1992

The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials

John E. Rumel
University of Idaho College of Law, jrumel@uidaho.edu

The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials

By JOHN E. RUMEL*

Introduction

TOWARD THE END of the American film classic "The Wizard of Oz," the Wicked Witch of the West decrees that the ancient timekeeper, the hourglass,[1] will determine the heroine Dorothy's fate. As the sand trickles down, the tension builds to an excruciating level until Dorothy's rescuers finally arrive. In frustration, the Wicked Witch shatters the hourglass.

Rarely used in the past,[2] the hourglass has recently found its way into the courtroom.[3] Trial judges, exercising their role as case managers, skeptical about attorneys' willingness to streamline the presentation of evidence, and concerned that burgeoning dockets will undermine the public's right of access to the courts, have increasingly placed time limits on the evidentiary portion of civil trials.[4] Thus, after waiting years to get

* Visiting Associate Professor of Law, Santa Clara University School of Law. J.D., 1981, University of California, Hastings College of the Law; B.A., 1977, University of California, Santa Cruz.

The author was a partner in a San Francisco law firm and appeared before Judge Brown only once. He would like to thank Professor Richard P. Berg for reviewing and making helpful suggestions on a prior draft of this Article, and Santa Clara University law student T. Michelle Laird for providing valuable research assistance.

1. An hourglass measures time by the regular flow of sand through a small hole at the mid-point of two connected bulbs of glass. Its use dates to the early 14th century. Historically, the hourglass was used at sea to navigate and to time the ship's watch. On land, the hourglass has been used for such diverse purposes as timing sermons and boiling eggs. 14 ENCYCLOPEDIA AMERICANA 458 (1981). It was first used as a metaphor for time limits on trials in McKnight v. General Motors Corp., 908 F.2d 104, 114 (7th Cir. 1990).

2. *See* Report to the President and Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, 80 F.R.D. 509, 536 (1979) [hereinafter "Antitrust Commission Report"]; *see also* Roger W. Kirst, *Finding a Role for the Civil Jury in Modern Litigation*, 69 JUDICATURE 333, 337 (1986).

3. Kirst, *supra* note 2; Mark Cursi, *Tick, Tick, Tick, Tick . . .*, S.F. REC., Apr. 4, 1991, at 1.

4. *See infra* section II. This Article will limit its analysis to time limits on the evidentiary portion of civil, primarily federal, trials, and will refer to that practice as "trial time

to trial, litigants and counsel may now face limited time to present their case.

Initially met with skepticism by some judges and trial lawyers,[5] trial time limits have been embraced by the bench, bar, and many commentators.[6] Appellate courts have upheld them in virtually every case,[7] and even appellate courts that disdain the practice have affirmed lower court judgments rendered in time-limited trials.[8]

Unlike the Wicked Witch, this Article does not intend to shatter the hourglass. It will, however, argue that trial time limits must comport with due process standards, including both "private" and "public" aspects of the due process clause.[9]

Section I of this Article discusses a trial judge's statutory and inherent authority to impose time limits on civil trials.[10] Section II examines the scant case law analyzing the propriety of trial time limits and focuses on two complementary themes.[11] One theme chronicles the near-unanimous judicial belief that limiting trial time benefits all parties interested in or affected by litigation. These parties include party litigants, other litigants awaiting trial before the same court, juries, and the public.[12] The second theme identifies the existent, but much less prevalent, judicial criticism of trial time limits. This criticism is rooted in the due process clause.[13] Section III outlines the contours of the due process limitation and focuses on safeguarding the rights of the litigant—the "private" due

limits," "time limits on trials," or the like. Although some of the points made in the Article may be applicable by analogy, it will not address time limits on the evidentiary portion of criminal trials, which raises Sixth Amendment issues. *See* United States v. Freel, 681 F. Supp. 766, 769 (M.D. Fla. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1990). Likewise, the Article will not address the propriety of other related time limits, such as time limits on the length of opening and closing arguments, *see* Michael R. Flaherty, Annotation, *Propriety of Trial Court Order Limiting Time for Opening or Closing Argument in Criminal Cases—State Cases*, 71 A.L.R. 4th 200 (1989), limits on the length of briefs and argument in both trial and appellate courts, *see generally* Pierre N. Leval, *From the Bench*: Westmoreland v. CBS, 12 LITIG. 7 (Fall 1985), and limits on the length of jury voir dire, *see, e.g.*, Boyd v. State, 811 S.W.2d 105 (1991).

5. *See* Frederick B. Lacey, *Proposed Techniques for Streamlining Trial of Complex Antitrust Cases: Pro and Con*, 48 ANTITRUST L.J. 487, 492 (1978-79); Cursi, *supra* note 3, at 10.

6. *See, e.g.*, Lacey, *supra* note 5, at 492; Cursi, *supra* note 3, at 10; Leval, *supra* note 4, at 8; Kirst, *supra* note 2, at 337; Antitrust Commission Report, *supra* note 2, at 535-36; William W Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 123.

7. *See infra* section II.

8. *See infra* section II.B.

9. *See infra* section III.

10. *See infra* section I.

11. *See infra* section II.

12. *See infra* section II.A.

13. *See infra* section II.B.

process limitation—and maintaining public confidence in our civil justice system—the "public" due process constraint.[14] Finally, Section IV suggests several factors that trial judges and appellate courts should use in setting trial time limits and determining whether such time limits satisfy due process requirements.[15]

I. Authority for Imposing Trial Time Limits

Like the constitutional right to privacy,[16] a trial court's authority to impose trial time limits emanates from the penumbra of several statutory provisions.[17] Federal Rule of Civil Procedure 1 provides that the rules of procedure must be construed to secure the "just, speedy and inexpensive determination of every action."[18] Federal Rule of Civil Procedure 16 further authorizes federal judges to issue pretrial orders limiting proof.[19] Rule 16 is especially relevant because, as discussed below, trial time limits are most appropriate when imposed before trial.[20]

Courts and commentators have relied on the Federal Rules of Evidence to limit the length of trials. Specifically, courts have cited Rules 403 and 611 as support for trial time limits.[21] Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[22] Rule 611(a) states that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth, [and] . . . avoid needless consumption of time. . . ."[23]

14. *See infra* section III.

15. *See infra* section IV.

16. See Griswold v. Connecticut, 381 U.S. 479, 484 (1965) where Justice Douglas found a right to privacy emanating from the penumbra of several constitutional provisions.

17. Judge Leval, discussing his decision to impose trial time limits in Westmoreland v. CBS, No. 82 Civ. 7913 (S.D.N.Y. 1984), indicated that he knew of no contrary authority. Leval, *supra* note 4, at 8.

18. FED. R. CIV. P. 1, *quoted in* SCM Corp. v. Xerox, 77 F.R.D. 10, 13 (D. Conn. 1977); United States v. Reaves, 636 F. Supp. 1575, 1578 & n.10 (E.D. Ky. 1986).

