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Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers

Geoffrey C. Hazard Jr.

UC Hastings College of the Law, hazardg@uchastings.edu

Paul R. Rice

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Geoffrey C. Hazard, Jr., and Paul R. Rice

Contents

NOTE: APPENDIXES 1–18	376
INTRODUCTION	377
I. HISTORY OF THE ACTION	381
II. THE PRETRIAL PROGRAM—GENERALLY	384
III. APPROACHING THE MANAGEMENT TASK	388
IV. THE SUPERVISION PROCESS	390
A. Procedural Rules	390
B. Informality	394
C. Tailoring of Procedures to the Litigation at Hand	397
1. The Privilege Claim Process	397
2. Isolating the Contested Issues	405
V. CONCLUDING REFLECTIONS	414
A. Mechanisms	414
B. The Decision Rule	414
C. Perspectives and Incentives	415
D. The Informality of the Process	416

NOTE: APPENDIXES 1-18

There are 18 documents constituting appendixes that are not printed here but will be published with this article in a monograph planned for publication in 1982. These documents are as follows.

1. Complaint, U.S. v. AT&T.
2. Pretrial Order No. 12, requiring Statements of Contentions and Proof; Opinion dated September 11, 1978, concerning scope of discovery.
3. Pretrial Order No. 16, Opinion, Memorandum, and Memorandum Order, concerning the stipulation process and related issues.
4. Pretrial Order No. 20, concerning judicial notice of agency decisions.
5. Order of Reference, appointing special masters to decide questions of evidentiary privilege.
6. Pretrial Order No. 13, appointing Magistrate Lawrence S. Margolis to supervise discovery.
7. Order dated October 10, 1979, concerning discovery and stipulation process.
8. Agreement concerning ex parte communication with special masters.
9. Pretrial Order No. 7, concerning nondisclosure to third persons of matter produced in discovery.
10. Pretrial Order No. 8, supplemented by Order dated June 19, 1980, concerning nondisclosure of matter produced in discovery by third persons.
11. Guidelines for Resolution of Privilege Claims.
12. Procedural Guidelines for Submission of Privilege Claims.
13. Letter from special masters to Department of Justice, in U.S. v. AT&T, dated May 4, 1979, concerning adequacy of documentation of privilege claims.
14. Stipulation Package No. 13, entitled Railroads.
15. Pretrial Order No. 14, concerning nondisclosure of the stipulation worksheets.
16. Order dated March 18, 1981, concerning tentative stipulations.
17. Letter from special masters to Judge Greene, reporting status of stipulation negotiations.
18. Reports on Status of Stipulation Negotiations, dated October 24, 1980.

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Geoffrey C. Hazard, Jr., and Paul R. Rice

This article reports on the experience of Special Masters appointed to regulate pretrial phases of a large civil antitrust suit. It describes techniques for expediting discovery, determining claims of privilege in production of documents, establishing stipulations of undisputed facts, and controlling and resolving disputes arising in discovery. It suggests a "managerial" approach to pretrial that is flexible and experimental and that may be useful in controlling the pretrial phase of other "big" cases.

INTRODUCTION

Management of the pretrial and trial processes in massive complex litigation has received considerable attention over the past few decades. The most recent general study is the 1979 report of the National Commission for the Review of Antitrust Laws and Procedures.¹ That report and others that preceded it² concluded that the complexities of massive litigation and the delays to which they give rise can be successfully resolved only through greater judicial participation in the pretrial process. The Commission concluded that the failure of judges to control and manage complex cases "is a major component of unreasonable delay." It also

Geoffrey C. Hazard, Jr., is Nathan Baker Professor of Law, Yale Law School, and Professor of Law and Management and Deputy Dean of the Yale School of Organization and Management. B.A., 1953, Swarthmore College; LL.B., 1954, Columbia University.

Paul R. Rice is Professor of Law, Washington College of Law, American University. B.B.A., 1965, Marshall University; J.D., 1968, West Virginia University College of Law; LL.M., 1972, Yale Law School.

We wish to give special recognition to Terry Miller, a senior law student at the American University, Washington College of Law, for her exceptional work in compiling the footnotes and statistical information for this article. Without the assistance of Ms. Miller and Leah Wadle, our associate for the past three years, the completion of this article would have been significantly delayed.

1. Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, *reprinted in* 80 F.R.D. 509 (1979). Hereinafter this commission is referred to as "the Commission."

2. Handbook of Recommended Procedures for the Trial of Protracted Cases, *reprinted in* 25 F.R.D. 351 (1960) [hereinafter cited as Handbook]; The Judicial Conference of the United States, the Report on Procedure in Anti-trust and Other Protracted Cases, *reprinted in* 13 F.R.D. 62 (1951) [hereinafter cited as Prettyman Report]; Manual for Complex Litigation, 1 pt. 2 Moore's Federal Practice (2d ed. New York: Matthew Bender, 1981) [hereinafter cited as Manual].

observed that “[i]n major antitrust suits where potential to protraction is acute . . . an uninvolved, unaggressive judicial posture is a prescription for directionless litigation and excessive delay.”³

To achieve more effective judicial control, a variety of proposals have been made for management of the pretrial processes. Aside from the 1979 Commission report, proposals have been made in the Manual for Complex Litigation,⁴ in the Report of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases (the Prettyman Report),⁵ and in the Handbook of Recommended Procedures for the Trial of Protracted Cases.⁶

The Manual was the first significant outline of a mechanism to introduce active judicial control into the pretrial process. It provides for management through four main pretrial conferences, each marking a new state of pretrial. The agenda for the early conferences includes establishing schedules for successive stages of discovery, setting deadlines for the filing of motions and briefs, and resolving other procedural matters. Discovery is scheduled in “waves”: the first wave takes in background information not related to the merits of the case, including the names and locations of witnesses, the existence, locations, and custodians of documents, and other physical evidence required later on; the second covers the merits; and the third covers any remaining information or special data. The court may order time and subject matter limitations on discovery. After discovery, issues are identified. No definitive factual or legal contentions are required before discovery is completed. The Manual stands in sharp contrast with later proposals that deal with the timing interplay between discovery and issue identification.

The Prettyman Report identifies the major factors leading to unnecessary delay in complex litigation as the vagueness of issues, the proffer of masses of unnecessary evidence, and the lack of organization, and the Handbook makes detailed recommendations based on its findings. The Handbook recommends that the judge take firm control of the case through the use of early, informal conferences between the judge and counsel. The object of these conferences is to define, organize, and simplify the issues of the case through the use of written and oral statements. Once the issues are identified and particularized, they are incorporated into a court order that serves as the basis for and limitation on the discovery process that follows. Issues can be modified as required while discovery unfolds. The Handbook also recommends that the judge issue

3. See note 1, *supra*, at 4.

4. *Supra* note 2.

5. *Supra* note 2.

6. *Supra* note 2.

protective orders to facilitate discovery, actively promote the stipulation of facts, and schedule tentative timetables for each phase of the case as a means of avoiding unfocused attorney activity.

