

Timing is Everything: Timing Orders for Trials in Federal Court

By Bryon Rice and Sara Hilkemann

When U.S. District Judge Alvin Hellerstein issued a timing order equally dividing the time the parties had to present their case at trial in the Southern District of New York in the last wrongful-death suit resulting from the 9/11 attacks, the attorneys were shocked.¹ Their reaction is not surprising. Having spent years preparing for trial, the last thing the attorneys wanted to hear is that the judge is restricting the time in which they have to present their case.²

But timing orders in federal court are not uncommon. Many district judges routinely limit the time in which lawyers have to present evidence at trial. Take, for example, the following two cases in which the district judge restricted the number of hours that the parties could use to present their case. In *Seymore v. Penn Maritime Inc.*, the court restricted the defendant's cross-examination and presentation of its case to ten hours.³ On a plain error review, because the defendant did not object at trial, the U.S. Court of Appeals for the Fifth Circuit determined that the district court not only did not abuse its discretion, but stated that, "We are convinced ... that Penn had sufficient time to develop its defensive theories and present its case."⁴ Similarly, in *McClain v. Lufkin Industries Inc.*, a complex Title VII class action that spanned almost a decade and in which plaintiffs questioned the defendant corporation's subjective decision-making, and implicated all of its divisions, the district court allowed each side only twenty hours to present its case.⁵ Chief Judge Edith H. Jones empathized with the defendant corporation—writing, "[W]e do not doubt that it was difficult for Lufkin to mount a defense ... in the mere twenty hours the district court allowed each side"—but nevertheless found that Lufkin had failed to persuade the Court that it "suffered reversible prejudice," depriving it of a fair trial.⁶

Indeed, federal judges have broad discretion in marshalling cases through their courts: not just in ruling on evidentiary matters or in sentencing convicted criminals, but also in deciding how much time that the parties take in their courtrooms to present their cases to the jury. The U.S. Court of Appeals for the Fifth Circuit has recognized that implementing time restrictions on trial—through a timing order or by simply controlling the pace and time of examination of witnesses—is a valid and effective method for a federal judge to use in managing a docket.⁷ Although these time restrictions cannot be onerous or favor one party over the other, a federal judge may "comment on the evidence, question witnesses, elicit facts not yet adduced, or clarify those previously presented," and "maintain the pace of the trial by interrupting or *setting time limits on counsel*."⁸ Moreover, the Fifth Circuit has made it clear that requiring parties to enter stipulated facts, not permitting lawyers to refer to stipulated facts, actively managing the trial, and expediting the presentation and questioning of witnesses "are all procedures that we view as tools that well serve our system of dispute resolution."⁹ Only when "information to a jury is judicially restricted to the extent that the information becomes incomprehensible"

and "the essence of the trial itself has been destroyed" does the Fifth Circuit say that a trial judge's tactics have gone too far.¹⁰ Indeed, one of the most useful tools for a judge, in ensuring that a case moves along, is the implementation of a timing order. Its effectiveness in compelling lawyers to streamline their cases and focus on the important aspects of trial is unparalleled, even if unpopular.

But timing orders are not just useful in civil cases. Several circuits have found these same judicial tools also appropriate in *criminal* cases.¹¹ For instance, in *United States v. Gray*, the Fifth Circuit noted that the district judge

frequently interrupted the defense testimony and questioning with admonitions not to waste time, to leave various issues for final argument, and to avoid repetition. The court strictly curtailed questioning on cross examination that appeared to go outside the scope of the direct examination, and ... ordered [Defense] counsel during cross examination to **sit down before his time was finished** ... and twice told the prosecutors to sit down.¹²

The Fifth Circuit characterized the district court's actions as made "not by partiality for the prosecution, but by antipathy to wasted trial time," noting that the trial court had directed the same tactics at both the prosecution and the defense.¹³

Many other courts agree that the district court may place time limitations upon the presentation of evidence and examination of witnesses in criminal cases.¹⁴ In *United States v. Vest*, for instance, the Seventh Circuit approved of the district court setting time limits on cross-examination.¹⁵ The court found that the time limits were reasonable because they "were reasonably anchored to the defendant's own requests for time and to the amount of time the Government used on direct."¹⁶ The court recognized that the district court "issued an order asking the parties to estimate the time needed for direct and cross-examination" and allowed the defense to have double the amount of time that the Government used on direct.¹⁷ Similarly, the Fourth Circuit, in *United States v. Janati*, found that the trial court was well within its discretion to limit to three days the time in which the government had to present its evidence in a 62 count healthcare fraud case.¹⁸ Citing the Fifth Circuit's opinion in *Sims v. ANR Freight Systems*, and the First Circuit's opinion in *Borges v. Our Lady of the Sea Corporation*, the *Janati* court reiterated the broad discretion a district court has to "manage trials," even in criminal cases.¹⁹

