions may have a greater likelihood of success in the compressed trial environment than otherwise.

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trials, there is reason to believe imposing time limits will force lawyers to tighten their presentations, becoming more efficient and effective in the process.

A question of dollars and cents

It is no secret that exorbitant, runaway costs are a major reason clients shy away from defending cases — even "slam dunks" — through trial. Any general counsel or chief financial officer who has reviewed a law firm's billing following a lengthy trial can attest to the experience, which varies from jaw-dropping surprise to sheer anger. It is not hard to see how reducing a three-week trial to four days would benefit a client's bottom line.

Preparation could actually cost more for a compressed trial, as greater thought and care are given to what must be shown versus what can be cut from the presentation. Even so, trimming the number of 16-hour trial days by half or two-thirds is guaranteed to cut the cost of trial, making it a real option once again. Here again, the benefits will trickle down. Serially sued defendants who decide to take a few meritless cases to trial — and win them — may find they are no longer serially sued defendants.

Cooperation, anyone?

Finally, the notion of stipulating to facts and to authentication of documents is not completely foreign to trial lawyers. But, it's not necessarily routine either — although it should be. Even if counsel (and their clients) cannot stand to be in a room together, there is rarely any benefit to refusing to come together and stipulate to authenticate documents. Courts increasingly require counsel to meet and confer before trial to agree where they can on authentication. In the case of a drastically compressed trial, as they should in anticipation of any trial, counsel has no choice but to give serious consideration to stipulating to both authentication of documents and facts that are not seriously in dispute. It becomes imperative to save trial time for the meat of the matter.

How to make it work

A logical next step for practitioners who find themselves in front of a judge who is reducing their trial estimate by half or more is to look for ways to turn this development to their client's advantage. If, as we predict, there comes a time when trials are routinely compressed, better lawyers will permanently change the way they prepare. Now, however, while it is still rare for a judge to force parties to significantly cut short their presentation of evidence, there is a window for the most astute lawyers to make real changes in their pretrial practice, which can give clients the upper hand against an ill-prepared or disorganized opponent. Here are some ideas.

Start from the start

Seasoned trial lawyers pay a lot of attention to the name of the judge they draw. Unlike litigators, all judges try cases. There is typically information in the way of feedback available on a judge, including how they like to conduct trials. If any of this intelligence suggests your judge is predisposed to force counsel to compress their evidence presentation (references to a "timer" or "stopwatch" are good indicators), start planning for a shorter trial from day one.

One method is to tailor written discovery to enable foundational evidence and documents to come in without lengthy witness testimony. Requests for admissions can be effective, if used to seek admission of authentication and foundational facts. Hopefully, your opposition will admit the requests without much fuss. If not, and motion practice is required, this creates an early opportunity to sensitize the judge to the fact you and your client are embracing, not fighting, the compressed time limits. Additionally, if the requests for admission are propounded far enough in advance of depositions, they can streamline the deposition process, as well. This becomes especially helpful in federal court, where the number and length of depositions are severely limited. Long gone could be the days of spending the time and money to ask the judge for more than seven hours (or one day) to take a plaintiff's deposition or seek to take more than the maximum number of depositions permitted. In those circumstances where the other side is intent on undertaking a "fishing expedition" or wants to drag out discovery, the judge or magistrate might need to shorten the process and scope so that the parties don't waste so much time and money on discovery.

Shed your inner novelist and become a short-story writer

This will only ring true for trial lawyers who take seriously the need to not just feed information into the minds of the jurors, but to really weave the evidence into a narrative that permits the jury to identify with their client.

Narratives are expressed in a variety of forms; novels and short stories are the ones with which most Americans are familiar. Most fiction writers who write both stories and novels say that the compression required of a short story makes it the more challenging medium. This is probably true of presenting information in a trial, and could explain why trials take longer than they should.

It takes both careful consideration and a measure of courage to dispense with evidence that doesn't directly advance a major theme of the story we are trying to tell. Careful thinking is required: We must picture ourselves going through the elements in a closing argument. What is the best possible evidence that establishes a given element? It takes guts, too, because no one wants to find themselves on the losing end of a verdict, questioning whether they made a serious mistake by eschewing a piece of evidence that might have changed the outcome.

But there is a lot to learn from the contrast between a short story and a novel. Stories dispense with unnecessary throat clearing and get right to the action. Does the jury really need to hear how the company was founded and grew from a garage to large conglomerate? Modern stories also tell facts in a non-linear way, out of sequence, which necessarily highlights certain events or points in time. Evidence is often introduced during a trial in a way that does not follow a logical or chronological sequence. This is more likely in a compressed trial, because the windows of opportunity for a witness — such as a busy expert — to testify are smaller. We slot them in where the timing fits, not where it makes logical sense. These circumstances put a premium on preparation and presentation of the closing argument. Closing is the time to tie together the evidence that came in at odd times or perhaps didn't make a lot of sense at the time. However, because the closing, like the rest of the trial, will be shorter, not a minute can be wasted with anything unnecessary.

