LONESOME DOCKET: USING THE TEXAS RULES TO SHORTEN TRIALS AND DELAY

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> *"The legislature has said in no uncertain terms that civil litigation should not be drawn out but should be disposed of with dispatch. By court rules we have sought to adhere to that policy. The end result should be a better administration of justice."*[1]

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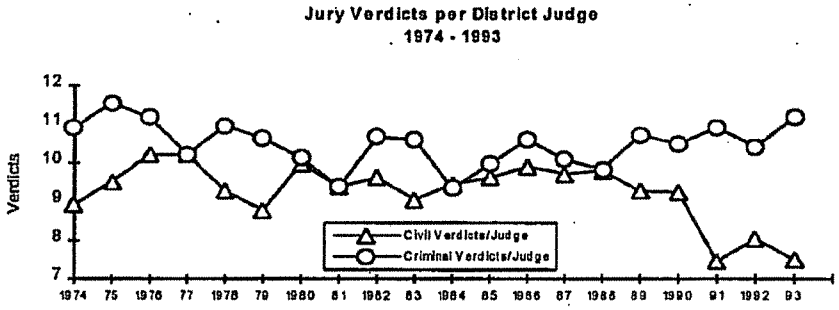
[1] Matlock v. Matlock, 249 S.W.2d 587, 590 (Tex. 1952).

Trials in Texas are slowing down. Despite ongoing improvements such as computerization, increased staffing, visiting judges, and alternative dispute resolution, the courts are not getting more productive in the output only they can provide—trials. The problem appears to be that trials are getting longer, a development without a silver lining for anyone except lawyers. It is the thesis of this article that explicit use of certain forgotten portions of the Texas Rules of Civil Procedure and Civil Evidence can reverse this trend and cut the rising cost of justice.

I. THE TROUBLE ANALYZED

According to the latest Judicial System Annual Report, in 1993 Texas district court judges averaged only nineteen jury verdicts per year, less than seven of which were non-family law civil cases.[2] While the number of criminal jury verdicts per judge has remained steady, the number of civil jury verdicts has dropped sharply in recent years, as shown in Figure 1. This is not because of a shortage of civil cases to try. From 1974 to 1993, the average number of pending civil cases per district court in Texas increased forty-three percent; jury verdicts per court, however, decreased sixteen percent.[3]

Figure 1



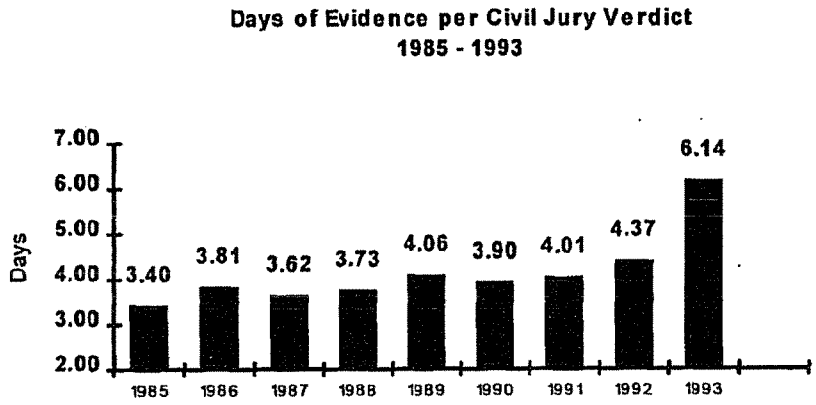
Several factors may account for this divergence between the number of cases waiting for trial and the number actually tried. However, one of the primary factors appears to be that trials are getting longer. As shown in

[2] OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT: FISCAL YEAR 1993 at 179-81 (1993).

[3] *Id.* at 181; OFFICE OF COURT ADMINISTRATION, TEXAS JUDICIAL SYSTEM ANNUAL REPORT: FISCAL YEAR 1974 at 137 (1974).

Figure 2 below, records of the twenty-five Harris County civil district courts show that the average number of days of evidence per jury verdict has increased steadily, from 3.40 in 1985 to 6.14 in 1993.[4] While litigants in one case may not think they are asking for much when they seek an additional day or two of evidence, when all litigants do so the effects are staggering. For example, each year the Harris County civil district courts average over 700 cases tried to verdict, with about 130 days of evidence per court.[5] If every case tried takes one additional day of evidence, the effect of adding 700 additional trial days on the system is not unlike abolishing five of the twenty-five courts.

Figure 2



The trend toward longer trials is not just a matter of statistical interest—it has costs. Longer trials are more expensive. For attorneys paid on an hourly basis, the relationship is obvious—more hours mean higher fees. Even for contingency fee or pro bono attorneys, costs go up as trials get

[4] *Harris County District Clerk Report No. 629*, 1985-93 (unpublished reports). The Harris County District Clerk's Office records one day of evidence for each day on which any testimony is taken. These figures overstate the length of evidence presented, as they record one day of evidence even if the testimony lasts only an hour or two. Additionally, days of evidence are included for trials that never reach verdict, either because of settlement, directed verdict, or mistrial. On the other hand, the figures understate trial length by not including voir dire, jury argument, or other days when a trial proceeds but no evidence is taken. Nevertheless, these procedures have remained constant over the years surveyed, so they should not affect the trend reflected in the graph. Additionally, the 1990 and 1991 figures have been adjusted to account for a consolidated trial of 281 asbestos cases.

[5] *Id.*

longer. More witnesses mean more depositions. More experts mean extra fees, often in the tens of thousands of dollars. In most cases, it is the client who ultimately will have to bear these costs. Thus, whatever the justifications may be for longer trials, one result is that clients will have to pay more for them.

Longer trials also increase costs by making trial dates less firm. When trial settings are unpredictable and resettings frequent, attorneys must prepare for trial several times, duplicating time and expenses.[6] The principle by which longer trials make trial dates less predictable is easily illustrated: flip a coin twice, and the probability of getting all heads or all tails is fifty percent; flip it five times, and that probability decreases to six percent. Similarly, if only two long cases can be set per week, there will be many weeks with no trials (all heads) or too many trials (all tails); if five short cases can be set, the probability of this feast or famine is significantly smaller.

Additionally, unpredictable trial dates and fewer settings discourage prompt settlement. Few things encourage settlement as much as a firm trial date.[7] Yet the number of firm trial settings depends upon the number of cases the court can try, which depends in turn upon the length of each trial.

Longer trials cost more than money. Contingency fee clients may be unable to find an attorney who is able or willing to finance their case if the trial requires weeks of time and strings of experts. Jurors who cannot serve for weeks or months are excluded, leaving a panel that may be quite different from a cross-section of the community. Jurors who do serve are placed under heavier stress,[8] and taken away from productive employment in their normal occupations. For them, long trials are not a way to make a living, but may be a way to lose one. As one juror stated after a four-month accounting malpractice trial, "It ruined our lives."[9]

All of this might be justifiable if justice demanded it, but the evidence indicates that it is more the result of the personal practices of judges and attorneys. A 1988 study of trial practices in New Jersey, Colorado, and California found the following averages for civil jury trials:[10]

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[6] *See* Robert E. Litan, *Speeding Up Civil Justice*, 73 JUDICATURE 162, 162 (1989).

[7] *Id.* at 165.

[8] Thomas L. Haffemeister & W. Larry Ventis, *Juror Stress: What Burden Have We Placed On Our Juries?*, 56 TEX. B. J. 586, 590 (1993).

[9] *Texas Lawyer*, April 27, 1992, at 24, col. 2.

[10] THE NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 14, 34 (1988).

State	Jury selection	Witnesses	Closing arguments	Total trial time
California	3 hrs. 13 mins.	10	2 hrs. 29 mins.	20 hrs. 56 mins.
Colorado	2 hrs. 11 mins.	9	1 hr. 12 mins.	15 hrs. 18 mins.
New Jersey	50 mins.	5	54 mins.	10 hrs. 19 mins.