19. FED. R. CIV. P. 16(c)(4) provides in pertinent part that "[t]he participants at any [pretrial] conference under this rule may consider and take action with respect to . . . the avoidance of unnecessary proof and of cumulative evidence." *See also* JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 21.64 at 113-14 (1986) (Manual for Complex Litigation); Schwarzer, *supra* note 6, at 123.

20. *See infra* notes 136-38 and accompanying text.

21. *See infra* notes 32-49, 66-74 and accompanying text.

22. FED. R. EVID. 403.

23. FED. R. EVID. 611(a). Courts have stretched the law when applying Federal Rules of

Less frequently, courts have relied on Rule 102 to place time limits on trials.[24] Rule 102 requires that the Federal Rules of Evidence "shall be construed to secure fairness in administration [and] elimination of unjustifiable expense and delay, . . . to the end that the truth may be ascertained and proceedings justly determined."[25] Some courts have held that these Rules of Evidence codify the judiciary's inherent power to control the disposition of cases on their dockets.[26] Other courts regard them as a complement to that power.[27] Whatever the source, the Supreme Court has made clear that trial judges have broad discretion to control the presentation of evidence:

> The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion. Within limits, the judge may control the scope of rebuttal testimony, may refuse to allow cumulative, repetitive or irrelevant testimony, and may control the scope of examination of witnesses. If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.[28]

The Federal Rules of Civil Procedure and Evidence, and the inherent power identified by the Supreme Court, provide ample authority for trial time limits. These authorities, however, by referring to the "ascertainment of truth," contain within them the due process limitation that has not yet been sufficiently defined or nurtured by the courts and commentators. Due process requires that trial judges not curtail the presentation of evidence so as to impede the ascertainment of truth—to the

---

Evidence 403 and 611 to support trial time limits. Judge Newman noted in one of the first reported decisions on trial time limits that Rule 403

> normally contemplates that the time-consuming nature of evidence will be determined as to each particular item of evidence offered. However, in a protracted case . . ., the purpose of the rule can best be achieved by considering time in the aggregate and leaving to counsel the initial responsibility for making individualized selections as to the relative degree of probative value from the mass of evidence available.

SCM Corp. v. Xerox, 77 F.R.D. 10, 13 (D. Conn. 1977). In addition, Rule 611(a) has been more commonly used as authority for taking witnesses out of order or allowing narrative testimony at particular junctures during trial. *See generally* JOHN B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, § 611[01], at 611-19 - 611-21, 611-30 (1991).

24. *See infra* note 71.

25. FED. R. EVID. 102.

26. *See, e.g.*, United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. Ky. 1986).

27. Link v. Wabash R.R., 370 U.S. 626, 629-32 (1962).

28. Geders v. United States, 425 U.S. 80, 86-87 (1976) (citations omitted), *quoted in* Secretary of Labor v. DeSisto, 929 F.2d 789, 794 (1st Cir. 1991); *see also* Schwarzer, *supra* note 6, at 124; Chambers v. NASCO Inc., 111 S. Ct. 2123, 2132-36 (1991) (discussing trial court's inherent power to assess attorneys' fees as a sanction for bad faith litigation conduct).

detriment of the litigants and public alike.[29] Thus, the same authorities that grant trial judges broad discretion to impose trial time limits also mandate circumspection in their use.

II. The Cases

Trial judges have only recently exercised their authority to impose time limits on trials.[30] The reported decisions are few and have usually involved complex cases, often antitrust matters.[31] The developing case law on judicially-imposed time limits has travelled just short of the full circle of judicial reasoning and emotions: from frustration with counsel resulting in their initial adoption; to unbridled enthusiasm for a new procedural tool; to the first hint of caution and restraint predicated on a vaguely-defined sense of fairness. To complete the circle, courts must develop a fuller understanding of the due process rights implicated by trial time limits, as well as principles governing and limiting their use.

A. Early Cases: Frustration Leads to Efficiency

SCM Corp. v. Xerox[32] was the first major reported federal decision to impose trial time limits. In *SCM*, counsel for both sides initially estimated that the trial of an antitrust action would take six to eight months (three to four months for each side) and the court impanelled a jury based on that expectation.[33] After fourteen weeks of trial, plaintiff SCM's counsel had called only two principal witnesses, using the balance

29. *See infra* section III.

30. *See supra* notes 2-8 and accompanying text.

31. *See infra* notes 32-106 and accompanying text. Faced with a civil case that threatens to tie up their docket for several months or longer, a trial judge will likely be more inclined to impose trial time limits. However, the size and complexity of a case bears no necessary correlation to the need for time limits. *See* Kirst, *supra* note 2, at 338. Indeed, the most vociferous judicial proponent of trial time limits has lamented that attorneys turn small cases into big ones. United States v. Reaves, 636 F. Supp. 1575, 1579 (E.D. Ky. 1986); *see infra* note 70 and accompanying text. Ultimately, the size and complexity of a case relate not to whether time limits should be imposed, but to the appropriate length of any limitation.

32. 77 F.R.D. 10 (D. Conn. 1977). For an early, perfunctory federal decision imposing time limits, see Molever v. Levenson, 539 F.2d 996 (4th Cir. 1976). For state decisions imposing time limits, see Hicks v. Kentucky, 805 S.W.2d 144, 151 (Ky. 1990), Varnum v. Varnum, 536 A.2d 1107, 1115 (Vt. 1990), and Brown v. Brown, 488 P.2d 689 (Ariz. 1971). Non-reported federal cases where time limits have been imposed include Zenith Radio Corp. v. Matsushita Electric Indus. Co., No. 74-2451 (E.D. Pa. filed Sept. 24, 1974), discussed in Lacey, *supra* note 5, at 492, Westmoreland v. CBS, No. 82 Civ. 7913 (S.D.N.Y. 1984), discussed in Leval, *supra* note 4, and Los Angeles Memorial Coliseum Comm'n v. National Football League, No. 78-3523 (C.D. Cal. 1981), *In re* Apple Securities Lit., No. C 84-20148 (N.D. Cal. 1991), and City of San Jose v. Paine, Webber, Jackson & Curtis Inc., No. C 84-20601 (N.D. Cal. 1991)—all discussed in Cursi, *supra* note 3, at 1, 10.

33. *SCM Corp.*, 77 F.R.D. at 11.

of the allotted time to introduce documents and present deposition extracts.[34] District Judge Newman repeatedly requested witness lists, but counsel did not promptly comply.[35] Moreover, SCM's counsel ignored the judge's repeated cautions to exercise "self-restraint" in presenting evidence, and not to "save the best [evidence] for last."[36] Finally, when SCM's counsel informed the court that plaintiff's case would take seven months, rather than the four initially estimated, Judge Newman took action.[37] Relying on Federal Rule of Civil Procedure 1 and Federal Rule of Evidence 403, Judge Newman ordered that SCM had six months to present its case.[38] The judge arrived at the time limit based

> upon all of the circumstances, including the estimates originally given, the estimates of additional time now claimed to be needed, the nature of the evidence presented to date, the excessive extent of detail with which such evidence has been presented, the absence of any significantly new topics yet to be presented, and the unlikelihood that any effort short of an overall time limit will prove to be effective.[39]

The judge indicated, however, that he would consider extensions if the time limits created hardship, but that SCM could only use additional time to rebut Xerox's case.[40]

Judge Newman imposed the time limit due to his frustration with SCM's counsel. The judge bemoaned counsel's lack of self-restraint and noted that counsel failed to aid the court by presenting evidence selectively.[41] Sarcastically, he observed that "[a]n antitrust suit remains a piece of litigation, . . . not a life's work."[42] The judge further wrote that "[i]t has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim,"[43] and "[t]he Court may . . . be forced to exclude where the evidence is not so much cumula-

34. *Id.* at 12.