Mistakes to Avoid When Trying the Compressed Case

- Stick to the established time limits for direct and cross-examination. Don't be forced to "jam up" later witnesses because too much time was spent examining early witnesses.
- Don't assume the judge is "just kidding" about the time limits and that you'll get extra time at the end. You could be wrong. Let your opponent be the only one to make this mistake.
- Don't be late to court. Ever. A judge using a stopwatch will probably count every minute of delay occasioned by your tardiness against you.
- Don't expect an appellate court will reverse an adverse jury verdict based on an argument that your client did not have sufficient time to present her case. Judges have substantial authority to control the timing of evidence presentation.

Prepare witnesses like never before

As mentioned, shorter jury trials should ultimately save clients money. One place not to cut costs, however, is in time spent preparing witnesses for their trial testimony. Most witnesses, including business owners and executives, fail to appreciate the importance of testimony preparation until they are on the stand for the first time. Then it becomes crystal clear.

In a compressed trial, there is simply no time for a client or friendly witness to go off the reservation. Scripted question and answer exchanges should be discouraged, as they sound mechanical and insincere. But each question and a hypothetical response should be practiced numerous times if at all possible.

Charts and demonstratives — anything with numbers — can be especially challenging in the compressed trial format. This is because many (lawyers included) struggle to process information containing numbers. Rehearsing testimony with any witness where there are numbers or complicated concepts should be a priority. Time and attention should also be spent on preparation of clear and concise demonstrative exhibits. A few clear demonstratives are less time-consuming and far more effective than several that make the same point from different perspectives. Yet the compressed trial format again allows your clients to save money on the blow-ups that you might have used if you had hours and hours before a jury; you have to limit your demonstrative exhibits to only those that impart substance absolutely necessary to the jury's determination in your client's favor.

Mock trial

Consider every case that will be presented to a jury and submit it to a mock trial, even if it is done "on the cheap" or strains the budget. Would you present a play or shoot a movie scene without rehearsal? Just hearing you deliver a statement, question or argument out loud in front of an audience yields positive results. Add the benefit of getting feedback from mock-trial participants: What worked? What didn't? What information was superfluous and what should you not have left out? There is no question that presenting a mock trial of certain parts of a case should be considered a key component of successful trial preparation.

Where the time for evidence and argument are drastically limited, the need to do one, or even several, dry runs

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of said argument is even greater. Back to the short-story analogy, try presenting the mock jury with the most abbreviated quantum of evidence possible. Get feedback, then add some evidence and see if it makes appreciable difference to their thinking. In this way, it becomes possible to gain an understanding of the net benefit (or detriment) of any particular item of evidence. Adding your opponent's evidence incrementally in this fashion is also helpful toward understanding what matters most about her case — the "punching bag" effect.

One tactic we stumbled onto quite by accident,[7] but which we would recommend in a compressed jury trial, is the "punching bag" effect. Realizing halfway through trial that we had spent too much time cross-examining the plaintiff, we decided we had to line up several witnesses back-to-back, to offer brief snippets of testimony over the course of one afternoon. The effect was dramatic and kept the jury awake.

In a trial of normal length, there is typically an opportunity for the jury to get to know even a minor witness. The jury establishes a rapport with the witness (or not), and the jurors have an opportunity to digest the information presented. In a compressed trial, only a few witnesses can testify long enough for any real rapport to develop, yet information still needs to be conveyed. Recognizing and accepting early on that protracted direct examination of several witnesses will throw your side behind schedule is important.

Rather than lamenting this fact, however, turn it into an opportunity to punch and counter-punch. Develop only the most minimal necessary background (unless the witness possesses something with which jurors might particularly identify, such as military service). Then get to the point of the testimony. Avoid getting bogged down with foundational questions that do not advance the ball. If you initially estimate a witness will take 30 minutes, change your thinking and tailor your questioning so he is on and off the stand in eight minutes. The next witness should be waiting immediately outside the courtroom, ready to go. If this is done with three to four witnesses in rapid succession, it should have impact with the jury, particularly as the internet, Twitter and text-messaging have trained our minds to expect and appreciate short, rapid bursts of information.[8]