The Commission advocates early, active judicial control maintained through continuous monitoring of progress, frequent contacts with the parties, and quick action in resolving disputes. It concludes that effective judicial control requires a well-informed judge who is flexible and imaginative in his use of management techniques. Consistent with the basic ideological premise underlying the Handbook's recommendations, the Commission emphasizes the need for early identification of issues through pretrial conferences and through the exchange of statements of facts and law between attorneys. The identification of issues serves both to promote stipulations and to restrict the scope of discovery. The Commission, as does the Handbook, supports the early imposition of realistic time limits to help remedy the problems of unfocused activity, indecisiveness, and the use of dilatory tactics by the attorneys. The Commission also encourages the use of protective orders to facilitate discovery and increase the use of summary judgment and judicial notice.

Although it acknowledges that effective judicial control will lead to cooperative efforts between counsel and decrease the need for sanctions, the Commission strongly supports strengthening the sanction provisions and using them more frequently to deter dilatory and abusive conduct.

Although many of these proposals are essential to effective management of litigation, we believe that they are only initial steps in the process of management. To varying degrees in each set of proposals the recommendations are incomplete and in some instances misdirected both in concept and in technique.⁷ All of the proposals consider the litigation almost exclusively in terms of the goals and viewpoints of the judge. They do not differentiate various functions that a judge performs in a case. They rely almost exclusively on management by directive: the judge issues orders, the litigants obey. Some tend to equate rigidity with firmness. Finally, the proposals are almost entirely procedural: they deal with the techniques for initiating and terminating issues without any attention to the content of decisions. Usually they call for additional or alternate procedures without taking into account the novel problems of specific litigation.

These limitations are cumulative: taken together they amount to a system in which the judge should control the case by making decisions and issuing orders, which the litigants will obey and thus move the case for-

7. We believe that the observations of the Commission were the most perceptive and that its proposals generally would be most consistent with our views on the management of complex litigation.

ward. This convention for managing massive cases seems to us wooden and literally uneconomical. From it follow a variety of procedures assumed to be appropriate in any litigation context, without consideration of whether they can be put into effect or of what problems would necessarily ensue upon their adoption. Given no indication of time, resource, and managerial demands made by these measures or of the probable effects of various combinations of the recommended procedures, judges may understandably be reluctant to use the procedures and frustrated when they do.⁸ We believe that this skepticism is well founded and that judges who say they “pay no attention to the Manual” are not necessarily irresponsible.

In tendering this critique, we should immediately make clear that our own experience with massive litigation is limited. We have been involved in just three cases, *United States v. American Telephone & Telegraph Co.*,⁹ an action by the government to restructure AT&T; *Southern Pacific Communications Co. v. AT&T*,¹⁰ a private antitrust action based on alleged monopolization; and *In re Amoxicillin Litigation*,¹¹ a multidistrict patent infringement and antitrust action. This account is based chiefly on our experience in one of those cases, *United States v. American Telephone & Telegraph Co.*, in which we served for three and one-half years.

On the other hand, we had a particularly useful vantage point and some relevant background. Our vantage point was that of special masters—lawyers appointed by a United States district judge as quasi-judicial officers to supervise certain aspects of these large cases. Although both of us had had some litigation experience, our backgrounds are primarily academic. Within the academic community, however, we had had substantial experience that seems to have been relevant. Both of us had taught litigation-intensive courses in procedure and evidence. Hazard had done extensive work in judicial administration and had taught management as well as law. Rice had supervised a criminal litigation clinic.

Limited in scope and purpose, our article is essentially a “debriefing” of our experience in supervising a complex case. Its aim is to suggest a concept of management of complex cases somewhat different from what

8. Judicial reluctance to manage and control discovery has been the rule rather than the exception. The federal rules offered no encouragement for active judicial participation until the 1980 amendments. See note 30 *infra*. Other factors contributing to judicial hesitance to use management procedures include the lack of time required and the experience necessary to be good case managers, the fear that activism will destroy impartiality, and not wanting to be involved with discovery matters. See Wayne D. Brazil, Improving Judicial Controls Over the Pretrial Development of Civil Actions: Modern Rules for Case Management and Sanctions, 1981 A.B.F. Res. J. 873, 885-87.

9. Civil Action No. 74-1698 (D.D.C., filed Nov. 20, 1974) [hereinafter cited as *United States v. AT&T*].

10. Civil Action No. 78-0545 (D.D.C., filed Mar. 12, 1978).

11. M.D.L. Docket No. 328, Misc. 78-0145, All Cases, D.D.C.

now generally prevails. At this time we inquire rather than demonstrate, simply because we have not done the extensive comparative studies required to sustain a more powerful argument.

I. HISTORY OF THE ACTION

The complaint in *United States v. American Telephone & Telegraph Co.* was filed on November 20, 1974.¹² In broad, sweeping, and typically vague language, it alleged that section 2 of the Sherman Act¹³ was violated by the American Telephone and Telegraph Company (AT&T), which owns all or part of the stock in 23 Bell Operating Companies; Western Electric Company, Inc. (Western Electric), which is wholly owned by AT&T; and Bell Telephone Laboratories, Inc., which is owned in equal parts by Western Electric and AT&T. It was contended that an unlawful combination and conspiracy existed between AT&T, the 23 Bell Operating Companies, and the other defendants to restrict competition from purveyors of other telecommunications services and from other manufacturers and suppliers of telecommunications equipment. It was alleged that the defendants achieved and were maintaining their monopoly over the telecommunications industry through illegal practices. The primary relief sought by the government was divestiture of various parts of the AT&T system.

The allegations covered three decades, from the end of World War II to the present. The industrial scale was enormous, for AT&T is the largest business enterprise in the world, with hundreds of thousands of employees, an invested capital of hundreds of billions of dollars, and annual revenues over the period of \$100 billion a year. The only organization that is larger is the United States government—the plaintiff.

With telecommunications a heavily regulated industry throughout that period, the case was complicated by more than 30 years of shifting and often times conflicting state and federal regulatory policies. Every major transaction in the case had been the subject of regulatory commission hearings, or private antitrust litigation, or both. The volume of potential-

12. See appendix 1.

13. 15 U.S.C. § 2, at the time the Complaint was issued, stated:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

This section was amended in Dec. 1974, by Pub. L. No. 93-528, § 3, 88 Stat. 1708. Any violation is now a felony and the penalty is a fine not exceeding one million dollars if a corporation or, if any other person, \$100,000, or imprisonment not exceeding three years, or both punishments.

ly relevant documents was immense.¹⁴ Not only was AT&T internally a vast organization, but externally it had myriad interactions with the government and with private sector organizations. The scope of the allegations gave rise to discovery involving more than 500 document subpoenas that touched 34 government departments and agencies, 23 Bell Operating Companies, Western Electric, Bell Laboratories, and hundreds of third parties. It generated tens of millions of pages of documents, thousands of privilege claims, and more than 200 depositions.

At the outset the defendants sought the dismissal of the complaint on two grounds. The first was *res judicata*, allegedly resulting from a consent decree entered in 1956 in *United States v. Western Electric Co.*¹⁵ The second was that the matters complained of were within the exclusive jurisdiction of the Federal Communications Commission and therefore immune from governance by the antitrust laws. These claims were ultimately rejected by Judge Joseph C. Waddy of the United States District Court for the District of Columbia, to whom the case initially was assigned, and certification of the questions was twice denied in the United States Supreme Court. However, litigation of these issues consumed 3 years, during which the discovery process was stayed for a total of 31 months. As a consequence, the pretrial process did not seriously begin so far as the court was concerned until after November 1977. The parties had of course been marshaling their evidence, but we infer that they did so without the intensity that prevailed after the appeals were denied.