The study found similar ratios among the states for all types of cases. For example, in auto accident cases, Colorado trials averaged twelve witnesses and California trials averaged ten, while New Jersey trials averaged six.[11] There is no reason to think car wrecks are less serious or complicated in New Jersey—they just try them faster. The study found little perception of unfairness or injustice among New Jersey attorneys, even though all types of trials there were shorter than in the other states.[12]

Even more surprising were the findings of an American Bar Association special committee studying jury comprehension in complex cases in federal district courts. The study found that flooding jurors with information *decreased* their understanding of the case, and that "limiting the amount of evidence, the number of witnesses, and the number and size of exhibits significantly promotes jury comprehension."[13]

Further, there is a strong argument that longer trials for a few result in less justice for all. When one person's day in court becomes a week or a month, others may not get their day. Protracted delay results in witnesses who disappear or forget, postponement of settlement discussions, and a general loss of confidence that the justice system is doing its job. This is why Texas Supreme Court guidelines call for concluding all lawsuits within 18 months.[14] If Sir Edward Coke was right that "justice delayed is justice denied,"[15] then the longer the delay, the greater the injustice.

II. THE TOOLS AVAILABLE

Although costs and delay are of special concern today because of the trend toward longer trials, they are not new concerns. The Texas Rules of

[11] *Id.* at 35.

[12] *Id.* at 3, 66-67.

[13] Thomas R. French, *KISS in the Courtroom: Keep it Short and Simple*, 28 TRIAL No. 11, 130, 132 (1992) (citing Margolis, et al., *Jury Comprehension in Complex Cases*, 1989 A.B.A. SEC. OF LITIG. REP. 25, 28).

[14] TEX. R. JUD. ADMIN. 6(b).

[15] EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 55-56 (4th ed. 1671).

Civil Procedure are crowded with provisions aimed at controlling cost and delay. They are supplemented by similar procedural provisions within the Texas Rules of Evidence. Some are familiar, but many are little used, and others virtually ignored. This section provides a summary of these rules, and discusses some of the more valuable of them.

A. *Rule 1 of the Rules of Civil Procedure*

The Texas Rules of Civil Procedure begin with a provision for limiting costs and delay. Rule 1 states:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.[16]

This little-used rule has great potential impact, as it provides a rule of construction applicable to the several hundred rules that follow. To the extent those rules are ambiguous or silent, this rule mandates that judges ask: (1) What will do justice? (2) What will save time? and (3) What will be least expensive?

Of the few cases citing this rule when construing other rules, almost all quote only the clause regarding justice. Perhaps judges neglect the dispatch clause for fear of being identified with Texas' most famous jurist, Judge Roy Bean and his "Law West of the Pecos." But justice and dispatch are complementary, not conflicting, goals. Delay itself creates injustice. "It is a recognized fact that unnecessary delay at any level of the judicial process frustrates the administration of justice. . . ."[17]

Therefore, the Texas Supreme Court stated early on that Rule 1 "emphasizes equally" the goals of justice and dispatch.[18] Abstract justice cannot be the only concern—judges cannot ignore the time limits in rules

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[16]Tex. R. Civ. P. 1.

[17]Modine Mfg. Co. v. North E. Indep. Sch. Dist., 489 S.W.2d 458, 459 (Tex. Civ. App.—San Antonio 1972, no writ).

[18]Gonzalez v. United States Fidelity & Guar. Co., 274 S.W.2d 537, 540 (Tex. 1955).

of procedure, for example, simply because they feel they are unfair in a particular case. Nor can promptness be the only concern—judges cannot strike a record on appeal, for example, just because it would dispose of the appeal more quickly.[19] Instead, the rules of civil procedure must be construed with both goals in mind.

Additionally, considerations of cost and delay may provide more concrete guidance in interpreting the rules than the abstract notion of justice. The definition of justice in a particular case usually depends upon which side one is on. If justice is the sole principle, every party who loses may claim a violation of Rule 1, as some have done.[20] By contrast, considerations of delay and expense may give judges clearer guidance as to what justice requires. For example, the rules of procedure require answers to pleadings or discovery within certain time limits. If judges enforce these rules faithfully, occasionally the result will be limitation or even loss of an otherwise valid claim. But if judges ignore them, far more claims will never be able to obtain justice because no one will answer anything. As the Texas Supreme Court has noted, a "disposition to circumvent consequences and avoid final decisions on procedural grounds may well invite a mass of procedural litigation and thus in the long run defeat its own object of deciding cases on the merits."[21]

Courts do consider costs and delay in construing and applying procedural rules, but for some reason they rarely rely upon Rule 1 in doing so. For example, the Texas Supreme Court placed the burden to request a hearing on discovery objections on the party seeking the discovery because it "avoids the needless expense and the use of valuable judicial resources by reducing the number of unnecessary hearings."[22] Similarly, the rule excluding witnesses named within thirty days of trial was justified in part by the continuances and delay such surprise witnesses frequently necessitate.[23] Yet, the supreme court did not mention Rule 1 in these cases. Express reliance by appellate judges on Rule 1 might result in a more consistent application of the principle, and increased consideration of cost and delay in many other contexts.

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[19] Punch v. Gerlach, 263 S.W.2d 770, 771 (Tex. 1954).

[20] *See, e.g.*, Howell v. Burch, 616 S.W.2d 685, 687 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.).

[21] *Gonzalez*, 274 S.W.2d at 541.

[22] McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989).

[23] *See* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 443 (Tex. 1984).

B. *Pretrial Conference Pursuant to Rule 166*

Probably the broadest and most potent tool for limiting cost and delay in the rules of civil procedure is Rule 166. This rule provides for pretrial conferences "to assist in the disposition of the case without undue expense or burden to the parties."[24] Although this rule has been a part of the Texas Rules of Civil Procedure since their inception in 1941, it was little used until broadened by amendment in 1990.[25]

The purpose of the amended 1990 Rule was to improve the efficiency of civil justice, settle more cases, and try the remaining cases more quickly.[26] The amended rule lists several ways a judge may focus and limit both discovery and trial at a pretrial conference, many of which would be unfeasible or impossible otherwise. The judge can set a discovery schedule and limit future amendments to pleadings.[27] The issues for trial can be limited and simplified,[28] often because attorneys will concede points to a judge they would not to opposing counsel.

Most importantly, judges may order the parties to disclose the witnesses and exhibits they intend to use at trial.[29] This information is unavailable through discovery because of work product concerns.[30] Nevertheless, it is perhaps the most critical information a party needs in order to prepare for trial. Knowing who the witnesses will be, attorneys can limit the number of depositions they have to take and the number of rebuttal witnesses they need to prepare. Knowing which documents will be admitted results in similar savings. By limiting the scope of the dispute and the evidence to be tendered, these steps can limit the amount of time and money spent on both discovery and trial.

Obviously, it is highly preferable to hold the pretrial conference as early as practicable in the litigation. As a recent study of urban trial courts found, "[i]f a court is interested in reducing litigation delay, early control over the scheduling of case events is likely to improve the pace of litiga-

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[24] TEX. R. CIV. P. 166.

[25] Albright, *Rule 166: Pretrial Conference—The Forgotten Rule*, 9 THE ADVOCATE 149 (1990).

[26] *Id.* at 152.

[27] TEX. R. CIV. P. 166(b), (c).

[28] *Id.* 166(e), (f).

[29] *Id.* 166(h), (i), (l).

[30] *See* Gutierrez v. Dallas Indep. Sch. Dist., 729 S.W.2d 691, 693 (Tex. 1987) (holding improper an interrogatory requesting anticipated trial witnesses); Loftin v. Martin, 776 S.W.2d 145, 148 (Tex. 1989) (holding improper a request for production seeking all documents supporting a party's allegations).

tion."[31] Further by knowing at an early stage what is and is not contested, litigants can avoid the merely routine or prophylactic depositions and discovery activities they would otherwise conduct. In addition, an early indication from the judge on key rulings may assist settlement by reducing some of the uncertainties the litigants have to consider.

An additional benefit of pretrial conferences is that they take place without the presence of either a jury or the heavy pressures of trial. Judges and attorneys frequently disagree regarding what evidence can be presented, what witnesses can testify, and how the trial will be conducted. If this were not the case, judges would be unnecessary. Unfortunately, making these decisions in the midst of a jury trial occasionally results in a verbal feud between the judge and an attorney. As one court of appeals tactfully noted, "Trials are often stressful to counsel and judge alike. They can bring about imperfect conduct from each."[32]

Lawyers have a duty to represent their clients zealously, including making arguments for admitting helpful evidence or excluding harmful evidence.[33] At the same time, the law grants judges liberty to express themselves while controlling the trial of a case.[34] If a judge believes an attorney is wasting time or harassing a witness, the judge may say so.[35] Obviously, it is better for all concerned to conduct these discussions at a pretrial conference without any jury present. When feuds take place in front of a jury, there is the possibility that they may influence some jurors. There is also the potential for a lot of wasted time, as such conduct by either attorneys or judges may require reversal on appeal. Pretrial conferences allow some of these difficult decisions to be made under circumstances where cooler heads may prevail, or at least where there will be much less damage if they do not.