Use motions to limit evidence

Using in limine motions to limit evidence presented during trial is nothing new. However, such motions take on a new importance and value in a compressed trial. First, it is crucial to move in limine to exclude evidence that, although it may not be hugely damaging to your client's case, nonetheless requires testimony and evidence (i.e., time) to put into perspective. Time wasted responding to marginally relevant evidence offered by your opponent is time that cannot be spent presenting your client's more crucial evidence. It is time the jury cannot spend developing a rapport with your friendly witnesses. And it is time that is not available to ex-

ACC Extras on… The Four-day Trial

Quick Reference

- Witness Preparation Checklist (Oct. 2011). *www.acc.com/quickref/witness-chklst_oct11*

Presentations

- Preparing and Protecting the Company and Its Witnesses at Deposition and Trial (Oct. 2010). *www.acc.com/cmpny-dpstn_oct10*
- Anatomy of a Trial: Influencing the Outcome from the Client's Chair (Oct. 2008). *www.acc.com/antmy-trial_oct08*
- Judicial Perspectives on Electronic Discovery (Oct. 2010). *www.acc.com/prspctv-ed_oct10*

Form & Policy

- Trial Strategy Memo (May 2011). *www.acc.com/forms/trial-strtgy_may11*

Article

- Deposition Preparation 101: The Nuanced Approach (Oct. 2011). *www.acc.com/dpstn-prep_oct11*

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plain, in the clearest terms possible, information like figures and numbers, which typically require time to "sink in."

A judge presiding over a compressed trial may also be more amenable to making bold evidentiary rulings in the interest of ensuring the trial adheres to her time limits. Motions in limine that might otherwise have little chance of success suddenly become real possibilities if the judge considers the motion in light of saving precious time.

Preserving the record for possible appeal

Counsel must remember to ensure the record is complete in the event the verdict is challenged on appeal. Courts of appeal rarely consider arguments made for the first time on appeal, even where counsel suggests the trial judge did not allow them sufficient time. Even when doing so runs the risk of consuming scarce trial time, or frustrating an already impatient judge, counsel must make sure the record is as complete as necessary.

A bold idea

We recognize that not every case lends itself to a compressed format. Where facts are complicated, or the witnesses are too numerous and too crucial for the case to be tried effectively and fairly without receiving testimony from all or nearly all of them, it is hoped that the judge will refrain from imposing unreasonable time limits on the presentation of evidence.

Where counsel perceives that the issues and evidence could be presented in a compressed fashion, however, we think that thought should be given to estimating or even requesting a shorter trial. If opposing counsel is inexperienced or not paying attention, the possibility exists to gain a tactical advantage by requesting, then properly preparing for, a compressed trial where even the judge has not suggested it.

Redefining normal

The practice of judges ordering the parties to compress their cases from several weeks to several days may not yet be the norm. But sound reasons exist why requiring more trials to be completed in a substantially shorter amount of time might benefit our clients, by increasing access to justice, improving the quality of jurors, enhancing juror attention and reducing the cost of taking cases to trial.

When practitioners find themselves preparing to try a compressed case, there are steps that help ensure a positive outcome. These include early planning and discovery, ample preparation of witnesses, changing the style of narrative from a novel to a short story and liberal use of motions in limine to limit the opponent's evidence. Trial practitioners are encouraged to incorporate these suggestions into their practice, and embrace rather than simply endure the abbreviated trial format, which we may see as more frequently practiced in the future.

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Notes

1 See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," *Journal of Empirical Legal Studies*, Vol. I, Issue 3, 459–570 (Nov. 2004).
2 See Nancy McCarthy, "Expedited Jury Trials Offer All Litigants Their Day in Court," *California Bar Journal* (August 2010).
3 Federal Rules of Civil Procedure, Rule 16(c)(2)(O), provides judges with the discretion to "establish ... a reasonable limit on the time allowed to present evidence."
4 See, e.g., Elizabeth G. Thornburg, "The Managerial Judge Goes to Trial," 44 *U. Rich. L. Rev.* 1261 (2010) ["Similar to pretrial management decisions, there is no established body of legal principles on which the parties can rely when making arguments about litigation timing. There will be no body of case law from which one can conclude that ten minutes is too little but thirty is enough. ..."].
5 United States Dist. Court for the Middle Dist. of Pennsylvania Civil Jury Trial Bench/Bar Task Force, Final Report (Oct. 2, 2008) (*www.docstoc.com/docs/119693998*).
6 Roy Krieger, "Now Showing at a Courtroom Near You," *A.B.A.J.* (Dec. 1992).
7 The authors successfully tried a "compressed" trial in the Fall of 2011, much like the scenario set out at the beginning of this article.
8 See Bill Haltom, "Twelve Angry Tweeters: The Effect of Twitter on the Jury System," *Verdict* (Winter 2010).