Trial began on February 15, 1981. Thus, in a period of 39 months—November 1977 to February 1981—the largest antitrust action ever filed was prepared and brought to trial. Had the action not been settled in the eleventh month of trial, the trial would have been completed in 12 months. That is a very short period of trial for a case of this magnitude. That conclusion is especially warranted in light of the facts that during the 11 months the proceedings were recessed for 2 months and that evidentiary proceedings on the average during the first 6 months of trial were conducted only 3 days per week. Thus, the case was presented in what amounted to about 8 or 9 months at full-time trial. That seems to us extraordinary, given the scope of the case and the fairly short active pretrial phase.¹⁶

14. Procedures in which documents more than 10 years old are considered *prima facie* inadmissible or for which the period of proof is limited, are parallel means of constricting discovery in protracted cases. Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, in 21 F.R.D. 395, 433, 480 (1957) [hereinafter cited as Seminar on Protracted Cases]; Handbook, *supra* note 2, at 405; Prettyman Report, *supra* note 2, at 73. This technique was inappropriate as a control mechanism, however, in light of the unique nature of this case.

15. Civil Action No. 17-49 (D.N.J. 1956).

16. The Administrative Office of the United States Courts supplied statistics to the National Commission for the Review of Antitrust Laws and Procedure (see note 1 *supra*) as to the average

number of days from filing to disposition of big cases (defined as trials lasting 10 days or more) in the years 1976, 1977, and 1978. In antitrust suits, the figures were 1,463, 1,086, and 1,443 days respectively (an average of 44 months); in all other actions the figures were 1,194, 1,164, and 994 days (an average of 37 months). A comparison of these figures with the data from the *AT&T* case dramatically demonstrates the relative speed of the pretrial.

It is important to note that this action was tried to the presiding judge, not to a jury. There is no right to a jury trial in a suit for injunctive relief in a civil antitrust action whether brought by the United States or by any person. See James W. Moore et al., *Federal Practice* ¶ 38.37[2] (2d ed. New York: Matthew Bender, 1981); Charles Wright & Arthur Miller, 9 *Federal Practice and Procedure* §§ 2308-09 at 41-47 (St. Paul, Minn.: West Publishing Co., 1971). The impact this had on the speed with which the action was tried cannot be precisely evaluated. It is obvious to us, however, that the presence of a jury would have significantly prolonged the trial. The process of educating laymen, as opposed to a judge experienced in dealing with the kinds of technicalities involved in telecommunications, and knowledge about the regulatory context from which the action arose, would have taken considerably more time. More importantly, evidentiary disputes would have been significantly increased due to the disproportionate impact that certain evidence could have had on lay finders of fact.

The complexity of the issues in antitrust cases, the length of the trials, and the extensive legal instructions combined with a jury selection system that tends to exclude those veniremen most capable of understanding the trial have raised the question of whether jury trials should be eliminated in antitrust cases. To determine which actions are included in the Seventh Amendment's right to a jury trial "in suits in common law," courts have used a historical approach. Application of this test does confer the right to a jury trial in an antitrust cause of action. A "complexity exception" that would give courts the discretion to deny a litigant a jury trial on an issue thought to be beyond the competence of the jury has been proposed. This suggestion finds support in a Supreme Court footnote that said that the practical abilities and limitations of the jury was a factor to be considered when analyzing whether the right to a jury trial attaches to a particular cause of action. *Ross v. Bernhard*, 396 U.S. 531, 538, n. 10 (1970). The "complexity exception" is generally rejected and some courts have gone so far as to rule that no "case is so overwhelmingly complex that it is beyond the abilities of a jury." See, e.g., *In re U.S. Fin. Sec. Liti.*, 609 F.2d 411, 432 (9th Cir. 1979).

Assuming the absence of a "complexity exception," a constitutional conflict still exists in complex and protracted litigation between the Seventh Amendment right to a jury trial and the Fifth Amendment right to due process; a lengthy trial presented to a jury incapable of deciding the issues may be violative of due process by denying a fair and competent fact-finder.

Several suggestions have been made to resolve this conflict. One commentator has suggested that antitrust cases be bifurcated. Judges would try economic market structure issues while juries continued to hear questions of conduct and damages. This system would maintain the historic and traditional role juries have played in American jurisprudence. An alternate suggestion involves modifying the jury selection system through the use of special juries. This would involve an altered jury selection procedure in which qualification would be linked with educational background.

A final suggestion that totally abandons the use of the jury calls for the use of an expert nonjury tribunal. Adjudication in such an administrative forum has been found to be consistent with the Seventh Amendment where public rights are being litigated. Elimination of jury trials would have the ancillary effect of shortening trial time. Statistics supplied by the Administrative Office of the United States Courts to the National Commission for the Review of Antitrust Laws and Procedures show that antitrust cases tried to a judge took 56 percent (in 1976), 85 percent (in 1977), and 34 percent (in 1978) of the time of cases tried to juries. A negligible time differential was evidenced in other cases. For a detailed discussion of these issues, see Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 *Calif. L. Rev.* 1 (1981); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 *Va. L. Rev.* 887 (1981); Comment, *Has the Right to a Jury Trial as Guaranteed Under the Seventh Amendment Become Outdated in Complex Civil Litigation?*, 8 *Pepperdine L. Rev.* 189 (1980).

The use of a special antitrust court and the use of a roster of "antitrust" judges to hear complex cases have been proposed as alternative ways of coping with the unique needs of such cases. These alternatives have been rejected because they present a potential for judicial bias and elitism and for fear that more complex problems would result if these hand-picked judges were unable to manage the case. Maxwell M. Blecher & Candace E. Carlo, *Toward More Effective Handling of Complex Antitrust Cases*, 1980 *Utah L. Rev.* 727; Seminar on Protracted Cases, *supra* note 14, at 437; Commission, *supra* note 1.

II. THE PRETRIAL PROGRAM—GENERALLY

As originally filed, the action was assigned to Judge Waddy. Judge Waddy had originally delegated to Magistrate Lawrence S. Margolis the responsibility for resolving discovery disputes. This entailed the determination of discovery motions and supervision of a discovery schedule. Judge Waddy also directed the parties to file a series of statements of contentions and proof, as called for in the Manual for Complex Litigation. We are not familiar with this phase of the process, for we were not brought into the action until May 1978.

We were appointed special masters to adjudicate claims of privilege. Our appointment, upon nomination by the parties,¹⁷ came about through recognition by the parties that the volume of anticipated privilege claims was so great that neither the judge nor the magistrate could fairly adjudicate them within a reasonable period of time because of the other responsibilities they had to assume.¹⁸

Immediately after our appointment Judge Waddy had to resign the

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To assist a jury's understanding of a complex case, the use of multiple witness testimony has been explored. This involves the presentation of testimony by two or more witnesses on the stand simultaneously and testifying alternatively. This innovative approach would enable simple, logical, and coherent presentation of the evidence. By preventing repetition of evidence, the cost and time of the case should be significantly decreased. This format for presenting testimony might have limited use but could be beneficial in cases where there is sequential testimony or little conflict as to the facts. See Paul Nejelski & Kathy Shuart, *Is Multiple Witness Testimony Worth a Try?*, 7 *Litigation* 3 (Wntr. 1981). Other ways of helping the jury which have more universal application include instructing the jury on legal issues at the beginning of the trial and refreshing them periodically throughout the trial, allowing miniarguments by counsel at critical stages during the proceeding, allowing the jurors to take notes and ask questions, and increasing the use of visual aids. Blecher & Carlo *supra*; Commission, *supra* note 1.