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[31] John A. Goerdt, *Explaining the Pace of Civil Case Litigation: The Latest Evidence from 37 Large Urban Trial Courts*, 14 THE JUST. SYS. J. 289, 321 (1991).

[32] American Home Assurance Co. v. Faglie, 747 S.W.2d 5, 7 (Tex. App.—El Paso 1988, writ denied).

[33] *Id.*

[34] Marriage of D.M.B. & R.L.B., 798 S.W.2d 399, 401 (Tex. App.—Amarillo 1990, no writ); Food Source, Inc. v. Zurich Ins. Co., 751 S.W.2d 596, 600 (Tex. App.—Dallas 1988, writ denied).

[35] *See, e.g.*, Prudential Ins. Co. of America v. Uribe, 595 S.W.2d 554, 569 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); Texas Emp. Ins. Ass'n. v. Garza, 557 S.W.2d 843, 845 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); French v. Brodsky, 521 S.W.2d 670, 679 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

C. *Other Rules of Civil Procedure*

Beside Rules 1 and 166, there are many other rules throughout the Texas Rules of Civil Procedure aimed at limiting delay and expense. Some rules, like Rule 1, expressly list these considerations. For example, Rule 40 provides for separate trials if necessary to prevent a party's claims from being "delayed, or put to expense" by claims between other parties.[36] Rule 174 allows consolidation of hearings or trials "to avoid unnecessary costs or delay."[37]

Other rules discourage unnecessary costs and delay by providing sanctions against the person causing them. Rule 13 punishes attorneys or parties who make statements in a pleading "which they know to be groundless and false," and "for the purpose of securing a delay of the trial."[38] Rule 70 allows the court to assess costs of a continuance against a party who causes it by filing a late amended pleading.[39] Rule 215 provides for sanctions for discovery requests "made for purposes of delay,"[40] and provides for reimbursement of costs and attorney's fees at least five times.[41]

Several rules of procedure limit the time and cost involved in waiting for trial. Rule 37 prohibits adding parties "at a time" or "in a manner to unreasonably delay the trial of the case."[42] Rule 165a allows dismissal dockets for cases, other than family law cases, not disposed of within eighteen months of answer (twelve months for non-jury cases).[43] Rules 251 and 252 limit trial continuances by requiring verified motions supported by sufficient cause and due diligence in trial preparation.[44]

Other rules of procedure also provide tools for limiting the length of trials themselves. Rule 9 limits each side to two attorneys at trial "except in important cases, and upon special leave of the court."[45] Similarly, Rule 265 limits cross-examination to one counsel per side "except on leave granted."[46] Rule 207 simplifies the logistics of presenting testimony by

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[36] TEX. R. CIV. P. 40(b).
[37] *Id.* 174(a).
[38] *Id.* 13.
[39] *Id.* 70.
[40] *Id.* 215(3).
[41] *Id.* 215(1)(d), (1)(e), (2)(b)(2), (2)(b)(8), (4)(c).
[42] *Id.* 37.
[43] *Id.* 165a(2).
[44] *Id.* 251, 252.
[45] *Id.* 9.
[46] *Id.* 265(9).

allowing the use of depositions at trial regardless of a witness's unavailability.[47] Rule 169 provides for requests for admission "to simplify trials by eliminating matters about which there is no real controversy, but which may be difficult or expensive to prove."[48]

Some of these rules are used frequently, others hardly at all. All reflect the importance of reducing delay and cost at every stage of the litigation. All should be construed in accordance with Rule 1 to accomplish these purposes.

D. *Procedural Rules of Evidence*

Several procedural tools for keeping trial length within reasonable limits appear not in the Rules of Civil Procedure but in the Texas Rules of Civil Evidence. The volume of admissible evidence obviously determines how long a trial will last. All trials require some selection of the salient facts from the mass of potential ones. Proving every detail surrounding an event may take longer than the event itself; recounting every detail of medical treatment and recovery that lasted a year might take a year as well. The main burden of selecting the salient facts to present to the jury must fall on the lawyers. But once they have made their selection, the rules of evidence provide additional limits on the evidence they might choose to present, and thus to some degree limit trial length as well.

The first and least controversial limit on evidence is that it must be relevant. Rule 401 defines relevant evidence as anything that makes a fact "of consequence to the determination of the action" more or less probable.[49] To some extent this rule is based on concerns of justice. Irrelevant evidence may cause jurors to decide a case on grounds that have no logical basis, or at least cause them to lose sight of important facts because of a forest of unimportant ones. But concerns of delay and expense also justify the relevance rule. If the color of a car, its features and options, and all of its journeys have nothing to do with why a particular accident occurred, they are irrelevant and inadmissible at trial, not because they may mislead the jury, but purely because they are a waste of time.

Other rules of evidence aim directly at reducing unduly long trials. Rule 403 of the Texas Rules of Civil Evidence provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially out-

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[47] *Id.* 207(1)(a).

[48] Sanders v. Harder, 227 S.W.2d 206, 208 (Tex. 1950) (referring to TEX. R. CIV. P. 169).

[49] TEX. R. CIV. EVID. 401.

weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[50] This rule establishes an explicit balancing process between the weight of evidence and the time necessary to present it. The less material the evidence, the less likely there is to be any injustice by omitting it. Judges may exclude relevant, admissible evidence solely because it goes over ground already covered.[51] Trial lawyers should note the corollary to this rule—the admissibility of evidence of marginal weight may depend largely on how long it will take to present it.

Similar concerns appear in Rule 611 of the Texas Civil Rules of Evidence: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."[52] "Mode" means "[t]he manner in which a thing is done."[53] This rule requires the judge to control the manner in which witnesses are questioned and evidence is presented—in short, the entirety of a trial—to avoid needless delay. The rule makes this duty mandatory; the judge must act even if there is no objection.

Although the language of these evidentiary rules is broad, courts rarely cite them for purposes of cutting delay at trial. Virtually all reported cases citing Rule 403 discuss prejudice or confusion, not delay or cumulative evidence.[54] Similarly, virtually all reported cases citing Rule 611 discuss the order of presenting witnesses and the form of questions, not consumption of time.[55] As so many trials get longer, surely this balancing of materiality and delay should occasionally come into play.

III. THE TREATMENT APPLIED

It is likely that judges limit uncontrolled growth of long trials more often than reported citations to the above rules suggest. But it is also likely that some judges and attorneys may not do more to enforce reasonable

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[50] *Id.* 403.

[51] Ahlschlager v. Remington Arms Co., 750 S.W.2d 832, 836 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

[52] TEX. R. CIV. EVID. 611(a).

[53] BLACK'S LAW DICTIONARY 905 (5th ed. 1979).

[54] *E.g.*, Bushell v. Dean, 803 S.W.2d 711, 711 (Tex. 1991).

[55] *See generally* TEX. R. CIV. EVID. 403 and Annotations.

limits on trial length because of limited authority in appellate opinions for using the existing rules in this way.

The question, then, is how best to use the above rules to reverse the trend toward longer trials. Applying the above rules to every question and answer at trial is not likely to result in shorter trials. Indeed, it may do just the opposite. The only way to ensure significant savings of time is to apply the rules to whole classes of testimony or witnesses rather than individual scraps. The remainder of this article addresses several places where such use of the civil rules of procedure and evidence might change the current trend.

A. *Shortening Voir Dire*

The statistics from different jurisdictions noted at the beginning of this article show that the time used for jury selection varies widely. Although the Texas Constitution declares the right to trial by jury to be "inviolate,"[56] it is well settled that this right is not absolute in civil cases. The right to a jury trial is subject to various procedural rules, such as timely request and payment of the required jury fee,[57] and exceptions such as summary judgments[58] or directed verdicts. Interestingly, the Texas Rules of Civil Procedure do not set out the manner for conducting *voir dire*, and in fact hardly mention it at all. The vast majority of opinions concerning *voir dire* in Texas arise in criminal cases. The criminal courts have upheld time limits on *voir dire* frequently,[59] finding error only if they keep a party from asking a proper question.[60] Any disallowed questions must appear in the record, or error is waived.[61] Repetitious questions,[62] attempts to commit a juror to a particular finding,[63] inquiries into jurors' personal habits rather

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[56] TEX. CONST. art. I, § 15.