Without doubt, the decision to issue a timing order in a criminal trial takes more care and scrutiny by the court. The defendant, of course, is not guilty until proven so beyond a reasonable doubt. He has no burden or requirement to present any evidence. Defense attorneys are not obligated to ask even one question. So soliciting an outline of the proposed time they may need to present their case requires prudence. The Fifth Circuit, however, has repeatedly upheld timing orders issued in criminal cases.²⁰ And because the judge who entered the order is also trying the case, he or she has the flexibility to extend the time that a lawyer may take in presenting their case. As one court stated: "Time limits are best used as guideposts rather than deadlines

in criminal trials, and time limits are no substitute for involved trial judges who must always shepherd trials along, curtailing repetitive, irrelevant, and immaterial questioning.²¹

So how do timing orders work in practice? Most commonly, the judge will issue an order before trial, eliciting from the parties the time they think they will need for trial, including the time for opening statements, direct and cross-examination, and in some cases, summation. After reviewing the parties' estimates, the judge will determine, using his or her discretion and experience in trying similar cases, how much time the parties will actually need. Careful not to deprive any party of the time necessary to adequately present their case, or unduly burden a party with too-restrictive of an allotment, the judge will measure the amount of time that each side will be given (weighing the number of witnesses the parties each plan to call, the number and complexity of the claims alleged to be decided by the jury, and the number of exhibits to introduced into evidence). The judge will then enter the timing order, laying out a specific amount of time that each side's attorneys will have to put on their entire case. More often than not, the time allowed is substantially less than the time that the attorneys proposed. One U.S. district judge in the Southern District of Texas has stated that during his 25 years on the bench, during which he has routinely issued timing orders in numerous cases, only once has he found it necessary to grant the parties additional time beyond what was allowed for in the timing order. In that rare instance, an intervenor was given thirty extra minutes. The case involved complex railroad tariffs and the role of the intervenor was unclear from the start. After recognizing the intervenor's role, the judge gave the party the time it needed to adequately present its case.

Although timing orders may be generally unwelcome, attorneys are well-advised to accept rather than fight them. If an attorney believes the judge's timing order unduly burdens his or her opportunity to present the case, the attorney can always ask for some additional time and explain the reasons extra time is necessary. The outcome of Judge Hellerstein's order in the 9/11 case is yet to be determined. Regardless, the judge has given each party its day in court—even if it is measured in hours.

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Endnotes

¹See Benjamin Weiser, *Judge Hearing A Last 9/11 Suit Has Set Timer*, NY. TIMES, April 28, 2011, at A1.

²*Id.*

³*Seymore v. Penn Maritime, Inc.*, 281 Fed. App'x 300, at 302 (5th Cir. June 5, 2008) (per curiam).

⁴*Id.*

⁵*McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282 (5th Cir. 2008).

⁶*Id.*

⁷See, e.g., *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996) (Parker, J.) (“We recognize that a district judge has broad discretion in managing his docket, including trial procedure and the conduct of the trial.”).

⁸*Id.* at 849 (emphasis added).

⁹*Id.*

¹⁰*Id.*

¹¹See *United States v. Colomb*, 419 F.3d 292, 298–300 & n.15 (5th Cir. 2005) (Fitzwater, J., sitting by designation) (recognizing the district court's discretion to utilize “structural limits,” such as limits on time and on the number of witnesses); *United States v. Maloof*, 205 F.3d 819, 828 (5th Cir. 2000) (Dennis, J.); *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004); *United States v. Gray*, 105 F.3d 956, 962–65 (5th Cir. 1997) (Jones, J.); *United States v. Wallace*, 32 F.3d 921, 928 (5th Cir. 1994).

¹²*Gray*, 105 F.3d at 963–64 (emphasis added).

¹³*Id.* at 964.

¹⁴See *United States v. Cousar*, No. 06-007, 2007 WL 4456798, at *5 (W.D. Pa. Dec. 16, 2007) (imposing time limits in thirty-nine count mail fraud and conspiracy trial of forty hours for the Government and twelve hours for the defense based on parties' estimates); *United States v. Hildebrand*, 928 F. Supp. 841, 844 (N.D. Iowa 1996) (“There seems to be no disagreement among the federal courts that district judges have broad discretion in managing their dockets, including trial procedure and the conduct and pace of trials.”).

¹⁵*United States v. Vest*, 116 F.3d 1179, 1186 (7th Cir. 1997) (“[T]he District Court imposed time limits on the cross-examination of the Government experts. When Vest's counsel reached those time limits, the District Court prohibited further questioning even though Vest's counsel had not yet cross-examined the expert regarding four [other issues].”).

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Janati*, 374 F.3d at 275.

¹⁹*Id.* at 273–75 (“[D]istrict courts have the discretion to ... fix the length of a jury trial ... and to place limitations upon the cross-examination of witnesses.” (citing *Sims*, 77 F.3d at 849; *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 442–43 (1st Cir. 1991)).

²⁰See *supra* note 11.

²¹*Vest*, 116 F.3d at 1186–88.