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Litigation

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*6 SPEEDIER TRIALS

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WESTLAW LAWPRAC INDEX

JUD -- Judicial Management, Process & Selection

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Amidst all the hullabaloo about fast-track court reform, the reformers have universally neglected the most important part of litigation: the protracted trial. Preoccupied with case backlog problems and calendar management techniques, Judicial tinkers have not paid much attention to jury trials that all too frequently last for months or even years. Perhaps they think that lengthy trials are too rare to warrant much scrutiny. They should think again. The problem is not so isolated: Almost all jury trials take from two to three times longer than they should.

The source of the problem? Slavish adherence to trial procedures that are outmoded, inherently inefficient, and time wasting. Ranging from bench conferences to the manner in which exhibits are handled, these procedures have become so institutionalized as to have taken on the force of law. By custom and practice, we adhere to these practices simply because we have always done it this way. It is time for judges and lawyers to ask whether there are better ways to conduct a trial.

Ancient procedures need not be sacrosanct. At the very least, their time-wasting features should be eliminated. The court can, and should, commit itself to "squeezing out the dead time." The results can be remarkable.

Here is my recent experience with six complex cases:

MDL 667 In re Passenger Computer Reservation Antitrust Litigation

Time Estimated:

4 to 6 months

Actual Trial Time:

32 days, including jury Selection

MDL 667 Continental Airlines v. United Airlines Antitrust Litigation

Over one million documents were produced before trial

Time Estimated:

As long as 9 months

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Actual Trial Time: 34 days, including jury Selection

CR 87-422(B) U.S.A. v. RAFAEL CARO QUINTERO, et al.

The first of the Camarena cases--most witnesses spoke through interpreters

Time Estimated: 4 months

Actual Trial Time 27 days, including jury Selection

CR 87-422(F) U.S.A. v. RAFAEL CARO QUINTERO, et al.

The second of the Camarena cases--virtually all witnesses spoke through interpreters

Time Estimated: 4 months

Actual Trial Time: 30 days, including jury Selection

CR 90-111 U.S.A. v. TERRELL AMERS, et al.

A seven-defendant case against Los Angeles County Deputy Sheriffs accused of skimming money from currency seizures. More than 200 witnesses and hundreds of documentary exhibits.

Time Estimated: At least 4 months

Actual Trial Time: 26 days, including jury Selection

*7 I assure you that this record was accomplished without shorting the process at all. Every lawyer was heard on every legal or evidentiary issue for which they sought a hearing. The court hours were routinely shorter than in most courts: 9:30 a.m. to 4:30 p.m. There were no after-hour or evening or weekend sessions.

How did we do it? The key was to ensure that the jury heard five or six hours of uninterrupted testimony every single day within normal working hours. When the jury hears so much continuous testimony, even the most complex trial can be concluded in one-third to one-half of the time estimated. How can this ideal trial day be achieved? It's easier than you may think.

Think about the great time wasters.

Far and away the greatest is the bench or chambers conference, interrupting the presentation of evidence to the jury. If you examine the records of trials that have taken months or even years, you will find that more time was devoted to conferences than was spent actually presenting evidence to the jury. The jurors are put on standby, either sitting in the jury box while the bench conference is held or, more often, cooling their heels in the jury room while the judge and the lawyers finish their conversation.

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Sometimes the major part of the trial day is used in this way.

Consider some recent examples. Under a headline reading "Procedural Lulls in Swaggart Case Bore Voyeurs and Scandalmongers," the *Los Angeles Daily Journal* ran a story that started like this:

The jurors in the Rev. Marvin Gorman's \$90 million slander suit against tel-evangelist Jimmy Swaggart were sent home for a day so the judge could hear portions of depositions that seem to be forever the center of argument over admissibility.