17. One factor accounting for the resistance to the appointment of special masters is that attorneys are concerned about who will be assigned to the case. Seminar on Protracted Cases, *supra* note 13, at 395. Whenever possible, therefore, the parties should propose and agree on the special master to be involved. Handbook, *supra* note 2.

18. Many commentators fear that the use of masters constitutes an abdication of a judicial function inconsistent with the constitutional mandate that judicial power be vested with judges. Although the court cannot be relieved of its primary judicial function, it appears that no constitutional barriers prevent the use of masters in limited circumstances. The prudent appointment of masters in exceptional circumstances is generally approved. In large and complex cases, masters can effectively be utilized to supervise discovery, perform mechanical functions or resolve esoteric issues. When an appointment is made, the need for close contact between the judge and master is emphasized. Note, *Masters and Magistrates in the Federal Courts*, 88 *Harv. L. Rev.* 779 (1975); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 *Colum. L. Rev.* 452 (1958); Handbook, *supra* note 2, at 418; Leonard S. Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 *A.B.A.J.* 848 (1980).

The Commission, however, does not recommend the use of masters or magistrates to supervise the pretrial stages of complex antitrust litigation. Commission, *supra* note 1, at 8. See Seminar on Protracted Cases, *supra* note 14, at 422.

For a discussion of the changing role of special masters and the specialized service they provide in institutional cases, see Samuel Jan Brakel, *Special Masters in Institutional Litigation*, 1979 *A.B.F. Res. J.* 543 (1979); Geoffrey F. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 *Hastings Const. L. Q.* 739 (1980).

case because of ill health, whereupon the case was assigned to Judge Harold H. Greene, newly appointed to the United States District Court from the Superior Court of the District of Columbia. A nice first case. However, it should be noted that Judge Greene was a very experienced judge. He had been a judge of the Superior Court for the District of Columbia for over a decade and had been chief judge for a large part of that time. Hence, he was experienced not only in adjudication but also in administration. He may not have been wholly enthusiastic about the case, but he was not intimidated by it.¹⁹

Judge Greene and the two of us thus came into the case late, after discovery had been going on in a desultory way for 3 years and in an intensive way for about 6 months. Judge Waddy's orders had established a division of responsibility between us and Magistrate Lawrence S. Margolis, but the division boundary was unclear. Judge Greene undertook to redesign the pretrial process in a way that was generally consistent with the orders previously issued by Judge Waddy but also more purposive and urgent.

Although we all did the best we could, in retrospect this arrangement suggests at least three serious mistakes in handling a big case. First, it is a mistake to have a horizontal division of responsibility between judge and magistrate or magistrate and special master. By horizontal division, we mean a coordinate division of responsibility over subject matter. In *United States v. AT&T* this division had discovery go to the magistrate, privilege claims to the special masters, and everything else to the judge. In this arrangement coordination theoretically is defined in orders and policed through appeals to the judge from the magistrate or special master. But the swirl of pretrial does not categorize so easily, and coordination by these means is slow and rigid. As things evolved, there emerged a vertical division of responsibility. We as special masters became responsible for almost all of the pretrial under the judicial authority and administrative superintendence of the judge. This allowed a division of labor between the judge and the subordinate judicial officers but put both the judge and us in a position to see and guide the case as a whole. The result was much closer coordination of the court responses to various parts of the case.

A second mistake, an unavoidable one, was the reassignment of the case from one judge to another. This turned out well in this particular case because of Judge Greene's unusual ability. However, the change in administration took a long time to become fully effective. It is generally

19. We say that because we believe some judges are indeed intimidated by big or controversial cases, a frame of mind that is ill suited to such matters.

recognized that a big case should be handled by one judge from start to finish, if possible.²⁰ Our experience validates that proposition.

A third mistake was trying to fix the timetable for the case once and for all at the beginning. Judge Waddy had aimed at this objective, as called for in standard doctrine on management of big cases. At the time of our entry in the case it was evident that the schedule had become unrealistic. Judge Greene sought to remedy this and did so to the extent of re-scheduling several stages of the process. However, we believe that he also may have sought to forecast too rigidly the conduct of a very complex and inherently unknowable course of events. We recognize the need for firm schedules and for a trial date target. We recognize also that in some sense the lawyers will never be fully ready for trial and hence have to be prodded and perhaps ultimately bludgeoned into going to the mark. On the other hand, we think that good planning anticipates flexibility and requires, to some extent, the capacity for feeling one's way along. Fortunately, neither of these was missing in Judge Greene's supervision of our management of his pretrial program.²¹ An unpleasant but intractable feature of a schedule for any complex unpracticed event is that it declines rapidly in its reliability the farther it projects into the future. A big trial is quintessentially a complex unpracticed event.

In the series of pretrial orders issued by Judge Greene after he took over the case, discovery was left largely unstructured except for a cutoff date beyond which open discovery under the Federal Rules of Civil Procedure would no longer be allowed.²² We thought this approach was wise because it recognized the fact that the lawyers are generally in the best position to structure their respective discovery programs because, at such an early stage, they have a better understanding of the case than the presiding judge and have the best understanding of their clients' needs and limitations. Issues were to be refined and uncontested matters eliminated through the series of Statements of Contentions and Proof²³ and a stipulation process.²⁴ Certain anticipated evidentiary questions were to be resolved, before trial, through a judicial notice/hearsay designation process.²⁵

20. The proposition that a complex case should be handled by a single judge from the moment it is identified as a "big case" is supported by all of the major studies on judicial management. See notes 1 and 2 *supra*; Seminar on Protracted Cases, *supra* note 14, at 413, 420, 444, 447, 477 (1957).

21. We cannot emphasize sufficiently the importance of "flexibility" as "the key to pretrial planning." Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770 (1981). Lack of flexibility can ultimately hinder resolution of the controversy, the very end achievement the case management techniques seek to expedite. Cf. Commission, *supra* note 1.

22. See appendix 2.

23. See appendixes 2 and 3.

24. See appendix 3.

25. See appendix 4.

The management of the pretrial process in general, and the schedule in particular, was redelegated from the magistrate to the special masters. As noted earlier, in the initial Order of Reference our responsibilities were limited to the resolution of privilege claims arising in the discovery process.²⁶ The magistrate was responsible for all discovery disputes.²⁷ Our responsibilities as special masters, however, were later expanded to include the regulation of discovery in subsequent stages of the pretrial process after open discovery was closed, the organization and supervision of a comprehensive stipulation process, the resolution of admissibility questions under the hearsay rule, and supervision of preparation of market share reports.²⁸ Thus, after an initial period the horizontal division of function was eliminated. Judge Greene retained comprehensive authority over the case, and we reported to him.