35. *Id.* at 13.

36. *Id.*

37. *Id.*

38. *Id.* at 13, 15.

39. *Id.* at 15.

40. *Id.* at 15-16. Judge Newman's order did not impose time limits on defendant Xerox, and his opinion did not address the issue. To satisfy due process requirements, Judge Newman should have imposed a similar limitation on Xerox, preferably sooner rather than later, although not necessarily one of the same length. *See infra* notes 134-38 and accompanying text.

41. *SCM Corp.*, 77 F.R.D. at 14 (citing United States v. United Shoe Machinery Corp., 93 F. Supp. 190, 191 (D. Mass. 1950) (Wyzanski, J.)).

42. *Id.*

43. *Id.* (quoting 6 JOHN H. WIGMORE, EVIDENCE § 1907 (Chadbourne rev. 1976)).

tive as overwhelming in quantity."[44] Drawing solace from Justice Holmes, the judge observed that limiting the evidence was "a concession to the shortness of life."[45]

Judge Newman's concerns for the jury also motivated him to impose time limits. The judge noted that jurors, as involuntary participants in the judicial process, should not be forced to serve much beyond the original trial time estimates.[46] More importantly, the judge stated that the time limits are necessary "to promote juror comprehension" and eliminate "[the] profusion of data [that] threatens to impede their orderly and fair decision-making."[47]

Finally, Judge Newman suggested that time limits were necessary to safeguard the overall administration of justice. Citing his heavy caseload, a lack of fellow judges, and his obligation to other litigants,[48] the judge noted that SCM's relatively private objective, a damage remedy under the antitrust laws, "must be weighed . . . in determining to what extent the public functions of a public tribunal should be diverted by continued litigation of this case."[49]

In another antitrust action, *Juneau Square Corp. v. First Wisconsin National Bank*,[50] the court also limited trial time. In so doing, the court highlighted the administration of justice rationale and addressed what amounted to a due process challenge to this fledgling form of case management. In *Juneau Square*, District Judge Warren allotted three months for trial. Plaintiffs had thirty-four days and the Bank defendants had twenty days to present their cases.[51] Hinting at a due process challenge, plaintiffs sought a new trial and argued that the time constraints denied them an opportunity to fully and fairly present their claims.[52] Specifically, they argued that their trial time was too short and that the Bank defendants' extensive voir dire and cross-examination of plaintiffs' witnesses, and the requirement that plaintiffs' witnesses read irrelevant portions of deposition testimony, further shortened their trial time.[53]

44. *Id.* (quoting JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE §§ 403[06], 403[95], 403[101] (1991)).

45. *Id.* (quoting Reeve v. Dennett, 11 N.E. 938, 944 (1887) (Holmes, J.)).

46. *Id.* at 14-15.

47. *Id.* at 15; Schwarzer, *supra* note 6, at 3.

48. *SCM Corp.*, 77 F.R.D. at 14.

49. *Id. SCM Corp.* was cited as authority for trial time limits in two recent bankruptcy cases. *In re* City of Bridgeport, 128 B.R. 589, 590-92 (Bank. D. Conn. 1991); *In re* Galaxy Assocs., 118 B.R. 8, 10 (Bankr. D. Conn. 1990).

50. 475 F. Supp. 451 (E.D. Wis. 1979).

51. *Id.* at 465.

52. *Id.*

53. *Id.*

Judge Warren rejected plaintiffs' arguments and indicated that he had established the time limit based on the complexity of the case and the vast quantity of evidence involved.[54] The judge further noted that other litigation pending before him necessitated the time limitation:

> Considering the crowded dockets of the courts, the [c]ourt has a responsibility to exercise reasonable control over the amount of trial time allotted to litigants. Affording parties unlimited amounts of trial time prejudices other litigants before the [c]ourt who must then wait extra months before their cases come to trial. These factors must also be considered and were considered by the [c]ourt.[55]

In the best known appellate decision on the subject, the Court of Appeals for the Seventh Circuit squarely addressed a due process challenge to trial time limits in *MCI Communications v. American Telephone & Telegraph*.[56] In yet another antitrust action, plaintiff MCI estimated that it would take twenty-six days to present its case-in-chief.[57] Defendant AT&T originally estimated that the action would take eighteen months, but later reduced that figure to eight or nine months.[58] District Judge Grady agreed with MCI's estimate and imposed a twenty-six day time limit on each side's case-in-chief, but did not impose a time limit on rebuttal or surrebuttal.[59] On appeal, AT&T argued that this time limit was arbitrary and denied due process.[60]

The Court of Appeals for the Seventh Circuit disagreed. The Seventh Circuit did not discuss the judicial administration rationale for imposing time limits, but stressed the district judge's right to limit cumulative evidence.[61] For the first time, the court stated that imposing time limits to exclude cumulative evidence was not, per se, an abuse of discretion, provided the court did not exclude witnesses based merely on numbers.[62] The court noted that Judge Grady had reviewed the parties' witness lists, summaries of their proposed testimony, and precise time estimates for trial before establishing the time limit.[63] The court further emphasized that the time limits were flexible and, although Judge Grady

54. *Id.*

55. *Id.*

56. 708 F.2d 1081 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983). The district court's opinion is reported at MCI Communications v. American Tel. & Tel., 85 F.R.D. 28 (N.D. Ill. 1979).

57. *MCI Communications*, 708 F.2d at 1170.

58. *Id.*

59. *Id.* at 1170-71 (citing *MCI Communications*, 85 F.R.D. at 32).

60. *MCI Communications*, 708 F.2d at 1171.

61. *Id.*

62. *Id.*; Padovani v. Bruchhausen, 293 F.2d 546, 550 (2d Cir. 1961) (error to limit witnesses based on mere numbers).