In the first trial of the Menendez brothers, the court devoted one full day to a hearing to determine whether a manuscript authored by one of the brothers could be received in evidence. The existence of this manuscript and the prosecutor's intent to use it had been known for more than two years. There was no reason pretrial motions could not decide the issue *before* trial. In another recent case, lawyers asked to see the judge in chambers one morning at 9:00. The jury and witnesses were kept on hold. The judge and counsel emerged at 11:45 a.m. What were they discussing? What, if any, restrictions should be placed on comments to the press, an issue the court could have decided at any recess.

In a recent high-publicity case, a defendant had spent a full day testifying and faced at least a full day of cross-examination the next day. Rather than start the cross-examination, government counsel asked at 8:30 a.m. to have the court determine whether the government could cross-examine the defendant on a manuscript he had written. They devoted two hours to this hearing, while the jury and witnesses languished.

With a full day of cross-examination ahead, there was absolutely no need to stop the trial in order to decide this issue at the outset. The court could have ordered it briefed or had the law clerk research it and made a better-informed decision at a previously scheduled break with much less pressure.

The Camarena Trial

In my third Enrique Camarena trial (the trial of the murder of a U.S. drug enforcement agent in Mexico), the government chose to play a tape and provide the jury with English translation transcripts. These tapes had been admitted in two previous trials after their authenticity and accuracy had been extensively litigated. The tapes, the transcript, and their litigation history were available to defense counsel for close to three years.

Yet, defense counsel now, for the first time, objected to the authenticity of the tape, the accuracy of the transcript, the correctness of the translation. These are complex issues that could take considerable time to resolve. Should the court interrupt the presentation of evidence in order to rule on these objections? NEVER.

Several things happen when the jury is dispatched to the jury room while the court considers legal arguments. None of them is good. The trial has been unnecessarily lengthened by the time devoted to the hearing. The jury loses its focus, and the trial has been unduly fragmented, often leading to skewed verdicts. By lengthening the trial, jury expenses increase. If you have appointed counsel, their fees go up too.

Jury dissatisfaction rises. Numerous studies have shown that what jurors dread most about jury service is the prospect of sitting around waiting. I tell jurors during voir dire examination that the trial will not be interrupted to hear arguments; that they can expect to hear one witness after the other without a break in continuity. Many jurors have actually written to me to express their appreciation for my using this procedure.

From the standpoint of the judge, the worst thing about these conferences is that he must make important decisions in an atmosphere of duress without the opportunity for reflection or research. If the issue is important enough to warrant a hearing then surely the judge must have some time to consider the matter in a proper way. A judge who is called upon to hear arguments at the bench must render a ruling very quickly, often shooting from the hip and relying almost entirely upon legal instincts. By contrast,

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if the judge has time to reflect on and research the issue, counsel are more likely to get an informed decision.

When significant objections arose in my Camarena case, counsel was ordered to proceed to the other matters or call a different witness. The objecting counsel was ordered to prepare a written motion setting forth all specific objections supported*8 by legal memoranda. Then at a more convenient opportunity, I was able to rule on the objections without wasting the jury's time. In my view, a judge should never send the jury to the jury room while these issues are being resolved.

Counsel have a right to be heard on all critical issues. They do not have the right to pick the time and place. Why should the court interrupt the presentation of evidence when a proper hearing can be held without doing so? The court controls the order of proof. It must exercise control to ensure an efficient presentation of the case.

Another threat to trial continuity is counsel's request to see the judge in chambers when the court is about to reconvene, often when the jury is already in the box. Such a request commonly occurs at the beginning of the trial day or the end of the noon recess. It should never be granted. My experience from my early years on the bench (when I foolishly granted such requests) is that the matter counsel wishes to discuss with the court is usually not urgent and could have been dealt with at any time. Also, having attained the judge's ear, counsel will now bring in what may be called "walk-in baggage." Herains upon the court a number of other matters not mentioned when he first sought the conference and for which he does not need an immediate decision.

It is not uncommon for such chamber conferences to result in a loss of 30 or 40 minutes of trial time. The efficient way is to direct counsel to raise these issues when the noon or evening recess is taken, not after they have ended. In this way, the court can reflect upon the issues during the recess, if necessary, and provide a ruling before the court reconvenes.