[57] Green v. W.E. Grace Mfg. Co., 422 S.W.2d 723, 725 (Tex. 1968); First Bankers Ins. Co. v. Lockwood, 417 S.W.2d 738, 739 (Tex. Civ. App.—Amarillo 1967, no writ).

[58] Mills v. Rice, 441 S.W.2d 290, 291-92 (Tex. Civ. App.—El Paso 1969, no writ).

[59] *See, e.g.*, Boyd v. State, 811 S.W.2d 105, 116 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 448 (1991); Clark v. State, 608 S.W.2d 667, 669 (Tex. Crim. App. 1980).

[60] Caldwell v. State, 818 S.W.2d 790, 794 (Tex. Crim. App. 1991), *cert. denied*, 112 S. Ct. 1684 (1992). *Compare* Barrett v. State, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974), *cert. denied*, 420 U.S. 938 (1975) (holding 30 minute time limit reasonable), *with* De La Rosa v. State, 414 S.W.2d 668, 672 (Tex. Crim. App. 1967) (holding 30 minute time limit unreasonable).

[61] *Caldwell*, 818 S.W.2d at 794.

[62] Guerra v. State, 771 S.W.2d 453, 467 (Tex. Crim. App. 1988).

than prejudices,[64] and other questions that are nothing more than an attempt to prolong *voir dire*[65] do not qualify as proper questions. Spending an inordinate amount of time lecturing the jury is also a consideration.[66]

There are several reasons that the unwritten rules governing *voir dire* in civil cases may be less strict than in criminal cases. First, the right to *voir dire* the jury in criminal cases stems from state and federal constitutional rights to counsel,[67] including the effective assistance of counsel,[68] rights that do not apply to civil trials. Second, specific rules of criminal procedure govern *voir dire* procedures in criminal cases,[69] for which there are no civil counterparts.

However, it is clear in civil cases that a litigant has the right to ask proper questions necessary to exercise challenges for cause or peremptory strikes.[70] The Texas Supreme Court has held that litigants need "broad latitude" in *voir dire* to discover prejudice.[71] Yet this does not justify questions that are duplicative, or revisit subjects already adequately covered.[72]

Accordingly, judges should be able to place reasonable time limits on *voir dire* in civil cases, and cut off even proper questions if counsel has chosen to spend the allotted time for nonessential or improper purposes. In practice, much of what passes as *voir dire* is really an attempt to: (1) make an opening statement, (2) make a closing argument, (3) befriend jurors, (4) call jurors as witnesses ("How did you feel about losing a family member?"), (5) commit jurors to certain verdicts, or (6) find out how they will vote ("If that is what we prove, can you return a verdict in our favor?"). None of these are proper. If an attorney chooses to use a significant part of time allotted to *voir dire* for such purposes, courts should consider this strategy a waiver of any need for additional time.

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[63] Trevino v. State, 815 S.W.2d 592, 599 (Tex. Crim. App. 1991), *rev'd on other grounds*, 112 S. Ct. 1547 (1992).

[64] Densmore v. State, 519 S.W.2d 439, 440 (Tex. Crim. App. 1975)

[65] Ratliff v. State, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985).

[66] *Id.* at 600.

[67] *Guerra*, 771 S.W.2d at 467.

[68] Smith v. State, 676 S.W.2d 379, 384 (Tex. Crim. App. 1984).

[69] *See, e.g.*, TEX. CODE CRIM. PRO. ANN. art. 35.17 (Vernon 1989 & Supp. 1994).

[70] Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705, 709 (Tex. 1989).

[71] *Id.*

[72] Dickson v. Burlington N.R.R., 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.); Gulf States Utils. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

Judges may also consider innovative methods of conducting *voir dire*. The mode of *voir dire* is largely left "to the sound discretion of the [t]rial [j]udge."[73] For example, there is no rule preventing unusual modes of jury selection, such as allowing all sides to make preliminary opening statements or ask general questions to the jury panel before any party begins specific questions to the jurors.[74] The federal rules allow judges to conduct *voir dire* without any questioning by the attorneys.[75] "Though the trial bar is not likely to agree, judges generally believe that examination by the court is the preferable practice and that it results in great savings of time and improves the character of the examination."[76] If Rule 1 requires consideration of both time and cost in construing the Texas rules, *voir dire* procedures should be developed bearing these concerns in mind.

B. *Material Witnesses in a Material World*

Trial court studies point out that jurisdictions also differ in the number of trial witnesses. It is no secret that many lawyers have a habit of calling several witnesses to go over every point several times. Perhaps the ubiquitous interrogatory for persons with knowledge of relevant facts, and the dire consequence for failing to list a critical witness, is to blame. This practice ensures long lists of potential witnesses, and once listed it becomes easier (and perhaps safer from a malpractice perspective) to call them all.

However, part of the reason for having twelve jurors is to make sure that someone catches every point, no matter how small. Calling a second witness to go over the same ground tells jurors either that (1) the lawyers think they are idiots, or (2) the lawyers think there are reasons to disbelieve the first witness.[77] Wigmore wrote that cumulative witnesses are excluded because, if the jury "did not believe the [first] ten, they will hardly believe two more, and if they did believe the ten, then two more are not needed."[78]

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[73] Zeh v. Singleton, 650 S.W.2d 518, 519 (Tex. App.—Houston [14th Dist.] 1983, no writ).

[74] *Id.*

[75] FED. R. CIV. P. 47(a).

[76] CHARLES A. WRIGHT & ARTHUR R. MILLER, 9 FED. PRAC. & PROC. § 2482, at 468 (1983).

[77] *See, e.g.*, Paul L. Colby and Robert H. Klonoff, *Sponsorship Strategy*, 17 LITIG. 1, 2 (Spring 1991).

[78] 6 WIGMORE ON EVIDENCE § 1908, at 760 (1976).

As with *voir dire*, the cure for excess witnesses might be placing time limits on a party's presentation of its case.[79] Such limits would then force counsel to exercise more judgment in selecting witnesses and condensing their examination. However, no Texas rule specifically authorizes time limits on witnesses, and thus the propriety of time limit restrictions on testimony is uncertain.

A more conventional method for controlling trial witnesses is to make sure every witness is a material witness. This method has the advantage of precedent; judges have been cutting cumulative witnesses for years.[80] The process for implementing this witness limitation under the Texas rules is simple: (1) determine the nature of each anticipated witness's testimony at a pretrial conference, and (2) apply Rules 403 and 611 of the Rules of Evidence to exclude witnesses whose testimony is cumulative, will cause undue delay, or needlessly consume time. Exclusion of such cumulative evidence is never reversible error.[81]

For example, medical testimony is among the most pervasive and time-consuming portions of personal injury trials. Often, several doctors describe in soporific detail everything that happened to a patient, whether material or not. In this age of specialization, several doctors usually treat a patient, but they do not all need to testify. Why not pick the doctor that is most knowledgeable, most persuasive, or most likable, to summarize all the medical treatment? Attorneys should also use discretion in selecting what treatment the medical witness describes. Successful attorneys know that selecting a few examples to illustrate the severity of an injury or the extent of treatment can be far more persuasive than detailing every MRI administered.

Alternatively, why call a doctor at all to describe facts that the patient or the records can establish? Medical testimony usually consists of five parts: (1) the doctor's background, training, and experience, (2) initial findings, (3) diagnosis, (4) treatment, and (5) current condition and prognosis. Often, very few if any of these matters are contested, and most appear in the medical records. Doctors charge far too much for their time to waste it detailing each time the patient saw the doctor, the complaints, and the treatments. Furthermore, the patient can often present these matters much more persuasively. After all, for the patient this was a vivid and

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[79] *See, e.g.*, Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIG. 7, 7 (Fall 1985).

[80] *See* Ballard v. Perry's Adm'r, 28 Tex. 347, 367 (1866).

[81] Reina v. General Accident Fire & Life Assurance Corp., 611 S.W.2d 415, 417 (Tex. 1981).

traumatic episode. For the doctors, it was a routine incident recalled only after reviewing the records.