63. *MCI Communications*, 708 F.2d at 1170.

denied AT&T's request for an extension, he had not been "prepared to adhere strictly to [his] preliminary time limits without regard to possible prejudice to either party."[64] The Seventh Circuit upheld these time limits against the due process challenge because AT&T had sufficient time for "an efficient, yet effective presentation of [its] defense."[65]

Having received appellate approval in *MCI*, trial time limits received their most vitriolic (some might say caustic) justification in *United States v. Reaves*,[66] a criminal tax fraud action. In *Reaves*, District Judge Bertelsman imposed a ninety-six hour, i.e., sixteen trial days, time limit on all parties.[67] More importantly, in dicta, Judge Bertelsman gave a testimonial for trial time limits and a diatribe directed at trial lawyers.[68] If his fellow judges had justified time limits based on a desire to exclude cumulative evidence, Judge Bertelsman made the point with a broadside:

> It would seem that early in the career of every trial lawyer, he or she has lost a case by leaving something out, and thereupon resolved never again to omit even the most inconsequential item of possible evidence from any future trial. Thereafter, in an excess of caution the attorney tends to overtry his case by presenting vast quantities of cumulative or marginally relevant evidence. In civil cases, economics place some natural limits on such zeal. The fact that the attorney's fee may not be commensurate with the time required to present the case thrice over imposes some restraint. In a criminal case, however, the prosecution, at least in the federal system, seems not to be subject to such fiscal constraints, and the attorney's enthusiasm for tautology is virtually unchecked.[69]

64. *Id.* at 1172. The Seventh Circuit noted as being "of interest, but not determinative," AT&T's counsel's remark to Judge Grady that he was "very pleased with the amount of time we have been given" and that he was not "cutting down [on the presentation of the defense] because you are leaning on us." *Id.* at 1172 n.133. Regarding the possibility of waiving the objection to overly restrictive time limits, see *infra* note 154.

65. *MCI Communications*, 708 F.2d at 1172. The court of appeals relied on the National Committee for Review of Antitrust Law Procedures report that recommended imposing time limits in complex antitrust litigation:

> Time limits for length of trial . . . have been rarely used. The power of judges to cut off cumulative, redundant presentations of proof may provide authority for the use of overall limits on trial presentations. As long as the limitations established are realistic and fair, and the judge prevents delaying tactics by hostile witnesses, we believe that trial time limits would also be an appropriate means of expediting litigation.

Id. at 1171-72 n.132 (quoting Antitrust Commission Report, *supra* note 2, at 535-36 (footnote omitted)).

66. 636 F. Supp. 1575 (E.D. Ky 1986).

67. *Id.* at 1581.

68. Although issued to justify a Scheduling Order, Judge Bertelsman issued his opinion almost eight months after the order and only after the case had ended in a mistrial caused by the misconduct of a witness. *Id.* at 1577.

69. *Id.* at 1576. Judge Bertelsman had previously experienced what he felt was a lack of cooperation from the government and voiced his dissatisfaction with its conduct in unmistaka-

Further sounding the need for trial time limits and pointing to attorneys' lack of self-restraint, Judge Bertelsman continued his *ad hominem*:

> A court cannot rely on the attorneys to keep expenditures of time in trying a case within reasonable bounds. The perspectives of the court and the attorneys in trying a case differ markedly. A judge wants to reach a just result in the case and to do so expeditiously and economically. An attorney's primary concern is to WIN the case. If he believes he can win that case by proliferating the evidence of the favorable, but relatively uncontested matters so that the weaker aspects of the case will be camouflaged, it is asking too much of our fallen nature to expect him to do otherwise.
>
> Somehow the unfortunate trend has arisen among attorneys to make almost every case a BIG CASE. There is a tendency to want to present the evidence not once, but many times over, and to adduce needlessly cumulative evidence not only on the controverted issues but also on those which are all but uncontested. Advocates tend to confuse quantity of evidence with probative quality. Nothing lulls an attorney to the passage of time like the sound of his or her own voice. Few attorneys can tell you what time it is without describing how the clock was made.[70]

After identifying the source of the problem, Judge Bertelsman compiled judicial and scholarly support and statutory and inherent authority for imposing trial time limits.[71] Significantly, Judge Bertelsman repeatedly invoked the public's interest in the speedy resolution of civil disputes and access to the courts as major factors justifying trial time limits:

> Modern courts recognize that the court's time is a "*public* commodity which should not be squandered." There is an unnamed party in every lawsuit—the *public*. *Public* resources are squandered if judicial proceedings are allowed to proliferate beyond reasonable bounds. The *public's* right to a "just, speedy, and inexpensive determination of every action" . . . is infringed, if a court allows a case . . . to preempt more than a reasonable share of the court's time.
>
> . . .
>
> Recent trends in litigation have brought courts to the realization that their dockets do not belong to the attorneys or litigants, nor even to the courts themselves, but to the *public*. . . .
>
> . . .

ble terms. *See* United States v. Algie, 503 F. Supp. 783 (E.D. Ky. 1980), *rev'd on other grounds*, 667 F.2d 569 (6th Cir. 1982).

70. *Reaves*, 636 F. Supp. at 1578-79.

71. For case authority, Judge Bertelsman relied on SCM Corp. v. Xerox, 77 F.R.D. 10 (D. Conn. 1977), MCI Communications v. American Tel. & Tel., 708 F.2d 1081 (7th Cir. 1982), *cert denied*, 464 U.S. 891 (1983), and Juneau Square Corp. v. First Wisconsin Nat'l Bank, 475 F. Supp. 451 (E.D. Wis. 1979). *Id.* at 1577 n.6. For scholarly support, the judge cited to Leval, *supra* note 4, and Kirst, *supra* note 2. *Id.* at 1577-78 nn. 2, 5 & 8. For statutory authority, the judge relied on Federal Rules of Evidence 102, 403, and 611(a), and Federal Rule of Civil Procedure 1. *Id.* at 1578 & n.10.

> . . . A . . . right of access to the courts is implicit in the Constitution of the United States and is essential to a free society.
>
> . . . [C]rowded dockets and overly expensive litigation can still effectively deny citizens their crucial right of access to the courts.[72]

Judge Bertelsman also pointed out the salutary effect of time limits. He noted that a case tried under the hourglass "ends up being presented more efficiently and intelligibly" and that when "[p]roperly streamlined, the case is more effective for the ascertainment of truth, as mandated by Fed. R. Evid. 611(a)."[73] Despite his exuberance, Judge Bertelsman cautioned that "the court must analyze each case carefully to assure that time limits set are not arbitrary."[74]

Other decisions have noted Judge Bertelsman's warning, but have not always heeded it. In prior decisions—*MCI* and *Reaves*—courts validated time limits but acknowledged that such limits should be "flexible," "realistic and fair," and "not absolute or unduly restrictive," or "arbitrary."[75] In *Flaminio v. Honda Motor Co.*,[76] a personal injury action decided before *Reaves*, but after *MCI*, the Seventh Circuit first directly disapproved of rigid time limits. The Seventh Circuit acknowledged that crowded dockets require federal district judges to strictly control the length of trials, including setting reasonable deadlines in advance.[77]

---

72. *Reaves*, 636 F. Supp. at 1578, 1579 (emphasis added) (footnotes and citation omitted). *Reaves*'s emphasis on the public's interest in expeditiously resolving civil disputes was reiterated in two recent time limit cases. *See* United States v. Hardage, 750 F. Supp. 1460, 1528 (W.D. Okla. 1990); Harris v. Marsh, 679 F. Supp. 1204, 1236 (E.D.N.C. 1987).