Trials Without Disruption

It is possible, with a little thoughtful planning and without prejudice to any party, to hear and decide all legal issues without disrupting trial continuity. Some of the most vexing trial interrupters are motions that should have been made prior to trial but are voiced for the first time during or just before the presentation of evidence or testimony. To avoid this, the court should advise counsel, preferably by written order as early as possible before the trial, that the court will not hold bench or chambers conferences during the trial; that the court intends for all trial testimony to be presented without interruption for five or six hours each day; and that all legal issues of importance must be raised in advance of trial by written noticed motions.

To make this work, the court must set a motion cut-off date. The judge must be very emphatic that matters of critical importance (even evidentiary ones) must be raised by motion on or before the motion cut-off date, and that they will not be considered during the trial without a strong showing that counsel could not by the exercise of due diligence have raised them sooner.

This will dispose of most major issues efficiently and without unfairness. The critically important issues are almost always well known before trial. And contrary to what you might expect, the result is not a deluge of motions. Once removed from the heat of trial and the dense atmosphere of tactics and battles for the favor of the jury, the important issues sort themselves out rather quickly.

For those issues that arise in the course of testimony, the court can help the process along with some commonsense procedural rules. For example, to make sure that counsel have sufficient opportunity to anticipate legal issues, the court should direct that the names of all witnesses and exhibits expected to be used be disclosed to counsel 48 hours in advance. In this way counsel will have time to raise an issue the next day either before the jury is put in the box or during one of the recesses, but never as the witness is called.

To be sure, some new issues are bound to come up during trial. These, too, can be handled more efficiently. When an

objection is made, the objecting lawyer will almost always ask to be heard on the objection. They want to be heard on every point, no matter how trivial or inconsequential.

In many cases, there is no requirement for a hearing. The court should tell the lawyers in advance that it will not hear arguments on ordinary evidentiary issues. The court just rules, and the testimony moves on.

If it is something that is extremely critical to the case and the lawyer believes it is absolutely necessary to be heard, counsel in my courtroom know to signal the clerk by sign or by note, indicating that they wish to take a matter up with the court. The court then asks the other counsel to defer questioning the witness on the objectionable area until a ruling has been made on the objection at the next recess, which is never far away. When the jury is excused for the next recess, the court remains behind to hear counsel. These matters rarely take more than a minute or two.

Interestingly, when counsel are offered the opportunity to be heard at the recess, more often than not they withdraw the request. Many of the requests for hearings are reflexive, a product of that same lawyer combativeness. Or they come from the "hip shooter" who has not thought out the case, has not reviewed the evidence, and whenever a thought occurs no matter how frivolous, makes an objection and demands a hearing. After counsel has had an opportunity to cool off or just reflect on the matter for the first time, he often realizes that the matter was not so important after all. The judge who readily grants hearings on demand is spending a good deal of time on trivial matters. She is in effect rewarding the slothful at the expense of the diligent. She is losing part of that sought-after full day of testimony.

The well-prepared lawyer will have thought out the case in advance, will know the facts, will have spotted the evidentiary problems that need to be raised with the court, and will, after direction from the court, bring them to the attention*9 of the court in a way that does not affect trial time. If this counsel still wishes to be heard in the midst of trial, the court should hear argument during a recess and make a ruling. Generally, the witness is still on the stand, and the subject may be reopened if the ruling dictates.

By this approach, hearings are reduced to a minimum, the court has time for deliberation, and there is at worst only a minor disruption of the testimony. Best of all, *almost every moment that the jurors are in the courthouse, they will be seated in the jury box hearing testimony.*

Once counsel understand the rules, they quickly adapt to them. The trial then takes on a beautiful rhythm that makes it a joy for the court, counsel, and, most of all, the jury. Counsel who return to court for a second case are always well prepared to conduct the trial without interruption and do so without complaint and without sacrificing the opportunity to be heard on any issue of importance.