Judge Greene's role in supervising the case was three-fold. First, he prescribed the basic rules—the constitution of the litigation, as it were. These rules established the general timetable, the events to be accomplished within the timetable, and our responsibility and authority. By implication they defined his residual authority over matters not delegated to us. Second, Judge Greene was the appellate judicial authority for all adjudicative decisions we might make. We had no unreviewable discretion, although as it turned out our decisions and exercises of discretion were appealed on relatively few occasions.²⁹ Third, Judge Greene monitored our administration. We kept him generally advised on the status, progress, and prospects of the case. On certain matters, particularly as the trial date approached, we gave him detailed written reports.

Periodically we met with him to discuss how things were going, to review our grasp of the situation, and to reassure him that things were in hand. However, we acted on our own initiative in all matters of detail and in all matters that could be worked out with the parties by negotiation, within the constraints of the judge's timetable and general directives.

Three techniques of control were thus used—rules, adjudication, and administration. Different procedures were used in each technique, including party proposals with regard to rules, formal argument in adjudication, and informal discussion and negotiation in administration. Both rules (i.e., general orders governing the case) and adjudication were conducted by the conventional legal procedure of briefing, hearing, and ruling. In general, when administration was involved we worked with the

26. See appendix 5.

27. See appendix 6.

28. See appendix 7.

29. See note 51 *infra*.

parties or with the judge, and often as a go-between; rarely did Judge Greene become involved with the parties in give-and-take discussions over management of the case. This distance protected the court's detachment.³⁰ It also reduced the amount of "gaming" between the judge and the parties. Much of the "gaming" that was inevitably necessary was carried out through us as brokers.

III. APPROACHING THE MANAGEMENT TASK

Because of the size of the litigation, the time limitations that Judge Greene established for completion of pretrial presented a significant challenge for the parties. Indeed, preparing the case was a Herculean task, involving dozens of lawyers, hundreds of paraprofessionals, and long hours for everyone.

Aside from the inherent complexity of the case, the stakes inevitably were conducive to elaborate preparation. The litigants were obliged to use extra caution—the syndrome of leaving no stone unturned. Thus, time limitations on the pretrial process were a necessity: they compelled the parties to be more efficient by being more organized and by establishing priorities in their discovery probes. Such structured control, however, is only the starting point of effective judicial management of complex cases.

A substantial amount of total delay in all litigation, and particularly in big cases, is not attributable to overpreparation and therefore not effectively met by judicially imposed structure. These are delays created by one adversary which have an adverse impact on the opponent's ability to prepare expeditiously and over which the injured party has little or no control. These include, for example, overly broad and repetitious discovery demands; dilatory, confusing and inadequate discovery responses; and uncooperative counsel.³¹ These sources of delay can be managed only

30. The concern that judicial intervention is a threat to a judge's impartiality, along with the traditional concept that a judge should play a passive role in the adversary process and not spend her time in case management, are accepted notions that sustain resistance to active judicial management. William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 *Judicature* 400, 403 (1978). The use of masters as middlemen is a practical alternative available to deal with this potential threat.

31. Wayne D. Brazil conducted a study based on data gathered during interviews with 180 litigators aimed at yielding attitudes regarding the use and abuse of the discovery system, the success of the system, and recommendations for improving the system. Sixty percent of the attorneys questioned in the Brazil study identified evasive responses, withholding information, and noncompliance with discovery requests as abuses of the discovery process. Antitrust attorneys estimated such abuses were present in 76 percent of their cases; large case lawyers offered estimates of 80 percent. Overdiscovery was considered a problem by 49 percent of the total sample: antitrust attorneys found this abuse present in 59 percent of their cases, and large case litigators found it a problem in 62 percent of their cases. In general, discovery was impeded by dilatoriness in 50 percent of all cases. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B.F. Res. J. 787, 831-37 [hereinafter cited as Brazil II].

through active supervision in every phase of the pretrial process—supervision that goes far beyond structure and is marked by the same intensity and efficiency expected of the parties.³²

Effective supervision requires more than setting deadlines. If a court's involvement is limited to specifying goals and deadlines for their completion, without at the same time trying to control these other forces of delay, the court will expect results that the parties realistically cannot accomplish. Simply setting goals and deadlines takes no account of the complex interaction between the parties usually required for a deadline to be met. Goals and deadlines are enforced by sanctions against the defaulting party.³³ But a default often is caused at least in part by an earlier default by the other side, and it is usually a frustrating experience to enter the scene after the deadline trying to find out who was most at fault. Furthermore, trying to get results simply by applying more pressure often merely masks the symptoms and thereby exacerbates an already severe problem in a party's case management. Making time of the essence may

32. According to the Brazil study, 93 percent of the large case litigators and 84 percent of the antitrust litigators felt that judicial assistance with discovery problems was inadequate. The attorneys felt that judges had a negative attitude toward discovery disputes and toward lawyers who sought judicial assistance in resolving disputes. Eighty-one percent of the antitrust litigators and 83 percent of the large case litigators felt this attitude had a negative impact on discovery. Lawyers said judges deal with discovery problems with condescension and impatience. Eighty-two percent of the large case litigators and 80 percent of the antitrust litigators favored a more active role in the judiciary in discovery. *Id.* at 787, 826, 864, 865. *Large case litigators* is defined as attorneys working on cases involving a minimum of \$1 million. Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 A.B.F. Res. J. 217, 219 [hereinafter cited as Brazil I].

33. According to the Brazil study, 90 percent of the large case litigators and 87 percent of the antitrust litigators favor the increased imposition of sanctions as a means of controlling discovery abuse. Brazil II, *supra* note 31, at 866. Brazil I, *supra* note 32, at 248; *see also* Peckham, *supra* note 21, at 803. The judicial reluctance to impose sanctions reflects a variety of factors and concerns: lawyers do not seek sanctions, out of a feeling that clients should not suffer for the sins of the attorney, fear of abuse of motions for sanction, resistance to limiting or denying the opportunity for a hearing on the merits of the case, concern about increased hostility that will decrease the chance of settlement, lack of judicial knowledge about the action, and a failure to appreciate the need to impose sanctions. Charles B. Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264 (1979). The Commission suggests that sanctions be imposed with greater frequency and recommends that the behaviors for which sanctions may be applied to be extended to include unwarranted motion practice. *See also* David N. Edelstein, The Ethics of Dilatory Motion Practice: Time for Change, in Symposium: Quality Advocacy and the Code of Professional Responsibility, 44 Fordham L. Rev. 1069 (1976). The Commission predicts that the financial disincentive created by the consistent application of sanctions will deter the abusive and dilatory behavior. To overcome concern that the 'sins' of the attorney will be visited upon the head of the client, courts can frame sanction orders to prevent the attorney from billing a client for the fine. Peckham, *supra* note 21, at 802. In addition to the traditional monetary sanction of ordering fines or penalties, Brazil suggests a right to compensation for expenses caused by an opponent's breach of discovery obligations. For maximum effectiveness, judicial discretion in ordering sanctions must be decreased by creating clear standards for identifying what justifies failure to comply with the discovery rules. When deciding whether to preclude issues or evidence as a sanction, a judge might balance the likelihood that unmerited penalty will be imposed on a third party against the need to prevent unfair surprise, delay, and inefficiency. Peckham, *supra* note 21, at 797. Brazil, *supra* note 8.

intensify other problems that have not been addressed. It may further reduce the quality, as well as the quantity, of preparation, having later harmful consequences at trial. The court will have gained pretrial expediency but at the cost of trial efficiency.