73. *Reaves*, 636 F. Supp. at 1580. Judge Bertelsman generally agreed with Judge Leval that imposing trial time limits renders

> [c]onsiderable benefits—primarily five: 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.

Id. at 1580 (citing Leval, *supra* note 4, at 7-8).

Specifically, because Judge Bertelsman issued his opinion after the case had been tried, he had the rare luxury of reporting on his order's effect. Continuing his criticism of the government, Judge Bertelsman observed:

> The order worked well in practice. Actually, it was more than generous, the prosecution's case still being overlong. It was refreshing to see . . . how things started to move along as the prosecution's time began to run out. Suddenly, the prosecutors quickly reached the point with each witness and stuck to the issues, thus eliminating many objections, and the case became intelligible and interesting.

Id. at 1577.

74. *Id.* at 1580.

75. MCI Communications v. American Tel. & Tel., 708 F.2d 1081, 1171-72 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983); United States v. Reaves, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986).

76. 733 F.2d 463 (7th Cir. 1984).

77. *Id.* at 473.

However, after citing *MCI* with approval, the Seventh Circuit, per Judge Posner, emphasized that it

> disapprove[d] of the practice of placing rigid hour limits on a trial. The effect is to engender an unhealthy preoccupation with the clock, evidenced in this case by the extended discussion between counsel and the district judge at the outset of the trial over the precise method of time-keeping—a method that made the computation of time almost as complicated as in a professional football game.[78]

Despite its objection, the Seventh Circuit affirmed the district court's judgment, finding that the lower court acted within its discretion in requiring plaintiffs to present their case within eighteen hours.[79] The circuit court ruled that plaintiffs had been allotted sufficient time, given both the case's complexity and plaintiffs' failure to demonstrate prejudice caused by the time limit—such as the exclusion of additional evidence they would have presented if time allowed.[80]

B. Recent Cases: A Suggestion of Caution

In three cases following *Flaminio*, the courts agreed that time limits may be imposed provided they were flexible and not arbitrary or unfair.[81] In each case, the court rejected a challenge to time limits because the objecting party had either waived the objection or failed to demonstrate prejudice.[82]

Thus, in *Johnson v. Ashby*,[83] the Court of Appeals for the Eighth Circuit found that if the district court had strictly enforced the time limit, it would have been improper.[84] However, the Eighth Circuit affirmed the lower court's judgment because appellant Johnson failed to both timely object and to make an offer of proof concerning the evidence that he would have introduced but for the time limits.[85] The circuit court also refused to absolve Johnson for his failure to object, concluding that the time limits did not constitute plain error.[86] Similarly, in *United States v. Freel*,[87] District Judge Gordon rejected a criminal defendant's argument that the time limit compromised his Sixth Amendment

78. *Id.*
79. *Id.*
80. *Id.*
81. *See* Johnson v. Ashby, 808 F.2d 676 (8th Cir. 1987); United States v. Freel, 681 F. Supp. 766 (M.D. Fla. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991).
82. *Johnson*, 808 F.2d. at 678-79; *Freel*, 681 F. Supp. at 769; *McKnight*, 908 F.2d at 115.
83. 808 F.2d 676 (8th Cir. 1987).
84. *Id.* at 678.
85. *Id.* at 678-79.
86. *Id.*
87. 681 F. Supp. 766 (M.D. Fla. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1990).

rights.[88] The judge concluded that the time limits were "not rigid," that counsel knew they could receive an extension if they showed good cause, and that, as in *Johnson*, defendant Freel failed to timely object, show that favorable evidence was excluded, or demonstrate plain error.[89] In *McKnight v. General Motors Corp.*,[90] the Seventh Circuit affirmed a judgment for plaintiff McKnight in his civil rights and Title VII action. Disapproving of the district court's "hourglass method" of limiting the length of trial, and finding unseemly the spectacle of witnesses running to and from the stand, Judge Posner noted that "to impose arbitrary limitations, enforce them inflexibly and by these means 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."[91] However, because General Motors failed to preserve its objection and show the time limits caused prejudice, the Seventh Circuit found the error harmless and affirmed the lower court's judgment.[92]

Recently, the First Circuit became the first court of appeal to find plain error in a lower court's decision to limit trial time. In *Secretary of Labor v. DeSisto*,[93] the district court in a Fair Labor Standards Act trial limited the witnesses to the Department of Labor compliance officer who had investigated the case and two additional witnesses, one for each side.[94] After a one-day trial, the court awarded plaintiff Secretary a substantial money judgment.[95] On appeal, the First Circuit found the evidence insufficient to support the judgment and that neither party had objected to the one-witness limitation.[96] The court of appeal concluded that the insufficient evidence resulted from the witness limitation and tainted the proceeding.[97] Consequently, the First Circuit felt compelled to review the trial court's discretion in controlling the presentation of evidence.[98] The circuit court acknowledged that a district court has substantial discretion to control its proceedings and, under Federal Rule of Evidence 403, has the power to exclude cumulative evidence.[99] Further-

88. *Id.* at 769.
89. *Id.*
90. 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991).
91. *Id.* at 115.
92. *Id.*
93. 929 F.2d 789 (1st Cir. 1991).
94. *Id.* at 794.
95. *Id.* at 790.
96. *Id.* at 794 & n.3.
97. *Id.* at 795-96.
98. *Id.*
99. *Id.* at 794-95.

more, the First Circuit acknowledged that trial courts may impose reasonable time limits to reduce crowded dockets.[100]

However, the *DeSisto* court reiterated the prohibition against excluding witnesses based on mere numbers,[101] and cited Rule 403's requirement that the negative consequences of evidence must substantially outweigh its probative value before evidence is excluded.[102] The First Circuit concluded that the district court erred because it had not performed Rule 403's balancing test before imposing the three-witness limit, nor could it have, since the district court's ruling occurred before the parties had submitted their witness lists.[103] Accordingly, the First Circuit found that the witness limitation was "an apparently arbitrary limitation imposed in the interest of conserving judicial resources,"[104] and "constituted an abuse of discretion in that it prevented both parties from presenting sufficient evidence on which to base a reliable judgment."[105] Thus, the First Circuit ordered a new trial.[106]

III. The Due Process Limitation

As discussed in Section II, courts and commentators overwhelmingly believe that trial time limits benefit litigants, juries, and the public. With the exception of *DeSisto*, courts have universally approved limitations on trial time. When properly applied, time limits undoubtedly provide substantial benefits. However, improperly-imposed trial time limits may undermine the due process rights of the parties for whom they are designed to benefit and protect.[107]

100. *Id.* at 795.

101. *Id.* (quoting Padovani v. Buchhausen, 293 F.2d 546, 550 (2d Cir. 1961)).

102. *Id.* at 796.

103. *Id.*

104. *Id.* at 795.

105. *Id.* at 796.

106. *Id.*

107. The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment makes the due process clause binding on the states by providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV, § 1.