Using Technology

I believe my approach is also superior to the solution recently offered by enhanced technology in the courtroom.

In some multi-party cases, lawyers have been equipped with headphones and microphones and are able to communicate with the judge in the presence of the jury without the need to assemble at the bench or have the jury leave. The effect has been just the opposite of what is desirable. Because the cumbersome elements of the traditional conference are gone, bench conferences become easier and their number increases. Even the judge is seduced by the ease of it all.

This technology has been used at least twice in the Central District of California. It is no accident that one of the cases was reputedly the longest ever held in this district, and the other was not far behind. Although many judges have implemented the procedures I recommend, there remain skeptics among the bench and bar.

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The five cases I listed earlier demonstrate the effectiveness of these techniques in shortening trials, both civil and criminal. All were multi-party, high-profile, complex cases. In each case, the estimated time for trial was at least four months, yet not one lasted for more than 34 days. The lawyers involved in these trials had no difficulty dealing with these procedures. Not a single bench or chambers conference was held that impinged on the jury's time. Day after day, the jury heard testimony for a full day.

Lawyers are not the only ones to blame for intrusions on the trial day.

When a judge returns to chambers for a recess, there is always a risk that she may become involved in chamber work, meetings with staff, administrative matters, or phone calls. It is not uncommon for the judge to lose track of time and allow the recess to exceed the allotted time. Inadvertently, the 15-minute recess becomes 30 minutes or longer. This lost trial time is irretrievable.

To prevent this from happening, I direct the clerk of the court to place the jury in the box at the exact time that the trial is to convene or a recess is to end, and then to buzz me, indicating that the parties, counsel, and all jurors are in their respective places. It is much harder to tarry in chambers knowing that everyone in the courtroom is expectantly watching the door awaiting your entry. The alternative--unintended trial delays--could amount to several lost days in a lengthy trial.

A second major area in which the court can improve the pace of trials is in the presentation of evidence. A few simple rules can go a long way.

The way in which exhibits are traditionally handled, for example, adds materially to the length of a trial. When I first became a judge, the common practice in the state courts was for the lawyer to request permission to approach a witness with each exhibit. The lawyer would then walk to the witness, leave the exhibit, and return to counsel table. An enormous amount of time was consumed in this way, particularly in a document-intensive case.

The practice in the federal courts when I arrived there in 1982 was no better. Counsel would request that the clerk place a certain exhibit before the witness; the clerk would then look for the exhibit, locate it, walk to the witness stand, and announce that "Exhibit 'A' is before the witness." This ritual would be repeated for each exhibit. These inherently inefficient and unnecessary round trips to the witness stand consumed substantial trial time.

The better practice is to squeeze out this dead time by requiring counsel, in advance of the trial or at least before a witness testifies, to notify the clerk what exhibits the witness will be asked to testify about. The clerk will then place those exhibits before the witness at the beginning, each clearly labeled. As the witness is questioned, she can simply look at each exhibit before her. Better still, particularly in a document-intensive case, counsel can put all documents in tabbed notebooks in a book cart right next to the witness stand, within easy reach of the witness. Counsel can then direct the witness to the numbered volume in which an exhibit appears.

A second big time-waster during testimony is the fishing examination.

In criminal cases especially, defense counsel often goes far beyond the scope of direct examination, particularly with witnesses not called to testify on the merits of the case. For example, a custodian of the records may be called by the government for the sole purpose of authenticating bank records. Each defense counsel will then seek to wring something of value from the witness not reasonably related to the witness's direct testimony, or his credibility, and usually not within the personal knowledge of the witness: "There's nothing in those records that shows my client was stealing money, is there?"

Although these argumentative or rhetorical questions exceed the scope of direct examination, government counsel almost never object. In a multi-defendant case, with each defense lawyer taking his turn, the result is often many valuable hours of wasted time.