We believe that the judicial participation necessary for coping effectively with these other problems of delay can be accomplished only through the drastic alteration of the way the court is apprised of and responds to the needs of the litigation. The court must be able to act quickly on every issue that threatens to delay the process. This can be accomplished only through (1) altering the formal procedures for bringing matters to the court for resolution, (2) expanding the flow of information (through an increase in quantity, quality, and the speed with which it is conveyed) between the litigants and the court through informal lines of communication, and (3) tailoring the procedures to accommodate the needs of each case.

IV. THE SUPERVISION PROCESS

A. Procedural Rules

The discovery process, specifically Federal Rules 26–37, offers an excellent example of the need for changes.³⁴ Under present law, the court's involvement in the discovery process after establishing the schedule is limited to the resolution of disputes brought to it by formal motion. If, for example, a request for documents is made under Rule 34, there is no judicial screening of the reasonableness of the demand. Indeed, the court is not even notified of its service on the opposing party. The party upon whom the request has been served has 30 days to respond or to object. If either the documents requested or the proposed schedule for production is contested, the parties are expected to attempt to negotiate an acceptable compromise.³⁵ To this point the court has received neither the Rule 34 request nor notification of the pending dispute. It is only when compromise efforts have failed that the court is brought into the affray by the demanding party's filing a Motion to Compel Discovery under Rule 37. The dispute will not be ripe for judicial resolution, however, for at least two more weeks and often longer depending on the time allowed in the

34. Plenary authority to modify the standard rules for "good cause" is conferred by Rule 26(c). Fed. R. Civ. P. 26c. In a sense, a massive case is "good cause" in and of itself. The standard rules anticipate counsel and court who are concurrently engaged in many other matters and who require time to adjust schedules and to bring the instant matter mentally into focus. In a big case the parties are at it every hour of every day, and in our case we were similarly on hand on behalf of the court. Given the significance of little delays in big cases, in those cases the standard rules are a serious impediment.

35. Many local rules, such as those of the District Court for the Northern District of California, explicitly require such negotiations. Peckham, *supra* note 21.

local rules of practice for response and reply briefs. Thereafter the matter will be placed on the motion calendar for oral presentation to the court. This often causes another week of delay. As a consequence, at least 2 months will have elapsed from the time the dispute arose until judicial action is possible, and in the normal course of litigation, more than 3 months would not be uncommon. Even then, owing to demands on the time of the presiding judicial officer, there will usually be additional delays before the matter is resolved.

Depending on the nature of the disputes that have arisen, the entire document discovery process may have lain dormant for this period of time. Yet legally no delay has occurred, because the parties have complied with all applicable procedural details. This scenario must be repeated each time a dispute arises in the numerous discovery requests in large cases. The resulting impact on the pretrial schedule is disastrous. Either the overall schedule collapses, or the recalcitrant party wins by attrition, or both. The standard discovery procedures, which may be justified in run-of-the-mill litigation, ill serve the ends of justice in the big case.³⁶

Our solution to this problem has been to require that all discovery demands be filed with us. This is done, not for our screening and approval, but to keep us apprised of developments in the action. If the responding party objects to a demand for any reason, he must file a written objection within 10 days. Hearings on objections are set within 7 days of their filing. This practice shifts the burden of seeking court assistance from the demanding party to the responding party and establishes a specific time period within which to do so. Briefs are accepted either at the hearing or within a short period of time thereafter.³⁷ All discovery must be completed under each demand within 30 days of the request or of the court order. Failure to do so must be justified in writing. We have found that this practice ensures that developing problems are addressed from their inception. In fact, our experience has been that all discovery disputes can be resolved in a shorter period than is allowed under existing discovery rules for making objections to the demanding party. And production under this procedure is usually completed before those disputes would have been presented to the court under the existing practice.

36. The 1980 Amendments to the Federal Rules of Civil Procedure include modification of discovery procedures through case management devices and sanctions to deal with discovery abuse. New Rule 26(f) provides for a discovery conference to identify issues for discovery purposes and to schedule, plan, and limit discovery. Rule 37(b) has been amended, and Rule 37(g) added to provide sanctions for failure to comply with a 26(f) order or failure to participate in planning discovery. 85 F.R.D. 521, 526, 532, 533 (1980). Whether these changes will lead to an increase in active court control of the discovery process remains to be seen.

37. We found that when briefs were filed after oral argument was heard, they were much more helpful because they were focused on the issues that were of particular concern to us.

Outside of the discovery arena the time periods established by either the Federal Rules of Civil Procedure or the Local Rules of Practice must be readjusted for the special problems in massive litigation.³⁸ A rule, for example, that allows 10 days for responsive pleadings and 7 days for replies has established little more than arbitrary time periods. Such procedures were formulated to accommodate rough approximations of administrative, procedural, and general litigation needs of action in which the tolerable limits of inefficiency are significantly higher than in big cases with issues and processes of greater number, size, and complexity. Such procedures designed for smaller cases must be replaced by pragmatic assessments by the court based on the issues at hand and the resources available to the litigants.

In a big case the court must give as much attention to procedural detail as it does to the structure of the pretrial program, because the former has a significant impact on the latter. When procedural details are overlooked, the courts impose unnecessary limitations on the efficiency and the ultimate success of the structures they have devised.

This brings out another point about administering a big case: the court, whether by itself or through a magistrate or special master, should insist on promptness in the subsidiary adjudications and other transactions within the case. Every issue requiring adjudication should be briefed and argued expeditiously, and it should also be decided expeditiously. Every scheduling commitment on the part of the judge and the parajudicial officers should be scrupulously met. We made it a point to decide every matter immediately. Usually a decision and opinion were rendered within three days of submission; rarely did they take more than

38. Similarly, to meet the needs of the big case, it is insufficient to routinely apply the Federal Rules of Civil Procedure, Rule 16, which envisions informal, repeated meetings that lead to the clear understanding of the issues, assure attorney preparedness, and limit trial by excluding irrelevant or unnecessary material. Rule 16 itself offering only minimal guidelines, many districts have adopted local rules to facilitate the resolution of the controversy and guide the pretrial process. The Commission drafted a model local rule that mandates early pretrial conferences for complex cases. This rule describes a procedural proposal requiring that the time limits defining the various pretrial phases and the pretrial process itself be established early and maintained firmly. An alternate model local rule includes the procedural elements of the Commission's rule but adds more substantive suggestions. Brazil, *supra* note 8, at 893-99. The Brazil model rule would compel discussion of the possibility of settlement (accord, Peckham, *supra* note 21, at 785), and prohibiting discovery before narratives of the factual and legal contentions were submitted would, in turn, limit and direct discovery. Dedicated to a comprehensive remedial approach to solving the problems encountered in discovery, Brazil proposes that attorneys be required to certify that there are good grounds for assertion of statements, drafted in good faith after reasonable investigation and as complete and accurate as available information permits. Sanctions against attorneys for violation of the certification duty would be available. A final innovative section of the local rule requires a good faith estimate of the cost and time of discovery to be given. This provision might provide the impetus for the client to restrain discovery activity and for the court to impose controls. See generally, Sherman L. Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 Minn. L. Rev. 253 (1979); Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 Va. L. Rev. 467 (1978).

a week. This was possible largely because we were continuously on top of the case and had no other docket responsibilities to distract us.³⁹ It is our impression that such rapid decision is unusual.

