

## **A Modified Jury Trial Schedule: A Win-Win-Win Situation** **by Timothy J. Malloy\* and Consuelo G. Erwin<sup>†</sup>**

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When reporting for jury duty in New York, “[o]ne lady asked to be excused because she couldn’t afford to pay \$40 per day.” When informed that she would actually be *paid* \$40 a day to serve, she happily accepted.<sup>1</sup> Although the woman’s perception of the “cost” of jury duty may be humorous, for many it is not very far from the truth. Numerous people report suffering significant hardships as a result of serving on a jury, including: rearranging work schedules, health issues, childcare or elderly care, and loss of wages. This last hardship—lost wages—is a considerable hurdle to many. In 1978, jury pay was \$30 per day; now it is \$40.<sup>2</sup> Although federal compensation to jurors has increased by thirty-three percent since 1978, the cost of living has increased in excess of one hundred and seventy-five percent!<sup>3</sup> “Few working-class persons can live on \$40 a day, even with a free lunch.”<sup>4</sup> Because of the economic and other hardships associated with jury duty, several commentators advocate the need for a dramatic increase in jury pay.<sup>5</sup> However, I recommend a simpler and more feasible solution—a modified jury trial schedule—that would mitigate the economic loss of jurors while benefiting judges and lawyers as well.

I first experienced this modified jury trial schedule when I, along with others from McAndrews, Held, and Malloy, tried a patent infringement action in April and May 2002 before the Honorable Judge William Alsup of the United States District Court of the

Northern District of California in San Francisco. This modified trial schedule ran from 8 a.m. to 1 p.m. with no lunch recess and two very short breaks rather than from 9 a.m. to 5 p.m. with a lunch and several other breaks, as a typical trial schedule would. This modified schedule allowed the jurors to attend to their jobs, families or errands in the early afternoon. However, this modified schedule did not just benefit the jurors; it benefited the judges and the lawyers as well. It allowed Judge Alsup to attend to his over 400 other case assignments, and it gave the lawyers time to prepare for the next day of trial without sacrificing a significant amount of greatly needed sleep. Okay, by now you must be saying to yourself, “yes, a modified trial schedule has some perks, but aren’t you forgetting about one really big downfall? Won’t it just increase the number of days a juror has to come to court?” To the contrary, Judge Alsup noted that the modified schedule lost only forty-five minutes when compared to the average trial day after accounting for lunch and other additional recesses.<sup>6</sup>

I find this type of schedule particularly efficient in my line of work. Patent infringement trials are quite taxing on jurors. The jurors are inundated with the fundamentals of patent law, which in itself can be filled with arcane jargon, and then, they are bombarded with all of the particulars of the technology involved. A condensed trial schedule overcomes these difficulties by maintaining the jury’s attention, minimizing lengthy interruptions, and avoiding the problem of post-lunch drowsiness.

To gauge the overall feasibility of a modified trial schedule, I contacted every Chief Judge in the Federal Court System by mail to inquire into his or her thoughts about the idea. Surprisingly, twenty percent of the responding judges<sup>7</sup> already use this type or a similar schedule<sup>8</sup> on a regular basis in their courtrooms. These judges are wholehearted

supporters because they have seen the benefits first hand. Their overarching rationale for adopting a modified schedule is that it improves the efficiency of the trial process. One of the trial judges who uses a modified trial schedule on a regular basis noted: “Perhaps, most important, it permits the careful trial judge to avoid side bars and jury interruptions during the trial, because he or she can direct the lawyers to present all evidentiary issues and problems at the close of the trial day in preparation for the next day. It also avoids that slow period that always follows lunch. Something about the human digestive system seems to make lawyers, judges and jurors all sleepy for the first hour and a half after lunch and everything slows down accordingly. In fact, I am convinced that the efficiency of the process results in my trials uniformly being shorter than expected.” Another judge praised the modified schedule by stating that the “jury also remains fresh and more alert, and I believe, more attentive and better able to perform its duty” and the lawyers are “better prepared.”

In addition, sixty-four percent of the responding judges had at some point used a modified schedule, with all but one reporting that at least one of their experiences with a modified schedule was a success. These judges who occasionally use a modified schedule suggest that it is particularly helpful when conducting lengthy civil trials. One judge stated, “[w]hen I first came to the bench in 1987, I tried a three month RICO case and did not use [a modified schedule]. It took me about a year to recover and attend to all the matters that had to be cancelled or adjourned because of the trial.”