It may be argued that improperly-imposed trial time limits constitute an abuse of discretion under the statutory and inherent authority to limit the presentation of evidence, but do not necessarily violate due process. Clearly, trial time limits that violate due process also constitute an abuse of the court's discretion to impose them. Moreover, when a trial judge abuses his or her statutory and inherent discretion by so limiting trial time that it prevents a litigant from presenting and proving its case, such limitation infringes on due process rights. Thus, in evaluating trial time limits, no meaningful distinction appears to exist between an abuse of discretion and a due process violation.

In addition, recognizing the issue as one of due process highlights two other concerns

The Due Process Clause guarantees a fundamentally fair judicial proceeding.[108] This guarantee of fairness makes two promises: one to the litigant whose case has reached the court for trial; and another to the public, who has a right to and need for confidence in the judicial system.

The private right to due process requires that a litigant have an opportunity to be heard.[109] This includes a hearing before a fair and neutral tribunal,[110] so that the litigant can protect liberty and property,[111] and a meaningful opportunity to present evidence and cross-examine witnesses.[112] Although not basing their analysis on due process, the two circuit courts most recently addressing the propriety of time and witness limitations have defined a fair hearing as one which strives for "accuracy of factual determination"[113] and allows the parties to present "sufficient evidence on which to base a reliable judgment."[114] In other words, due process to the litigant means a trial that seeks to ascertain the truth. This goal is consistent with both the express terms of Federal Rules of Evidence 102 and 611(a) and the Supreme Court decisions discussing the trial courts' broad discretion to regulate their own proceedings.[115] Thus, to the litigant, a trial that satisfies due process by seeking to ascertain the truth will also lead to a reliable judgment.[116]

---

which are not readily apparent under an abuse of discretion analysis. First, beyond the harm suffered by the litigant, improper trial time limits may adversely affect the public aspect of due process. *See infra* notes 117-21 and accompanying text. Second, characterizing the problem as an abuse of discretion is at odds with the heightened standard of review that should govern appellate review of trial time limits. *See infra* notes 152-54 and accompanying text. Thus, although courts may exercise their discretion to limit trial time, they must also consider due process issues before imposing the limitation.

108. Estelle v. Williams, 425 U.S. 501, 503 (1976); *In re* Murchison, 349 U.S. 133, 136 (1955); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.8, at 528 (4th Ed. 1991).

109. *See In re* Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

110. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); *Murchison*, 349 U.S. at 136.

111. Carey v. Piphus, 435 U.S. 247, 259-60 (1978); Chambers v. Florida, 309 U.S. 227, 237 (1940).

112. Morrissey v. Brewer, 408 U.S. 471, 489 (1972); Specht v. Patterson, 386 U.S. 605, 610 (1967).

113. McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991).

114. Secretary of Labor v. DeSisto, 929 F.2d 789, 796 (7th Cir. 1991).

115. *See supra* notes 21-29 and accompanying text.

116. Professor Tribe has referred to the desire for accurate decision-making and reliable judgments as an *instrumental* approach to due process. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 666-67 (2d ed. 1988). Contrasting this *instrumental* view with what he characterizes as an *intrinsic* approach, Tribe postulates that the

> more *instrumental* approach views the requirements of due process as constitutionally identified and valued less for their intrinsic character than for their anticipated consequences as means of assuring that the society's agreed-upon rules of conduct

Safeguarding a litigant's right to a reliable judgment is inextricably related to the public aspect of due process. The public aspect originates with the litigant and derives from the litigant's feeling that he or she has received a fair hearing.[117] Justice Frankfurter noted an interrelation between the litigant's, and, ultimately, the public's perception that the judicial system has functioned fairly:

> The validity and moral authority of a conclusion largely depend on the mode by which it has been reached . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[118]

The Supreme Court has explicitly linked the litigant's right to a proceeding which produces a reliable judgment with the public aspect of due process. In *Morgan v. United States*,[119] the Court reviewed a quasi-judicial administrative proceeding and stated that "the rudimentary requirements of fair play . . . demand 'a fair and open hearing'—essential alike to the legal validity of the [proceeding] and to the maintenance of *public* confidence in the value and soundness of this important government pro-

---

> . . . are in fact accurately and consistently followed . . . . From this "instrumental" perspective, due process is such process as may be required to minimize "substantially unfair . . . deprivations" of the entitlements conferred by law upon private individuals or groups . . . . [I]ts point is less to assure *participation* than to *use* participation to assure *accuracy*.

Id. (emphasis in original) (citations and footnotes omitted).

117. As noted, Professor Tribe characterized this aspect of an individual's due process rights as an *intrinsic* view of procedural due process. *Id.* at 666. According to Tribe:

> [T]here is *intrinsic* value in the due process right to be heard, since it grants to the individual or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons . . . . Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome . . . At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.

Id. (emphasis in original) (citations and footnotes omitted); *see* Stephen N. Subrin and A. Richard Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451-58 (1974).

118. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

119. 304 U.S. 1 (1938).

cess."[120] Thus, the public aspect of due process carries ramifications far beyond the just outcome of an individual case.[121]

Unreasonable trial time limits may violate due process. Therefore, before limiting trial time, courts must weigh private due process rights and public due process concerns against the interests of the litigants, jury, and public. For each benefit that trial time limits may bestow, a risk exists that due process rights and interests may be violated or undermined.

As to the litigants, reasonable time limits may force them to streamline the evidence presented in their case. This judicially-imposed clarity may benefit litigants by causing them to persuade the factfinder. Unreasonable trial time limits, however, may prevent a litigant from presenting sufficient evidence to support a reliable judgment. Overly ambitious time limits may so restrict the evidence presented that a litigant cannot establish a prima facie case or defense, let alone a persuasive theory of the case. For example, setting a short time limit, e.g., a week, in a civil rights case may impair a plaintiff's ability to establish a pattern and practice of constitutional violations and thereby prevent the plaintiff from presenting sufficient evidence to prove its case. As a result, the time limit would impair the jury's ability to return a reliable verdict. Such time limits would violate the litigant's private due process rights.

Time limits may also interfere with the public aspect of the litigant's due process rights. Unreasonable time limits may cause litigants to perceive that they did not receive a full and fair hearing. As the trial moves from a decorous and deliberative process toward a "Beat the Clock" game show atmosphere with witnesses running to and from the stand (as occurred in *McKnight*), the litigant will believe that efficiency has triumphed over substance. Thus, irrespective of the result, the litigant will perceive that justice has not been served. If judges increasingly impose unreasonable time limits, each litigant's individual sense of frustration will become systemic.

As to the jury, reasonable time limits may cause the parties to focus and better organize their evidence to enhance juror comprehension and thereby promote the "ascertainment of truth." In addition, reasonable time limits decrease the time citizens must spend as jurors and may in-

120. *Id.* at 15 (emphasis added).