Collateral witnesses can be another source of trial delay. For example, records custodians should almost never testify at trial. If the records are clearly admissible, an opponent's failure to file a business records affidavit on time does not make them inadmissible. The records are still admissible, but only after calling the custodian as a trial witness to establish the foundation. This routine but wasteful expenditure of trial time should be avoided if at all possible.

Please note, the mere fact that two witnesses will say the same thing does not mean judges have to exclude one. Although duplicative in the strictest sense, a second witness on the critical issue in a case is almost always material. This is not the kind of "needless" presentation of cumulative evidence that the rules prohibit. However, as the number of repetitions increases, there is a decreasing return on materiality, and perhaps even a negative return by angering or boring jurors.[82] At some point, judges must draw a line barring more witnesses who add little or nothing to the case.

C. *Experts We Can Live Without*

Expert witnesses involve much greater expenditures of time and money, and for this reason this section gives them extended consideration. Experts frequently are making more money per hour than anyone else in the courtroom, and perhaps not coincidentally are often the most loquacious. Even when taciturn, they can take up an inordinate amount of trial time. Jurors have to be informed about their extensive education and work experience, what they have reviewed, how often they testify, and how much they are being paid, none of which are involved with most other witnesses.

Additionally, unlike other witnesses, the number of expert witnesses in a case is potentially unlimited. As the United States Supreme Court noted in 1858, "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount. . . ."[83] Experience in the century and a half since then has shown much, much more of the same. Especially in recent years, the number and fields of expert witnesses have

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[82] French, *supra* note 13 (citing Call, *Handling the Jury—The Psychology of Courtroom Persuasion*, 1987 A.B.A. SEC. OF TORT & INS. PRACTICE REP. 847-48).

[83] Winans v. New York & Erie R.R. Co., 62 U.S. 88, 101 (1858).

exploded. For example, in January 1973, the *Texas Bar Journal*'s classified ads listed a single expert witness for hire;[84] by January 1993, that number had increased to sixteen individuals and eight groups of experts.[85] The latter pales in comparison to the 108 listings in another publication's recent directory of expert witnesses.[86]

In addition to the rules of civil procedure and evidence already discussed, Rule 702 of the Texas Rules of Evidence further limits the scope of testimony by expert witnesses as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[87] The primary focus of this rule is on the qualifications of the proffered expert, and most cases concern this question. For example, an "expert" cannot criticize the conduct of a licensed professional unless the opposing expert is also licensed.[88]

But the rule has a second hurdle to admissibility—the expert testimony must help jurors understand the evidence or determine a fact issue. This requirement eliminates experts on matters of common knowledge or common sense. A witness cannot help jurors understand something they already know. Thus, if a surgeon operates on the wrong leg, the rule requiring expert testimony in medical malpractice cases does not apply, because jurors need no help to understand this evidence.[89] Neither is expert testimony necessary to show that a nursing home located on a busy highway should not leave unsupervised a patient with a known tendency to wander.[90] Before spending thousands on several experts, reports, and depositions, litigants need to consider how much help the jurors really need on an issue.

The following subsections discuss how the Texas rules place reasonable limits on expert testimony. As with fact witnesses, these questions

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[84] *Classified Advertising: Services*, 36 TEX. B. J. 77 (1973).

[85] *Classified Ads: Services*, 56 TEX. B. J. 90-92 (1993).

[86] *Texas Lawyer*, July 19, 1993, at supplement.

[87] TEX. R. CIV. EVID. 702.

[88] Parkway Co. v. Woodruff, 857 S.W.2d 903, 919 (Tex. App.—Houston [1st Dist.] 1993), *writ granted*, 37 Tex. Sup. J. 667 (Apr. 20, 1994); Prellwitz v. Cromwell, 802 S.W.2d 316, 317 (Tex. App.—Dallas 1990, no writ).

[89] Williford v. Banowsky, 563 S.W.2d 702, 705-06 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

[90] Golden Villa Nursing Home, Inc. v. Smith, 674 S.W.2d 343, 349 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

are best addressed at a pretrial conference. The earlier in the litigation they are addressed, the greater the savings to all concerned.

1. Relevance

Rules 401 and 402 provide the basis for excluding classes of experts whose testimony is irrelevant. Some litigants offer experts for purposes of presentation, not substance. Even if there are simpler, cheaper, and faster ways to present proof, they want the expert as "window dressing"—not to help jurors see anything, but to make the case look more attractive by embellishing it with the endorsement of an expert. But trials are not advertisements, and endorsement by a celebrity does not increase the probability that a fact is true.

For example, some litigants have designated economists to place a value on lost consortium or household services. In the first place, it is hard to imagine what an expert with a Ph.D. in economics can tell jurors about love, sex, and cleaning house that they do not already know. After all, jurors have spouses, parents, and children, and know or can imagine what it would be like to lose them.

The primary objection to such testimony is that it is irrelevant. The amount charged by a professional housekeeper does not make any particular amount for lost consortium more or less probably true. The fact that an educated or even famous economist would award one damage figure does not make it more correct than the one found by twelve jurors using their common sense. Analogies highlighting the many things a family member does may be proper jury argument, but they are not evidence that justifies the cost of expert testimony. Accordingly, the courts generally have barred experts from testifying as to a particular dollar figure for lost consortium based on the fees of a psychiatrist,[91] a teacher,[92] or a minister, psychologist, social worker, and counselor.[93]

Economists also may tender "evidence" for closing arguments on punitive damages. In this developing area, the courts have been more recep-

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[91] Seale v. Winn Exploration Co., 732 S.W.2d 667, 669 (Tex. App.—Corpus Christi 1987, writ denied).

[92] Celotex Corp. v. Tate, 797 S.W.2d 197, 202 (Tex. App.—Corpus Christi 1990, no writ)

[93] Lopez v. City Towing Ass'n, 754 S.W.2d 254, 279 (Tex. App.—San Antonio 1988, writ denied). *But cf.* Garza v. Berlanga, 598 S.W.2d 377, 381 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (holding opinion testimony of economist on pecuniary damages may properly be admitted).

tive, occasionally allowing such testimony.[94] The amount of punitive damages depends on the twin notions of just punishment and sufficient deterrence. As to the former, appropriate punishment is a matter within the jury's discretion, determined more by the prevailing mores of the community than empirical proof. In Texas criminal cases, where lives are at stake rather than dollars, jurors decide an appropriate punishment without the help of experts.[95] As to deterrence, it is hard to imagine an expert who knows what amount would deter others. How would such an opinion be reached? By conducting a poll inquiring "How large a verdict would make you stop being consciously indifferent to others?" Where the issues are more a matter of lay opinion than science, attorneys should be fully competent to make the necessary arguments, and should not charge their clients two fees by hiring an expert to do so.

2. Prejudice

Rule 403 requires exclusion of expert testimony if its probative value is substantially outweighed by the danger of unfair prejudice. For example, an expert cannot testify as to the "profile" of a typical sexual harasser, which profile just happens to fit the defendant exactly.[96] Under our system of law, the question at trial is whether a person did the alleged act, not whether the defendant is the type of person who normally does such acts. The possibility for discrimination in the latter scheme is apparent.

Similar concerns about prejudice should bar most expert opinions on issues of intent, truthfulness, or state of mind. Almost every trial requires jurors to decide what is, or ought to have been, in another person's mind. Did the parties intend to contract? Was the act committed knowingly? Intentionally? Was the occurrence foreseeable? Is the witness telling the truth? To help the jury on these difficult questions, some litigants now tender psychologists—scientists devoted to studying what is in another person's mind. The first problem with such tenders is that they prove too much. If psychologists are truly reliable experts at judging a person's thoughts and truthfulness, then they should replace jurors in our civil justice system.

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[94] *See* Borden, Inc. v. De La Rosa, 825 S.W.2d 710, 719 (Tex. App.—Corpus Christi 1991), *vacated by agreement*, 831 S.W.2d 304 (Tex. 1992).

[95] TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1987 & Supp. 1994); Washington v. State, 677 S.W.2d 524, 527 (Tex. Crim. App. 1984).

[96] Bushell v. Dean, 781 S.W.2d 652, 656 (Tex. App.—Austin 1989), *rev'd*, 803 S.W.2d 711 (Tex. 1991) (appellant failed to preserve error for review by the appellate court).