The judge need not suffer this abuse in silence. He can and *10 should interpose his own objection. Under Rule 403 of the rules of evidence, a court may exclude evidence that causes undue delay or waste of time. Alternatively, the court can offer to permit recall of the witness as a part of the defense case in chief. These offers are never accepted, thereby proving that the examination was merely a fishing expedition. And the court has saved valuable time.

Controlling Fishing Expeditions

The problem of fishing expeditions is probably most acute in the case of the presentation of evidence of undisputed facts and sometimes cumulative evidence of those facts. Let me cite an example from the sheriff corruption trial I mentioned earlier. The government called as its first witness a sheriff's captain in charge of personnel. His task was to "prove" when each defendant joined the department and when each was assigned to the investigative unit. This witness had nothing to say about the merits of the case.

These employment facts really were not in dispute. They were also destined to emerge with equal clarity elsewhere in the trial. For example, the star witness against the seven defendants was their own sergeant, who surely could have testified to these facts without difficulty. But with the personnel chief on the stand, each of the seven defense counsel sought to cross-examine him about matters well beyond the scope of his direct examination.

For example:

- What was the function of this elite narcotic unit?
- What are the requirements for assignment?
- What was the history and background of the witness?
- Had the defendant lost his pension rights?
- When was the defendant last paid?

I put a stop to this at once, advising counsel that they could recall the witness during the defense case. No counsel asked to do so. I should add that the defense lawyers were only partially at fault. The young prosecutor had opened the door by calling unnecessary witnesses and overtrying his case. He could have spared himself, and the court, much trouble by asking himself four simple questions before calling the witness:

1. What facts do I need to elicit from this witness in support of my case in chief?
2. Are those facts sure to emerge?
3. Can a stipulation be used in lieu of the witness?
4. Is this witness really necessary?

The outcome is often a significantly reduced number of witnesses.

This analysis is particularly helpful in major fraud or conspiracy cases. Defendants usually do not seriously dispute the existence of the fraud or conspiracy. Their defense is rather to challenge the evidence connecting them to the enterprise. In the Camarena cases, each of the defendants was charged with the commission of a violent act in furtherance of a criminal enterprise. Not one of the defendants challenged the existence of the enterprise. In every one of these cases, though, young government prosecutors tried to present cumulative evidence of the conspiracy or fraud. Once I pointed out to the prosecutors that the existence of the conspiracy was not in dispute, he concentrated on the evidence that tended to connect the defendants. The time savings in the case were enormous. There are several other possible time-savers during the testimony:

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- Do not allow witnesses either to draw diagrams or put markings on exhibits while the jury is in the box. Advise counsel beforehand that diagrams or exhibits should be drawn or marked by the witness before getting to the stand. The witness may then adopt the diagrams and markings and tell the jury what they represent.

- Prohibit counsel from paraphrasing each answer into a new question that asks the same thing:

“Do I understand you to mean that . . . ?”

“Is it your testimony then that . . . ?”

“Is it fair to say that . . . ?”

“Can we assume then that . . . ?”

This should be stopped by telling counsel that the witness has already answered the question. Soon opposing counsel begins to understand that these paraphrased questions have been asked and answered and will make appropriate objections. There is no need to hear the testimony of the witness two or three times, certainly not in these rhetorical and purely argumentative forms.

- Scrutinize carefully any request to approach a witness. In a long trial, the walk to and from the witness can take up substantial time. Remember, the objective is the continuity of testimony without interruption. Almost all such requests can be avoided with relatively simple expedients. For example, during cross-examination of a federal agent, counsel may ask the witness the date a search was conducted. The agent is unsure. Counsel then asks if the agent's report might refresh his recollection. The agent says that it would, and counsel requests to approach. I would deny the request and direct counsel to stipulate to the date.

- Require all testifying agents to have any reports or declarations they have prepared with them on the witness stand. This will avoid the scramble that takes place when the agent says he needs to see his report before he can answer, and no one can seem to find it.

- Equipment such as a video projector should be ready without the need to use the jury's time.