121. Certainly, litigants have standing to assert that arbitary or unreasonable trial time limits have violated their due process rights. It is less clear, however, that a member of the public would have a comparable right to bring suit claiming that trial time limits have undermined public confidence in the civil justice system. Accordingly, and notwithstanding the importance of the public aspect of due process, this Article refers to private due process *rights* and public due process *concerns* or *interests*.

crease jurors' respect for and willingness to participate in the trial process. But, time limits that unduly exclude evidence will not give jurors sufficient evidence to determine the facts. Unreasonable time limits may promote confusion and speculation rather than clarity, and, ultimately, may lead to unreliable judgments. Like the litigants, jurors may lose confidence in a system that deteriorates to the point where juries become the "studio audience" in the litigants' race against the clock. This erosion of confidence would surely increase when jurors attempt to deliberate over an insufficient evidentiary record resulting from unreasonable time limits.

Finally, as to the public, reasonable trial time limits may promote efficient and economical use of judicial resources and protect other litigants' right of access to the courts. Reasonably imposed time limits may allow courts to resolve more cases in a shorter period of time. Unreasonable time limits, however, will erode public access to the judicial system if they require appellate review and re-trial. This will lengthen, rather than shorten, the waiting period for other litigants bringing cases to trial. More importantly, although trial time limits have not yet been widely imposed, their unreasonable imposition over time may erode the public confidence they are designed to engender. Efficiency and access will be meaningless if time limits so curtail the presentation of evidence that judgments become unreliable and cause the public, litigants, and jurors to lose confidence in a civil justice system characterized more by haste and expediency, than by decorum and deliberation.[122]

IV. Guidelines Safeguarding Due Process Rights and Interests

To efficiently administer justice *and* guarantee due process, courts must establish guidelines for imposing trial time limits. These guidelines must ensure trial time limits are "flexible," "realistic and fair," and not "absolute or unduly restrictive."[123] They must also safeguard the litigants' private due process rights and the public's right to confidence in the judicial system. This Article, therefore, proposes guidelines for trial judges imposing trial time limits and appellate courts reviewing such decisions.

First, to establish a "realistic and fair" trial time limit, a trial judge must possess sufficient knowledge about the claims and issues in the case

122. Although calling for adaptation "to changing notions about time," one proponent of trial time limits has cautioned that "[t]here is a need for a delicate balance. Enforced haste could destroy the decorum and deliberation essential for public acceptance of the jury's verdict as valid . . . ." Kirst, *supra* note 2, at 337.

123. *See supra* notes 32-106 and accompanying text.

and "adequate information regarding the nature and extent of the proposed evidence."[124] Before setting time limits, trial judges must immerse themselves in the case by becoming involved in the pretrial proceedings.[125] This can most readily be accomplished in jurisdictions, like most federal district courts, that assign a single judge to manage a case from filing to judgment.[126] As a case manager, a district judge should call and participate in status and pretrial conferences under Federal Rule of Civil Procedure 16.[127] During these conferences, the judge should familiarize herself or himself with the nature of the claims, the proposed testimony and numbers of witnesses, and the documentary evidence to be presented.[128] Also, the trial judge should require the parties to file pretrial statements.[129] In these statements, counsel should be required to estimate the length of the proponent's case and the entire trial, including

124. MOORE, *supra* note 19, § 21.643, at 114.

125. Lacey, *supra* note 5, at 492.

126. *See, e.g.*, N.D. CAL. R. 205-1. In an attempt to eliminate delay, state court's have increasingly utilized a single assignment system for certain cases. *See, e.g.*, CAL. SUPER. CT., SAN FRANCISCO COUNTY R. 2.3(1),(2),(3). Conversely, many states continue to utilize a master calendar system in which the trial judge is assigned to the case on the day of trial. Because judges working under a master calendar will have little time to familiarize themselves with the case, trial time limits imposed in a master calendar system are less likely to satisfy due process.

127. FED. R. CIV. P. 16(a) provides that

> the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management . . . .

128. FED. R. CIV. P. 16(c) provides that

> [t]he participants at any conference under this rule may consider and take action with respect to
>
> . . . .
>
> (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
>
> . . . .
>
> (5) the identification of witnesses and documents,
>
> . . . .
>
> (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, and
>
> (11) such other matters as may aid in the disposition of the action.

129. FED. R. CIV. P. 16(d) provides that "[a]ny final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances." As part of that final pretrial conference, many district judges require each party to file Pretrial Conference Statements discussing the matters listed in Rule 16(c).

the amount of time needed for each witness.[130] Based on this information, the judge can set a reasonable time limit for the trial.[131]

Second, judges should be prepared for counsel to inflate their time estimates during the pretrial process.[132] Trial lawyers are nothing if not advocates. They know that a trial judge already disposed to imposing time limits will be further inclined to pare hours or days from their estimates. Thus, counsel may be prone to exaggeration. Given this likelihood, the trial judge can allocate less time than requested for trial, provided he or she has considered the complexity of the issues and the nature of the evidence. However, when a trial judge adopts the parties' estimates, the time limits imposed should be presumed fair and only subject to challenge if unforeseen events cause hardship during trial.[133]

Third, trial judges should impose time limits on all parties.[134] This requirement guards against arbitrary or discriminatory imposition in two respects. Imposing trial limits on all parties prevents the trial judge from punishing one party for another party's transgressions. For example, judges should not impose a time limit on the defendant after an "unlimited" plaintiff has taken an inordinate amount of time to present its case. Bilateral time limits also avoid imposition of time limits on an ad hoc basis. In *SCM v. Xerox*, Judge Newman imposed time limits on the plaintiff during the middle of trial, but neither imposed, nor indicated that he would impose, time limits on the defendant.[135] Judges must impose bilateral time limits to promote evenhanded justice and fundamental fairness.

Fourth, trial judges should impose time limits before trial, if at all, and before either party presents evidence.[136] Establishing time limits before trial not only prevents inequities and potential discrimination caused by changing the rules in the middle of trial,[137] but also gives all

130. MOORE, *supra* note 19, § 21.643, at 114.

131. *Id.*; Leval, *supra* note 4, at 8; Schwarzer, *supra* note 6, at 124.

132. *See* Leval, *supra* note 4, at 8.

133. As a matter of symmetry, it may seem appropriate for the trial judge to allocate the same amount of time to each party. However, given likely differences in issues, proof, and style of presentation, each party will not necessarily require the same amount of time to present its case. Although widely divergent time allotments may raise questions of fairness, a judge does not have to allot equal amounts of time to the parties in most cases.

134. Lacey, *supra* note 5, at 492.

135. *See supra* notes 32-49 and accompanying text.