More to the point of the rules, however, is the problem that psychology, like other disciplines, is not foolproof. Psychology is largely a matter of judgment, not scientific proof. For this reason, psychologists often make mistakes, even when using a scientific technique beyond the comprehension of most jurors (such as polygraph tests or malingering indices on tests like the MMPI). Moreover, these mistakes are on very critical questions, like truthfulness or intent. A mistake that miscategorizes an honest person as a liar, backed up by scientific tests jurors may not understand, is especially prejudicial.[97] The very foundation for a jury system is that these critical decisions should be made not by experts, but by the judgment of twelve average citizens.

For this reason, the courts have excluded experts as to whether another witness is telling the truth.[98] Experts cannot opine whether another person thought an insurance policy was in effect,[99] whether a testator intended to include adopted children as descendants in his will,[100] or whether the reason a company fired an employee was for filing a worker's compensation claim.[101] Again, however, few judges cite the rules concerning unfair prejudice and confusion when they make such rulings.

Sometimes the expert's opinion may not expressly address an issue of state of mind or truthfulness, but analysis of the foundation for the expert's opinion discloses it. For example, police officers often give opinions regarding the cause of and fault of an accident. However, this does not justify an expert opinion as to who ran a red light if the opinion is based solely on eyewitness statements. In such circumstances, the officer is acting solely as an expert on who is telling the truth.[102]

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[97] Romero v. State, 493 S.W.2d 206, 209-11 (Tex. Crim. App. 1973); Berry, Baer, & Harris, *Detection of Malingering on the MMPI: A Meta-Analysis*, 11 CLINICAL PSYCHOLOGY REVIEW 585 (1991).

[98] James v. Texas Dept. of Human Servs., 836 S.W.2d 236, 244 (Tex. App.—Texarkana 1992, no writ); Ochs v. Martinez, 789 S.W.2d 949, 956 (Tex. App.—San Antonio 1990, writ denied).

[99] Riggs v. Sentry Ins., 821 S.W.2d 701, 709 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

[100] Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687, 689 (Tex. 1984).

[101] Borden, Inc. v. De La Rosa, 825 S.W.2d 710, 718 (Tex. App.—Corpus Christi 1991), *vacated by agreement*, 831 S.W.2d 304 (Tex. 1992).

[102] Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619, 623 (8th Cir. 1986); Monsanto Co. v. Johnson, 675 S.W.2d 305, 311 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

3. Scientific, Technical, or Specialized Knowledge

Expert testimony is necessary only if it helps jurors understand the evidence or determine a fact in issue. Often, lawyers call experts not to present technical information but to draw conclusions therefrom. This is fine if expert training is necessary to draw the conclusion, but not otherwise. This error stems from a misconstruction of the rule of *Birchfield v. Texarkana Memorial Hospital*,[103] that allowed experts to give opinions on ultimate issues. In that case, the Texas Supreme Court held that a physician could testify whether the failure of a hospital to purchase certain equipment was negligence or gross negligence.[104] Expert testimony was proper because most jurors have no idea what ordinarily prudent hospitals should do.

But the holding that an expert may give an opinion on an ultimate issue does not mean that it is always necessary or proper to do so. In many instances, jurors can draw their own conclusions, either based on their own knowledge or the facts presented to them. For example, expert testimony is inappropriate on whether driving while intoxicated is gross negligence[105] not because it contains an opinion on an ultimate issue, but because it fails to meet the requirement that scientific knowledge is necessary for the jury to understand the evidence.

Clearly, expert testimony regarding what a reasonable person would do is unnecessary.[106] Jurors are themselves reasonable people, and normally need no help on this question. Careful analysis of what some experts are saying, however, shows that this is precisely the substance of some expert testimony. For example, in *General Chemical Corp. v. De La Lastra*,[107] the families of two deceased shrimp boat workers brought a warnings claim against the manufacturer of a chemical compound used as a preservative. As in all warnings cases, the issue was whether the warning given ("toxic gas") adequately communicated the possible danger (death by asphyxiation). A toxicologist was allowed to give an expert opinion

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[103] 747 S.W.2d 361 (Tex. 1987).

[104] *Id.* at 365.

[105] *See* Louder v. DeLeon, 754 S.W.2d 148, 149 (Tex. 1988) (per curiam).

[106] *See, e.g.*, Montelongo v. Goodall, 788 S.W.2d 717, 720 (Tex. App.—Austin 1990, no writ) (holding question whether no handrail or a plastic covering on four steps to a trailer house created an unreasonable risk of harm is not expert testimony). However, expert testimony as to what a member of a specialized occupation would think is proper. Riggs v. Sentry Ins., 821 S.W.2d 701, 709 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

[107] 852 S.W.2d 916 (Tex. 1993), *cert. dismissed*, 114 S. Ct. 490 (1993).

that the warning was inadequate.[108] As the warning did not contain particularly technical or specialized language, it is unclear why twelve reasonably prudent jurors needed assistance to look at the warning, look at what happened, and decide whether the former sufficiently communicated the risk of the latter.[109]

To borrow a rule from another context, warnings experts are unnecessary because, unless there are technical terms, the warning "speaks for itself." The flaw is not in the witness, who may very well be a distinguished expert. Nor is it in the form of the question, as experts clearly can give an opinion on the ultimate issue. The flaw is that the particular conclusions being drawn require no scientifiic or technical training to draw them.

This same error appears on occasion with law enforcement experts. In suits against a property owner where a crime has occurred, the issue is whether a reasonable property owner or occupier—not a security expert—should have foreseen criminal acts and taken steps to prevent them.[110] All jurors either own or occupy property, so once they are informed about the neighborhood, they can make up their own minds what a person should foresee and do. In *Havner v. E-Z Mart Stores, Inc.*,[111] the plaintiff's experts testified that a convenience store had several inadequacies, including no alarm system, poor lighting, promotional signs blocking windows, one night clerk instead of two, a telephone that did not allow outgoing calls, and an inoperable drop safe.[112] A strong argument can be made (and obviously was) that these inadequacies create an unsafe place to work, but this conclusion requires no expert training. Four members of the court specifically noted that the testimony of these experts was "marginal"[113] and "superfluous."[114]

Similarly, in *Walkoviak v. Hilton Hotels Corp.*,[115] the court relied upon an expert's opinion that employing a single security guard to look occasionally down the aisles of a large parking lot constituted negligence.[116]

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[108] General Chem. Corp. v. De La Lastra, 815 S.W.2d 750, 755 (Tex. App.—Corpus Christi 1991), *aff'd in part & rev'd in part*, 852 S.W.2d 916 (Tex. 1993).

[109] *See, e.g.*, Herrera v. FMC, 672 S.W.2d 5, 7 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

[110] Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 550-51 (Tex. 1985).

[111] 825 S.W.2d 456 (Tex. 1992).

[112] *Id.* at 459.

[113] *Id.* at 462 (Phillips, C.J., concurring).

[114] *Id.* at 465 (Cornyn, J., dissenting).

[115] 580 S.W.2d 623 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

[116] *Id.* at 626.

That may be true, but is it something that jurors cannot understand without technical expertise? The future of this practice appears in *Berry Property Management v. Bliskey*,[117] where the security expert testified that leaving marked apartment keys in an unlocked cabinet in the management office (from which a thief stole one) was "unconscionable" and "terrible."[118] True, perhaps, but these are not the terms and conclusions normally used by rocket scientists or any other form of technical expert.

This is not to say that there is never any room for expert testimony in such cases. By way of contrast, one expert in *Havner* cited published studies showing that implementation of certain suggested safety measures reduced injuries to convenience store employees by thirty percent.[119] This would be technical information unknown to most jurors, and if from reliable authorities, should be read to the jury.[120] But the same is not true of expert testimony that merely draws conclusions based on common sense.

When appellate opinions approve such experts, or at most excuse testimony as harmless error, this has a tendency to multiply experts in all similar cases. When the *Havner* majority cited expert opinions as "some evidence"[121] to support the verdict, although the true basis for the holding was the circumstantial evidence itself,[122] litigants in many other cases may be lead to believe that they too must hire an "expert" to draw such conclusions and avoid no evidence finding. This is misleading. An expert's opinion that criminal acts were foreseeable is no evidence of negligence without suspicious occurrences or other circumstantial evidence.[123] More importantly, it will greatly multiply the cost of litigation by multiplying experts. Having decided in one case to "let it all in," courts may have difficulty ever keeping it out again.