- Enough witnesses should be present to ensure a full day of testimony. There should be no “dead time” caused by running out of witnesses. Also, I require the witness testifying at the time of an adjournment or recess to be back on the stand when the court reconvenes. If a new witness is to be called, he must be seated in the front row ready to be sworn.

- Require counsel to have their witnesses review all exhibits about which they will be questioned. The following examples will demonstrate the wisdom of this requirement: Counsel asks the witness to examine Exhibit Number One (a 50-page document) to determine if the defendant's name is mentioned. The witness laboriously reads every page while the court, counsel, and the jury sit in idle boredom. If the witness had previously read the exhibit, the question could be handled as follows:

Question: Prior to the trial, did I ask you to review Exhibit Number One to determine whether the defendant's name appeared on it?

Answer: Yes.

***11 Question:** Did you do so?

Answer: Yes.

Question: Is the defendant's name mentioned anywhere in Exhibit Number One?

Answer: No.

These recommended procedures are by no means exhaustive. There will be other ways to carry out the objective of having the testimony flow unimpeded. The judge must have this purpose in mind and share it with counsel at the earliest time. The inept, the lazy, and perhaps the showboat will grumble, but in the end even they will cooperate.

Two aspects of jury management can also have an enormous impact on trial time: jury selection and jury instructions. Start with jury selection. The following is a typical scenario in a complex, high-profile, multi-party litigation, civil or criminal:

A large panel of jurors is brought to the courtroom. They are immediately told, usually before anything else, that this case will last four, five, or six months or perhaps longer. The pronouncement promptly strengthens the resolve of many of the jurors to find a way to be excused. Many come to court already feeling this way, and the announcement convinces them to do so at all costs.

There follows the individual examination of each juror regarding his or her ability to serve for the stated period. This becomes an educational process, where each juror who is excused has educated the other jurors on what must be said and done to be excused; once the judge has excused a juror on particular grounds, he can hardly deny another juror who has the same grounds. The judge exhausts one panel and sends for another and then another. The process can take many days and many jurors.

In the two Camarena cases and the deputy sheriffs case, I qualified a jury panel in approximately 20 minutes. The key was that I waited to tell the prospective jurors how long the case would take until I had told them of the positive aspects of the case, piquing their interest. In the Camarena cases, it went as follows:

This case involves the kidnapping, torture, and murder of an American Drug Enforcement Agent in Mexico. You may have heard about it. The defendants on trial are charged with those crimes, and they have pled not guilty.

As cases go, this may be the most interesting case on which you will ever have an opportunity to serve. I only regret that all of you cannot serve; only twelve jurors and six alternates will be chosen from the panel which ultimately qualifies for this case.

To determine which of you qualify, I am going to ask some questions. But, before I do, let me tell you about the schedule of this case.

We will not be in trial on Mondays, so jurors on the case will enjoy three-day weekends throughout the trial.

Our hours on Tuesday through Friday will be 9:30 a.m. to 4:30 p.m.

All holidays will be observed. (I specified what they were and also mentioned other breaks such as the Ninth Circuit Conference.)

Please do not ask to be a member of this panel unless you are absolutely sure that you can serve for the requisite period. We don't want you on the panel unless you can serve without hardship.

When I say hardship, I do not mean inconvenience to yourself or your employer. I mean a severe unavoidable and irreversible hardship. Anyone claiming such a hardship may be closely questioned by me, and you will have to satisfy me of the severity of this hardship.

At this point, I told the panel that the case may take three or four months or longer, and I asked those who were able to serve to stand and hand their name cards to the clerk. In all of these trials, we had more people stand than we needed. In a short time, we had a qualified panel without the individual examination of each potential juror.