136. MOORE, *supra* note 19, § 21.643, at 114 & n.200.

137. *See supra* notes 134-35 and accompanying text.

parties sufficient opportunity to determine the best use of their time before presenting their case.[138]

Fifth, as Judge Grady did in *MCI*,[139] and to avoid the rigidity disapproved of by the Seventh Circuit in *Flaminio*[140] and *McKnight*,[141] trial judges should also inform the parties before trial that they will grant reasonable extensions for good cause.[142] Ideally, the trial judge's initial time allocation should include a cushion—perhaps ten to fifteen percent above the actual time estimate—for contingencies that may arise during trial.[143] By so doing, the trial court may avoid mid-trial requests for extensions. Also, a cushion avoids unfairness to the party who complied with the court's initial time limits.[144] Based on experience with similar cases and knowledge of the present case, the trial judge may accurately estimate the amount of time necessary for trial. However, estimating reasonable time limits is not an exact science. Issues may take on unanticipated significance after a few days of trial, more evidence than anticipated may be necessary to prove or rebut a point, or witnesses and counsel may be unduly hostile or obstructionist. Moreover, even when a trial proceeds as anticipated, the most informed time estimate may become unreasonable. Thus, the trial judge must be willing to grant extensions to accommodate the necessary expansion of issues and proof, protect against hostility or delay from witnesses or opposing counsel, and correct mistaken initial time estimates.[145] Accordingly, and notwithstanding the legitimate desire to avoid changing the rules mid-trial, trial judges must be willing to grant reasonable extensions to ensure due process.

Sixth, the trial judge must develop an equitable method of charging time against each parties' account. In many instances, the defendant will prefer to present its case through cross-examination of plaintiff's witnesses.[146] Rather than charging each side for the total time used to pres-

138. MOORE, *supra* note 19, § 21.643, at 114 n.200.

Limiting the amount of time for rebuttal constitutes an exception to the general rule. Because the scope of rebuttal largely depends on the scope of the preceding "case," courts should impose time limits for rebuttal only after each party presents its case-in-chief.

139. 708 F.2d 1081 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983).

140. 733 F.2d 463 (7th Cir. 1984).

141. 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991).

142. *See* Leval, *supra* note 4, at 8; MOORE, *supra* note 19, § 21.643 at 114-15. *But cf.* Schwarzer, *supra* note 6, at 124 (extensions defeat the purpose of time limitations and may be unfair to the party who conformed to the limit).

143. *See* Schwarzer, *supra* note 6, at 124.

144. *Id.*

145. *See* Antitrust Commission Report, *supra* note 2, at 536; Leval, *supra* note 4, at 8; MOORE, *supra* note 19, § 21.643, at 114-15.

146. *See* Leval, *supra* note 4, at 7-8.

ent its case, the judge should charge each party for the time *it* uses, regardless of whether the party uses its time on direct or cross-examination.[147]

The trial judge must also decide how or whether to charge time taken to hear and resolve evidentiary objections. One approach—adopted by Judge Bertelsman in *Reaves*—would be to deduce the time spent arguing an overruled objection from the objecting party's time allotment.[148] Although Judge Bertelsman declined to do so, the time spent arguing a valid objection could be charged to the proponent of the evidence.[149] However, not all evidentiary rulings have a clear-cut winner or loser and such intricate time-keeping invites the same criticism that Judge Posner levied in *Flaminio*.[150] Most objections will take only seconds of trial time to resolve. Thus, although the party conducting the examination will lose some of its allocated time, the time spent hearing most objections should not be charged to any party. On the other hand, if the trial judge allows lengthy argument on an objection or believes that counsel has interposed objections to delay, the judge should retain the discretion to charge the time against the obstructionist party or extend the time of the non-offending party.[151]

Seventh, appellate courts must utilize a standard of review for trial time limits that takes into account the due process rights at stake. Ordinarily, a trial judge is entitled to substantial deference in supervising litigation or controlling the presentation of evidence and appellate courts review a trial judge's decisions on such matters under an abuse of discretion standard.[152] Appellate courts, reviewing time and witness limita-

147. *Id.*; Schwarzer, *supra* note 6, at 124. *But cf.* MOORE, *supra* note 19, § 21.643 at 114-15 n.202.

The trial judge must also determine the "turn over" point in the trial. If a plaintiff may suffer prejudice because defendant has tried his or her case on cross-examination, defendant may be prejudiced if plaintiff refuses to rest. A plaintiff might take advantage of the time limits by refusing to turn over the case to defendant and instead calling witness after witness, thereby forcing defendant to exhaust her time on cross-examination. As noted by Judge Leval, the judge should address the turn over issue at the outset. Upon receiving input from all parties and after making due allowance for the parties' strategic considerations, the trial judge should set an outside limit (based on a percentage of plaintiff's time allotment) for when plaintiff must rest. Leval, *supra* note 4, at 8. As with the initial time estimates, the turn over point may be modified upon showing of good cause. *Id.*

148. United States v. Reaves, 636 F. Supp. 1575, 1581 (E.D. Ky. 1986).

149. *See* United States v. Hardage, 750 F. Supp. 1460, 1528 (W.D. Okla. 1990).

150. *See supra* notes 76-80 and accompanying text.

151. MOORE, *supra* note 19, § 21.643, at 114 & n.202.

152. Pierce v. Underwood, 487 U.S. 552, 558 n.1 (1988); Donovan v. Burger King Corp., 672 F.2d 221, 225 (1st Cir. 1982).

tions, have applied that deferential standard.[153] However, as discussed above, the propriety of trial time limits is not merely a question of a court's ability to control its docket, but also a question of due process. As such, appellate courts should take a "hard look" at a trial judge's imposition of trial time limits and thereby apply a standard of review falling somewhere between the deferential abuse of discretion standard and the non-deferential de novo standard applicable to pure questions of law.[154]

The foregoing guidelines attempt to accommodate the courts' and society's interests in the efficient administration of justice while paying greater deference than has previously been paid to the litigants' and public's due process rights and interests. Adoption of these or similar guidelines will give practical meaning to concepts of fairness and will promote and protect due process values.

Conclusion

As case managers armed with the hourglass, trial judges will undoubtedly continue to impose time limits on civil trials. Their authority to do so appears unassailable, and few can quarrel with a procedural innovation that promises so much to so many. However, like many procedures that champion efficiency, trial time limits may hinder, rather than promote, the ascertainment of truth. In so doing, they may violate private due process rights and undermine public due process interests. Trial judges must consider these due process rights and interests when establishing time limits and courts must develop guidelines to safeguard them. Although time limits may flourish, they must not be allowed to denigrate the litigants', and ultimately the public's, right to a fair trial.

153. Secretary of Labor v. DeSisto, 929 F.2d 789, 795 (1st Cir. 1991); MCI Communications v. American Tel. & Tel., 708 F.2d 1081, 1171 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983).

154. *See* White v. Estelle, 669 F.2d 973, 975-76 (5th Cir. 1982); United States v. Austin, 933 F.2d 833, 841-41 (10th Cir. 1991); *see also* United States. v. Pardue, 765 F. Supp. 513, 531 & n.6 (W.D. Ark. 1991). To preserve the issue on appeal, the party objecting to the trial time limits should ordinarily timely object or be deemed to have waived the objection. *See* McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); Johnson v. Ashby, 808 F.2d 676, 678-79 (8th Cir. 1987). However, given the due process rights involved, a party need not object in every instance. *See* DeSisto, 929 F.2d at 794 & n.3. If the trial judge fails to immerse himself or herself in the case before imposing time limits or fails to follow the above guidelines to the appellant's prejudice, a party may raise the due process challenge on appeal even though it failed to object during the trial.