4. Mode of Presenting Evidence

A judge's control over the manner used to present evidence may help avoid additional expert fees. While litigants should enjoy broad freedom in deciding how to present their case, the rules limit this discretion when it begins to run into significant expense and delay.

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[117] 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.).

[118] *Id.* at 654.

[119] *Havner*, 825 S.W.2d at 460 n.3.

[120] TEX. R. CIV. EVID. 803(18).

[121] *Havner*, 825 S.W.2d at 460 n.4.

[122] *Id.* at 456.

[123] Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60, 65 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

There are several routine situations where reasonable control over the mode of presentation should allow exclusion of experts. For example, in proving the probable length of a person's life, life expectancy tables published by government or trade organizations are routinely admissible;[124] hiring experts to prove these figures adds little, but costs a lot. Similarly, reconstructionists in routine auto accident trials usually estimate vehicle speed by looking up skid mark length on charts published by public agencies; they also may testify as to driver reaction times, again reading from government or trade publications. These documents are themselves admissible in evidence.[125] Why should clients have to pay an expert to read an admissible document to the jury? Unless litigants have unlimited funds and the courts have unlimited time, this evidence should go to the jury through exhibits, not expert testimony.

Litigants could avoid paying for trial testimony by economists in many cases by using other methods. Economists most frequently testify concerning the present value of future losses.[126] Usually, this application of math (present value) to the evidence (e.g., lost wages and expected work life) can be done by a $20 calculator rather than a $200 per hour expert witness. At a much lower cost, an economist could prepare a chart showing a range of assumptions as to wage loss, work life, inflation, and discount rates. Admission of this chart (for demonstrative purposes if nothing else)[127] would allow jurors to understand present value without a college course in economics.

Additionally, presentation of an exhibit with a range of assumptions would remove a potential problem of prejudice. Economists who give only a single opinion as to the present value of future losses are making certain assumptions concerning inflation and interest rates. It has not been proven that economists are experts at predicting these rates. In fact, if one could do so with accuracy, there would never be any volatility in the bond markets. The United States Supreme Court has noted that forecasts of inflation are "too unreliable to be useful in many cases," and cautioned

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[124] *See, e.g.*, Harwell & Harwell v. Rodriquez, 487 S.W.2d 388, 400 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

[125] TEX. R. CIV. EVID. 803(8), 902(5).

[126] *See, e.g.*, Halliburton Co. v. Olivas, 517 S.W.2d 349, 351-52 (Tex. Civ. App.—El Paso 1974, no writ); Williams v. General Motors Corp., 501 S.W.2d 930, 940 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

[127] *See, e.g.*, Main Bank & Trust v. York, 498 S.W.2d 953, 955 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

against turning trials into seminars on economic forecasting.[128] The Fifth Circuit noted the same problem:

> [T]he battle of economic experts is apt to shift the trial's emphasis from the determination of liability and the estimation of basic damages into the formulation of predictions concerning the national, indeed, global, economic future, including the likelihood of future increases or decreases in oil prices and the stability of foreign governments.[129]

Twelve jurors may estimate these effects just as accurately, keeping in mind that the underlying figures in these verdicts (future work life, expenses, and wages, not to mention pain and suffering) are themselves very rough estimates.

Another area where the mode of presentation to the jury should be controlled has to do with the applicable law. The proper mode for informing jurors on the law is instruction by the judge, not expert testimony. Thus, the courts have excluded expert testimony as to the legal duty of a sign company to repair a sign installed by another,[130] whether coverage exists under an insurance contract,[131] and the law for tracing funds in a community property context.[132] Similarly, there is no expert as to the meaning of a contract.[133]

D. *Depositions, Lies, and Videotape*

The Texas rules governing depositions can save a significant amount of time and money without compromising justice. These rules allow liberal use of deposition testimony at trial without regard to the availability of the witness or other hearsay concerns.[134] Using depositions rather than live

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[128] Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 548 (1983).

[129] Culver v. Slater Boat Co., 722 F.2d 114, 119 (5th Cir. 1983).

[130] Puente v. A.S.I. Signs, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied).

[131] Cluett v. Medical Protective Co., 829 S.W.2d 822, 827 (Tex. App.—Dallas 1992, writ denied).

[132] Welder v. Welder, 794 S.W.2d 420, 433 (Tex. App.—Corpus Christi 1990, no writ).

[133] United Gas Pipe Line v. Mueller Eng'g Corp., 809 S.W.2d 597, 602 (Tex. App.—Corpus Christi 1991, writ denied).

[134] TEX. R. CIV. EVID. 801(e)(3).

testimony eliminates further witness preparation, scheduling headaches, and other costs and delays associated with bringing busy witnesses like doctors to trial.

Unfortunately, trial depositions also can become cumulative and wasteful. Presenting deposition testimony wastes rather than saves time if the witness will testify in person as well. The deposition and the live testimony always will cover much of the same ground, and anything critical from the deposition certainly will be asked at trial as well. For this reason, there is no error in excluding deposition testimony where the witness testifies live.[135] This does not prohibit using limited portions of a deposition for specific purposes such as impeachment. But confrontation and credibility concerns generally favor live testimony.

Further, depositions result in shorter trials only if they are edited carefully. Often this is not the case. Deposition testimony that once seemed relevant often becomes superfluous as the trial unfolds. If the first few witnesses present the background facts, there is rarely any reason for later deponents to do the same. Before presenting depositions, attorneys should reconsider what the jury still needs to know, and edit accordingly.

Editing is more difficult with videotaped depositions. While editing a deposition transcript requires little more than a stroke of the pen, editing a videotaped deposition requires a significant amount of time and perhaps the services of a video professional. If objections are sustained during the trial, it becomes extremely cumbersome and time-consuming to try to delete a short phrase or attorney colloquy during the video playback. Rather than being mesmerized by the medium, jurors become frustrated with the delay as the video operator cues back and forth trying to skip over words and phrases.

Videotape editing is critical also because of the medium. Many lawyers feel that videotapes are better for communicating with jurors who live in a TV world. Yet most trial videotapes have about as much relationship to modern television as TV sitcoms have to real life. Because seventy-seven percent of Americans get ninety percent of their news from television, they expect to learn what they need to know in action-filled bursts of thirty to ninety seconds.[136] By contrast, the average videotaped deposition consists of a tedious shot of the upper body of the deponent responding to questions from an unseen lawyer. This "talking head" usually goes on for

[135] Mottu v. Navistar Int'l Transp. Corp., 804 S.W.2d 144, 147-48 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

[136] French, *supra* note 13 (citing SONYA HAMLIN, WHAT MAKES JURIES LISTEN 8 (1985)).

hours, unrelieved by any change of position, shot, or background. Large segments consist of the witness staring at the ceiling while the questioner rustles papers in the background, searching for a document or the next question to ask.

If litigants present videotaped depositions like these in order to imitate TV, one has to ask what channel these people are watching. Most jurors do not watch C-SPAN because, although it broadcasts important information, it is boring. Does anyone really think this format captivates jurors? One has to wonder whether videotaped depositions are used as an effective means of presenting evidence to the jury, or merely as a relaxing break for the lawyers while the jurors stare at a screen and daydream. If television producers made video depositions, they would make them much shorter. They would eliminate background information if it is not critical, and use a narrator's initial summary if it is. They would never present the deposition in the order it was taken, and they would be within the rules in doing so.[137] To the extent humanly possible, they would present a witness' entire "story" in twenty minutes.

IV. THE TASK AHEAD

This article seeks to place neither blame nor fault for existing delays and high costs in litigation. Judges, attorneys, litigants, legislators, jurors, and society in general have all contributed to the way trials are conducted today. Reforming the system will require a cooperative effort by all of them as well. Nevertheless, judges and attorneys, who conduct litigation daily, must bear the major responsibility for implementing changes such as those discussed above.

A. *The Role of Attorneys*

Any effort to cut delay and expense in the civil justice system will fail if the individual lawyers who do most of the work resist it. Because the vast majority of cases settle before trial, legislative decrees and court orders will have an insignificant impact if attorneys do not choose to cut costs and delay on their own.