On the other hand, these judges believe that it is better for the jury and the lawyers who are assigned to a shorter trial to spend two or three long days in court rather than facing the possibility of extending the length of the trial, even if it is only by one

day. Moreover, shorter trials, by nature, do not result in the same hardships to lawyers and jurors as lengthy trials do. Jurors miss only a few days of work, and lawyers do not require as much preparation time. Therefore, the benefits of a modified trial in a shorter trial setting may not be as noticeable as in a lengthy trial setting. Additionally, a criminal case setting poses extra obstacles to a modified schedule. Some judges noted that transporting a defendant from custody to the courtroom is a very time consuming task, especially when there are multiple defendants. Consequently, it may be more resourceful to get in as much trial time as possible per day to take full advantage of each transfer of the defendant(s).

Another twenty percent of the responding judges suggested that they would consider using a modified schedule sometime in the future. Several judges noted that they set their trial schedule on a case-by-case basis, and they request guidance from the attorneys and jurors for each case concerning what type a schedule would be most beneficial for them. These judges who would consider using the modified trial method commented that it had merit and that they would pose it as an option in future cases.

Of course, there were still thirty-six percent of the responding judges who did not think that a modified trial schedule was a good idea. Most of these judges were not necessarily against a modified schedule as much as they thought that a modified schedule was unsuitable for their particular district. Many judges from rural areas noted that, while a modified schedule would be advantageous in an urban district, it just was not suitable for their districts because of the lengthy jury commutes. Some jurors travel over 100 miles to serve, and many judges thought that a starting time of 8 a.m. would make it difficult for these traveling jurors. In addition, these jurors may find it burdensome to

commute for two hours and then only serve a partial day even if many courts pay for the jurors to stay overnight if they wish. Whether these commuting jurors stay overnight or travel back home, it is unlikely that they would obtain significant advantages from the modified schedule since they are unable to return to work or their families early in the day.

Ironically, a few urban judges thought that a modified schedule would be more appropriate for rural districts because urban jurors might have commuting problems caused by rush hour traffic. They noted that an 8 a.m. starting time would create the possibility that jurors would have to begin their commute unreasonably early in order to make sure they arrived at the courthouse on time. Nevertheless, changing the schedule to run from 9 a.m. to 2 p.m could alleviate this problem.

A few judges had other rationales for disliking the idea of a modified trial schedule. Some were concerned over losing trial time and believed that a modified schedule would just increase a court's inefficiency. One judge stated, "The best trial is a short trial. Its like an operation—heart surgery—you want to get in and get out or the patient will die!" Others had reasons to oppose a modified trial schedule that were unrelated to the actual merits of a modified schedule. For example, one judge commented, "I can't believe someone would copy anything Cal[ifornia] does. We could have tried O.J. in two weeks," yet another judge "oppose[d] any generalized infringement on an individual judges discretion."

In my view, the modified trial schedule is a creative and progressive solution to the problems associated with jury service. This schedule benefits everyone. It allows jurors to return to their jobs, the judges to attend to their other cases, and lawyers to

prepare for the next day of trial. It also improves the efficiency of the trial process. However, judges should be aware that a modified schedule might actually inconvenience jurors with difficult commutes. In general, however, a modified trial schedule benefits all of the trial participants. All things considered, it seems like a win-win-win situation, but you can be the judge of that.

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<sup>1</sup> *Juror Excuses Heard Around the State*, 73 N.Y. ST. B.J. 34, 34 (June 2001).

<sup>2</sup> In 1978, federal jurors were paid \$30 per day. In 1990, the jury compensation statute was amended to compensate jurors \$40 per day. Juror compensation remains the same in 2002. *Compare* 28 U.S.C. §1871(b)(a)(1978) *with* 28 U.S.C. §1871(b)(a)(1994). Juror compensation at the state level is usually lower.

<sup>3</sup> The annual average Consumer Price Index rose from 65.2% in 1978 to 179.3% in 2002.

*Consumer Price Index, 1913-*, at

<http://woodrow.mpls.frb.fed.us/research/data/us/calc/hist1913.cfm> (last visited August 8, 2002).

<sup>4</sup> Thomas L. Fowler, *Filling the Box: Responding to Jury Duty Avoidance*, 23 N.C. CENT. L.J. 1, 1 n.4 (1997-1998); *Pay Jurors Fairly*, 156 N.J.L.J. 294, 294 (1999).

<sup>5</sup> *See, e.g., Pay Jurors Fairly*, 156 N.J.L.J. 294, 294 (1999).

<sup>6</sup> Also, a judge who has used the modified trial schedule noted that “[o]ur experience is that the case goes about the same total length give or take a day and in the scheme of a 15 or more day trial one more day does not matter much.”

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<sup>7</sup> Tim Malloy contacted all the federal district chief judges by letter inquiring about each judge's current trial schedule, the pros and cons of a modified trial schedule, and any other comments they had on the subject. To date, twenty-five judges have responded.

<sup>8</sup> For example, a judge might use a schedule running from 8:30 a.m. until 1:30 p.m. or from 8 a.m. until 2 p.m.