We thought rapid decision was especially beneficial for several reasons. First, it sets a model for the parties. After a point, a court can demand urgency only if it supplies urgency. Second, decision quells contentiousness and allows the parties to go forward upon authoritative resolution of their disputes. A complex case is a big battle over legal rights between the litigants, but it actually encompasses hundreds of little battles over legal rights between counsel; order through law is useful within adjudication as well as through adjudication. Third, the continuing activities of the contending legal forces in a big case, and hence the future movement of the case, are often in suspense until a ruling is made. The parties' situation in a big case is thus like that of armies at war—hurry up and wait. Decision time for the court is often down time for the parties, bringing the progress of the case to a temporary halt.⁴⁰ If there is a series of such halts, the whole train of motion slows or stops. We surmise that many judges do not understand the dynamics of this movement, which becomes crucial in big litigation where there are so many tasks so complexly interlinked.

The speed with which judges can resolve with fairness and accuracy the disputes brought to them is dependent upon the degree of knowledge of the facts of the case and developments in the pretrial process that they bring to the dispute. Typically, little knowledge is possessed because communications between the parties and the court are limited to formal

39. Even without docket responsibilities, it was exceptionally difficult to stay abreast of issues and act expeditiously. The privilege process along was a mammoth undertaking. Aside from the complexity of the issues raised, the process required the examination of hundreds of thousands of pages of documents. When our responsibilities were expanded to the general management of the pretrial process and the resolution of all discovery disputes, the magnitude of the undertaking was compounded. In a very real sense, our ability to manage the litigation was governed by our ability to organize and manage our own affairs. We were able to accomplish this only because of the exceptional abilities of our associate, Leah Wadle, who before receiving her law degree had been a senior paralegal in a major Washington law firm and thus offered sophisticated organizational skills that proved to be indispensable to our internal operations. Because of this talent and her apparently boundless tolerance for detail, we were able to devote more of our time to substantive issues. This resulted in more expeditious action by us and significant cost savings for the parties. As important as Wadle's organizational skills were to the office, when coupled with her legal training (which allowed her to understand the various processes under our supervision) and knowledge of our management goals for each process, her value assumed a new dimension. She became an important management asset because through her the special masters were always available to the parties. To the extent she could not independently provide information and guidance to the attorneys when we were unavailable, she was a reliable conduit through whom critical information could be relayed to us for immediate action.

40. Eighty percent of all attorney surveyed in the Brazil study had used discovery tools as a means of gaining time or slowing down the action. This practice is particularly likely to be used by defense counsel since postponing judgment can be to her advantage. See Brazil II, *supra* note 31, at 852. Thus, delay caused by slow judicial decision making indirectly lends support to abusive discovery tactics.

pleadings prompted by disputes and status calls. To increase the efficiency with which judges are able to perform, there must be an expanded flow of information to them—more information acquired more frequently and with greater speed. We believe that this can be accomplished in a meaningful way only through the development of informal lines of communication.

B. Informality

Historically, judges have assumed a formal and distant role in their relationship with the litigants and in the management of the litigation. This has been thought to be essential to preserve both the appearance and the reality of impartiality at trial. Whether this is justified is not clear. What is clear, however, is that this judicial posture severely inhibits their effectiveness because it prohibits the type of supervision that is necessary to resolve expeditiously, if not avoid altogether, the myriad of disputes that give rise to delay. Given this role for the presiding judge, what is needed is a new type of supervising judicial officer, possessing the power of the presiding judge but serving more in the role of judicial case manager—an intensely active and substantially less formal position. This is the role that we assumed in the government litigation against AT&T, a role that we have concluded is vital to the most successful management of litigation.

To maximize our management potential and minimize any delay that might arise in the various processes, we encouraged the parties to communicate informally with us on matters they felt required or would benefit from our immediate action. We met regularly with the parties on an informal basis—usually once a month, but during periods of intense activity we often met on a weekly basis. We were in daily telephone contact with them. Often we initiated these contacts to stay abreast of developing issues and to check on the parties' compliance with informal commitments they had made. Through this informality the lines of communication between the parties and the court were kept open. This maximized their use and efficiency and, as a consequence, our knowledge and understanding of the dynamics of each process and the problems being encountered by each party. It enabled us to resolve disputes more quickly and sensitively because of a better understanding of their origins, details, and implications. In many instances we were able to avoid or resolve problems before they caused delay. In all instances we were able to resolve problems before they reached their full delaying potential under the standard procedures.

Although the litigants often made *ex parte* contact with the special masters, it was understood that they would hold substantive discussions to the minimum necessary to apprise us of a problem and to arrange for

our intervention.⁴¹ It was understood that the substance of all such communications would immediately be reported to the opposing side for comment and that hearings or conferences would be held on short notice (three to five days was not uncommon) upon request of either party. At the same time, it was clearly stated that the invariant practice was that a party wishing a formal hearing was entitled to it, promptly and ungrudgingly. Informal procedure was employed only by mutual assent and not in displacement of procedural rights. Indeed, we believe that informal procedure works satisfactorily only if the parties know they can "blow the whistle" and demand a formal adjudication. Formal briefings, however, usually were held under the expedited time schedules referred to earlier.

Through informal communications we were often able to resolve by telephone, literally in minutes, problems that would have consumed weeks, if not months, of paperwork and delay under the conventional procedure. We also were better able to keep the presiding judge apprised of matters affecting the pretrial schedule or requiring his attention later.

It was our experience that most problems arising in the pretrial process could be easily resolved through open and frank discussions between the litigants. Most of these discussions took place without the intervention of the special masters. However, the adversarial posture of the parties which characterizes the discovery process can lead to a breakdown in interparty communications in the best of circumstances. The cooperation of adversaries in litigation hangs in a delicate balance that can be easily disrupted. Actions by one party may signal, correctly or not, a combative posture that is assumed for adversarial gain. This, of course, prompts the opponent to respond in kind, which, in turn, can set into motion a very destructive and wasteful chain of events. In such instances it is imperative that the court intervene with dispatch to resolve the dispute and restore the balance before it is irreparably damaged.

Through our accessibility and willingness to act quickly and informally, we were able to reduce uncertainties in the process, which allayed anxieties and allowed the parties to operate from a basis of knowledge and reason instead of speculation and fear. While the speed with which we were willing to act increased the risk of error, we concluded that this risk was justified for two reasons. First, for many issues it is often more important for a decision to be rendered than to be correct. Often there is no clearly correct decision but simply a need for a ground rule. Secondly, we attempted to anticipate and reduce errors by issuing in draft form all de-

41. See appendix 8.

cisions that entailed more than applying a clear legal principle to a simple factual question. In response to these drafts we accepted comments and supplemental submissions by the parties. We believe that this openness, speed, and flexibility encouraged and facilitated the cooperative atmosphere that prevailed throughout the litigation. As a consequence, a momentum was maintained, and the court, rather than the fortuities of the litigation, controlled the pace of the litigation.