There are several good reasons why attorneys should cooperate with attempts to shorten trials. First and most important, they are spending someone else's money. Every deposition charge, every expert's fee, and

[137] *See* Jones v. Colley, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied).

every day of delay takes money out of the client's pocket. So does every moment in trial. For attorneys paid on an hourly basis, the correlation between length of trial and fee received is direct. For attorneys paid a contingency fee, the correlation still exists, as the time and labor required is one of the considerations in determining whether a contingency fee is reasonable.[138]

Attorneys stand in a fiduciary relationship to their clients.[139] As such, they bear the usual fiduciary duties to deal with their clients in utmost, scrupulous good faith,[140] to render full and fair disclosure,[141] and to deal fairly with their clients' interests and property, especially in areas of potential conflict of interests.[142] No less than other fiduciaries, they cannot use their position to gain personal benefit at the client's expense, and must avoid placing themselves in a conflict of interest with their clients.[143] Additionally, there is the usual presumption of unfairness in financial transactions for the fiduciary's benefit, the attorney bearing the burden of proving the perfect fairness of all contracts and transactions with the client.[144] Accordingly, attorneys need to consider whether the costs they incur because of lengthening trials, especially those that may end up in their own pockets, meet the high standards of a fiduciary.

It is true that from a malpractice perspective, a lawyer who chooses not to do something is at greater risk than one who simply does everything. But again, this is not the way fiduciaries must think. A professional must exercise uncorrupted judgment for the sole benefit of the client.[145] Making clients pay more because their attorney fears malpractice claims is not the way professionals are expected to act.

Secondly, there are strategic reasons for attorneys to shorten the cases they present. In their article *Sponsorship Strategy*,[146] attorneys Paul Colby and Robert Klonoff point out that jurors begin with the perception that attorneys are hired guns acting not as impartial truth seekers but as zealous

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[138] TEX. DISCIPLINARY. R. PROF. CONDUCT 1.04 (1989).

[139] Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988).

[140] Henderson v. Shell Oil Co., 208 S.W.2d 863, 866 (Tex. 1948); State v. Baker, 539 S.W.2d 367, 374 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

[141] *Willis*, 760 S.W.2d at 645.

[142] Jinks v. Whitaker, 195 S.W.2d 814, 819 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.).

[143] Slay v. Burnett Trust, 187 S.W.2d 377, 388 (Tex. 1945).

[144] Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964); Ginther v. Taub, 570 S.W.2d 516, 525 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

[145] International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 577 (Tex. 1963).

[146] Paul Colby & Robert Klonoff, *Sponsorsip Strategy*, 17 LITIG. 1 (1991).

advocates simply trying to win.[147] Accordingly, jurors are skeptical of evidence presented in support of an attorney's case—they expect no less from them. However, they give a good deal of credence to any evidentiary flaws or admissions by the attorney. Thus, there is limited advantage to positive evidence, and much to be lost by equivocal or negative evidence. The authors conclude by suggesting that trial lawyers present only the critical evidence supporting their case, and nothing more.[148]

A third reason attorneys should attempt to cut the costs and delay of litigation is that the Texas Disciplinary Rules require it. There is a perception that, while judges have a duty to other cases on the docket, lawyers do not. But this view of an attorney's duties is too narrow. The Disciplinary Rules provide that "[i]n the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[149] This duty is not limited to persons involved in that particular case; "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ."[150]

Despite these considerations, some lawyers will resist efforts to shorten trials because of fears that they will lose control. Others may resist because they fear what judges might do. Indeed, abuses can occur in the name of expediency. For example, in *Employers Insurance of Wausau v. Horton*,[151] the trial judge announced at the start of a trial that "we've got to be through by Friday."[152] To meet the deadline, she required the defendant to begin its case at 7:52 p.m., and the jury to retire for deliberations at 10:55 p.m., returning over two hours later with a verdict for the plaintiff. The defendant got sympathy from the appellate court, but not a reversal.[153]

Yet, the possibility that some judges may abuse a practice does not mean it has no merit. Further, the exclusions discussed in this article should not leave dissatisfied litigants without a remedy. By requiring a concise statement of a witness's anticipated testimony at the pretrial conference, a record for appeal is created automatically.[154]

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[147] *Id.*
[148] *Id.* at 48.
[149] TEX. DISCIPLINARY R. PROF. CONDUCT 3.02 (1989).
[150] *Id.* 4.04.
[151] 797 S.W.2d 677 (Tex. App.—Texarkana 1990, no writ).
[152] *Id.* at 679.
[153] *Id.* at 681-82.
[154] TEX. R. APP. P. 52(b).

B. *The Role of Judges*

Most of the suggestions made throughout this Article require action by trial judges. If judges do nothing to limit costs and delays, they will continue to increase. This is a task that judges must undertake voluntarily. They cannot be made to take such action by mandamus, as the costs and delay inherent in a mandamus proceeding itself would make such efforts self-defeating. Further, most of the rules contemplate an exercise of discretion, rendering mandamus inapplicable.

By virtue of their position, judges are the best qualified to decide what is necessary and what is not at trial. Judges see scores of trials every year, far more than most attorneys, and thus should have a better idea what evidence persuades jurors and what simply wastes time. Judges know the status of their own docket, and can better assess what the costs will be if the next case is delayed by prolonging the current one. They have no stake in the litigation, so their judgment is not clouded by considerations of self-interest or financial gain.

For these reasons, the rules place the burden and discretion for reducing delay largely on judges. As discussed above, many of the Texas rules call for action by judges on their own initiative, without waiting for any party to object. The standards for prompt disposition of cases appear in the rules governing the conduct of judges, not lawyers.[155]

Appellate judges also must bear responsibility for encouraging reasonable limits on trial time. Because admitting cumulative or immaterial evidence is always harmless,[156] trial judges naturally hesitate to exclude evidence if there is any possibility it will result in having to re-try the case. Thus, unless appellate judges make clear that they will not second-guess efforts by trial judges to exclude unnecessary evidence in the interest of efficiency, most trial judges will be inclined to continue "letting it all in,".

Finally, judges must not fear taking steps to shorten trials because of the possibility of mischaracterization of their motives. Judges tend to resist any measures of court activity that might be used unfairly as job performance standards. The number of verdicts received, the number of cases disposed, and similar statistics depend on many factors beyond a trial judge's control. These numbers can be manipulated, and in the wrong hands turn from tools for improvement into notches on a gun or political dynamite.

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[155] TEX. R. JUD. ADMIN. 6(b).

[156] Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 230 (Tex. 1990).

Nevertheless, judges must work toward shorter trials for the general good they will do. Several thousand years ago, Jethro rebuked Moses, the only judge in Israel, because the people had to wait from morning until evening to receive judgment.[157] Why, imagine having to wait all day! Judges are right to avoid schemes that are merely popular or politically correct. But at the same time, they should ask themselves, "What would Jethro say if he saw my docket?"

V. CONCLUSION

The public is demanding greater efficiency in the civil justice system. At the same time, the same public is neither funding more courts nor filing fewer claims. The trend of increases in pending caseloads without corresponding increases in the number of judges to try them means that shorter trials are a matter of necessity, not choice. It is true that those demanding quicker trials are usually not the ones who have to live with the verdicts. Nevertheless, when attorneys making $200 per hour resist any suggestion of limiting trial time, there is at least the appearance of a conflict of interest.

Naturally, the process of shortening trials can be carried too far. Judges and attorneys must approach changes to the way trials are conducted warily. Justice is not like widgets—more output is not necessarily better. To some degree, the process by which people receive their day in court is just as important as the outcome.

But at the same time, traditional practices and notions of procedure are hard to defend if they make costs prohibitive and trial dates illusory. The existing Texas rules are neither drastic nor inflexible, barring evidence only if it is "needless,"[158] and requiring dispatch and cost limitation only where it is "practicable."[159] While some evidence bears repeating, surely not every point, and not by endless repetition.

There is no reason to think that cutting improper *voir dire*, cumulative witnesses, ersatz experts, and lengthy depositions will cause unjust verdicts. After all, such practices are by definition improper, cumulative, and unnecessary. Curtailing them, however, will certainly affect how expensive and time-consuming it is to get a verdict. No study has ever shown there will be less justice if a trial lasts one day instead of three. On the

[157] *Exodus* 18:13-27.
[158] TEX. R. CIV. EVID. 403, 611.
[159] TEX. R. CIV. P. 1.

other hand, more injustice will be the inevitable result if increasing numbers of litigants languish on crowded dockets.

If courts exist to help people settle their disputes peaceably, then long and expensive trials may be sending them back to the streets. In this life, both time and money are short. Trials should be, too.