Particularly in high-profile cases, the issue of publicity usually slows jury Selection to a crawl. Having obtained a time-qualified panel, the court must begin the sometimes laborious process of determining each potential juror's exposure to pretrial publicity and the degree of prejudice, if any. I believe this process, though obviously important, simply takes too long. In an average case, the court will already have obtained questionnaires from these prospective jurors setting forth the nature and extent of exposure to pretrial publicity. This provides a useful baseline for decision. The hard part--and the place where many courts go wrong--is determining whether it is necessary to separately examine each person or whether questioning the entire panel during voir dire is sufficient.

In the Ninth Circuit at least, no precise rule prescribes the type of voir dire examination necessary to protect against prejudicial pretrial publicity. The appropriate scope and detail of the pretrial publicity voir dire depends on the level of the publicity and the initial responses that are elicited from prospective jurors. The extent and manner of questioning is left largely to the district judge's discretion.

The Supreme Court fortified this approach in *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991). There, the court held that a trial judge's refusal to question prospective jurors about the specific contents of the news reports to which they had been exposed did not violate the defendant's Sixth Amendment right to an impartial jury under the Fourteenth Amendment. The trial judge had merely asked:

Would the information that you heard, received or read from whatever source, would that information affect your impartiality in this case?

*65 Obviously, this question is not right in every case. But the use of a juror questionnaire can help separate out the cases where individual voir dire is necessary. The point to be remembered is that the judge should be certain that individual voir dire is necessary before embarking on such a time-consuming course.

Experience has taught me that few people are tainted by pretrial publicity. A surprising number of prospective jurors do not subscribe to or read newspapers. Many do not watch television news. Those who do read concentrate on special sections such as sports, entertainment, or business. Some merely skim headlines. Few read beyond the first paragraph or two of a story.

As judges and lawyers, we sometimes come to believe that all people are as well read or informed as we are. In all of the cases I previously cited, we found no juror who could provide any details of what they had read or seen. Some simply had vague recollections of hearing about the case; others had not heard of these cases at all. Individual examination was not required.

The procedure used to settle jury instructions can also greatly impact the length of a trial. In many courts, the practice is for every party to submit a separate set of requested instructions. Many of these will be duplicates or say the same thing in different words. Many will be argumentative or formula instructions. When the evidence has been concluded, the court will then meet with counsel and laboriously go over each instruction, hearing arguments from counsel each in turn and deciding which instruction to give. This process can take a week or longer

Controlling Counsel

In the average case, counsel's preparation is often helter-skelter. If limitations aren't placed on counsel, they will throw at the court every formula and argumentative instruction having the remotest connection with the case. They will search old files and produce instructions from other cases, from colleagues' cases, and from "how-to books." If the court falls into the trap of going over every instruction from each counsel and allowing counsel to argue, the process can be interminable.

In the five cases listed, I settled the jury instructions in 30 minutes or less. At the scheduling conference, I gave a standing order to all counsel that required them to submit a joint set of agreed instructions. If they are unable to agree on any requested instructions, the objecting counsel is requested to state in writing specific objections, citing authorities and any alternative instruction counsel considers more appropriate. Very often, lawyers make only a half-hearted effort to agree. The court should return the instructions and direct counsel to try again. Eventually, they will agree on most instructions, leaving very few for the court to decide.

Where genuine disagreement exists, the court's staff or the judge (regrettably, not all state court judges have law clerks) must do the necessary research on disputed points of law. But this happens rarely. Most are really disputes on legal points. More often, they are semantic differences from which counsel believe they may derive an advantage. My procedure usually takes care of these problems quickly.

At this point, the judge should decide on a tentative set of instructions and *66 prepare copies for counsel. These will be given to counsel in advance of the conference to settle the instructions and usually before the evidence has closed. The court then meets with counsel to hear objections. Surprisingly, there will be very few. The process will not exceed 15 minutes, and the court is ready to move to the argument.

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With a few preventative steps like these, our courts--like the rest of our society--can strive for greater efficiency. Trials are important. The available time for trial should not be wasted.

[FN^a]. *Mr. Rafeedie is a U.S. District Court Judge for the Central District of California. Adapted from Southwestern University School of Law Law Review.*

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