The informal process was not simply busywork or group therapy. Monitoring is a part of case supervision, for it maintains the court's awareness of the pretrial situation as it unfolds. However, we were interested in "what was going on," not for its own sake, but so we could act, when necessary, without a lot of preliminaries and with a more assured feel of the situation. We believe the open channel was therapeutic in that it helped maintain basic trust between the lawyers. Mutual trust—guarded trust, to be sure—is an essential but fragile element in efficient pretrial. Nevertheless, monitoring and maintaining trust were conceived respectively as a means and as a by-product. They were not ends. Indeed, we believe these processes become perverted when conceived as ends: monitoring degenerates into formal status calls and "maintaining trust" becomes a second-order form of gaming.

The purpose of informal communication, then, is to facilitate providing authoritative guidance to the parties in development of the case. Formal guidance, of course, was provided through our adjudications based on formal submissions. Informal guidance was provided by suggesting to the parties what we "will be inclined to do" or "think is fair" or "are willing to approve" in relation to various conflicts arising between the parties in the pretrial process. In giving guidance, we consulted with the parties and with each other, and we made prompt and direct pronouncement. The guidance was authoritative because we held a commission from the judge and enjoyed his confidence and support. (We can recall no yardage by either party on end runs.) But whatever the form, and whether right or wrong on its merits, the guidance provided the parties with definitive premises for their further action. It thereby reduced their uncertainty, reduced the number of contingencies for which they had to be ready, reduced their anxiety and frustration, and reduced the amount of unnecessary work they had to do. We do not say that all our decisions had these results, or that there was a one-to-one relationship between decision and reduction of unnecessary work. We say only that the continuous and consistent close administration of procedural justice within the case had strongly beneficial effects as far as the litigants were concerned. Lawful order is a profound positive good in a situation that is riven with deep conflict.

Critical to the success of efficient pretrial is thus the ability of the court to respond promptly and authoritatively to the myriad questions that arise in that stage. The court must appreciate that parties are constantly having to make important tactical decisions, both substantive and procedural, that are freighted with enormous economic and legal consequences. The court must be willing and able to respond clearly, decisively, and with the same speed that is expected of the parties.

The same general point can be seen from a somewhat different angle. It has long since been observed that in modern complex litigation, pretrial and trial merge into each other. Certainly, in a big case, pretrial is as unrehearsed, spontaneous, and risk laden as a trial ever was. Taking the point one step further, pretrial *is* a trial: it is a close, contentious interaction between contending legal forces for procedural dominance and control of the instruments of legal victory. If a fair and orderly trial at trial requires the continuous presence of a judicial officer—observing, administering, admonishing, guiding, and ruling—the same is true for the trial at pretrial.

C. Tailoring of Procedures to the Litigation at Hand

1. *The Privilege Claim Process*

a) *The scope of the problem* □□ As indicated, our initial responsibilities were limited to the resolution of privilege claims. At the time of our appointment it was estimated that the documents being withheld on privilege grounds by the litigants and third parties numbered in the tens of thousands. The sheer volume of materials to be read and evaluated was overwhelming. The diverse statutory privileges that potentially could be asserted, particularly by the government agencies, made a further complication. Also, the law was unclear on several vital points, particularly whether the “control group” test limited the attorney-client privilege.⁴²

In consultation with the parties we concluded that the task of resolving

42. The “control group” test that defines the attorney-client privilege as it applies to a corporate client was first articulated as follows: “[I]f the employee making communication . . . is in decision to control or even to take substantial part in decision about any action which corporation may take upon advice of attorney . . . he personifies the corporation when he makes his disclosure to lawyer, and attorney-client privilege applies.” *City of Philadelphia v. Westinghouse Elec. Co.*, 210 F.Supp. 483, 495 (E.D. Pa.), *petition for mandamus and prob. denied*, *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).

The purpose of the attorney-client privilege is to encourage communication between employees and attorneys to achieve full disclosure. The control group test, however, ignores reality; employees not in the control group may be those who possess the information needed by a corporate lawyer or may be best able to put legal advice into effect. By removing the attorney-client privilege from communications involving employees not in the control group, the control group test thereby defeats the very premise upon which the privilege rests. Based on this reasoning, the Supreme Court recently rejected the use of the “control group” test in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

the privilege claims could be met only if a process were devised that would: minimize both the number of documents that would be withheld and the number of alternative privilege grounds that would be asserted for any given document; permit the parties to use standardized procedures, executed mostly by paralegal staff; lighten, simplify, and expedite our task of evaluating the privilege claims that would be asserted; minimize the number of appeals that could or would be taken from our rulings (so that production delays could be avoided); and insure that such appeals as were taken would not result in substantive determinations inconsistent with the standards we had applied (thereby unraveling hundreds of hours of privilege determinations).

One of the significant steps taken to expedite the production process and to reduce potential privilege claims was the issuance of protective orders by Judge Greene. In substance, these orders shielded all documents produced from inspection by third parties and precluded use of the documents for purposes other than the instant litigation.⁴³ The litigants, as well as third parties, possessed literally millions of pages of material of a proprietary nature that were within the comprehensive discovery requests that had been made. Although these materials were not protected by statutory or common law privileges, they would have been subject to claims that their disclosure should be restricted under Rule 26(c) of the Federal Rules of Civil Procedure.⁴⁴ The government agencies possessed materials relating to governmental operations and activities that arguably should not be made public. The defendants and third parties possessed commercial materials containing trade secrets and other confidential research that likewise arguably deserved some protection. The documents produced were protected by the producing party physically marking the document "PROTECTED—U.S. v. AT&T."⁴⁵ This designation served

43. See appendixes 9 and 10.

44. Federal Rule of Civil Procedure 26(c) states in a paragraph on "Protective Orders":

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to that motion.

45. See appendix 9, Pretrial Order No. 7, Protective Order, p. 5, ¶ 5; appendix 10, Pretrial Order No. 8, Documentary Discovery of Non-Parties, pp. 2-3, ¶ 4.

to limit the use of the document to purposes of the litigation as well as to limit inspection to identified individuals under conditions that insured its protection. Most of the difficulties were thus obviated.⁴⁶

A second aspect of the protective order was also important. The court ordered that a waiver of privilege would not result when a document was produced inadvertently to the opposing side. By eliminating the risk of inadvertent waiver through the production of documents, the order eliminated the necessity of hypercareful scrutiny of each document prior to its disclosure. The waiver doctrine entails the result of waiver not only of the

46. The constitutional and policy issues involved in issuing and in modifying protective orders have been addressed by only a few courts. In *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit found a First Amendment right to disseminate discovery information. A protective order that prohibits such dissemination operates on the requesting party's First Amendment freedom of expression as a form of prior restraint and, as such, carries a strong presumption of unconstitutionality. In opposition to this First Amendment right are the interests of the litigants and of the discovery process itself—the right to a fair trial, protection of confidential information, and the maintenance of maximum effectiveness of the discovery process. Since the court cannot condition access to discovery data on the waiver of the requesting party's constitutional rights, one commentator has suggested the use of a balancing test to determine when a protective order may constitutionally issue. The test would weigh the First Amendment rights of the requesting party against the judicial interests of protecting the litigants and the discovery process. If the court determines that the First Amendment rights are outweighed, a protective order restraining the dissemination of the discovery information may constitutionally issue. To be consistent with traditional First Amendment analysis, the order must not be overbroad and should therefore be narrowly drawn and represent the least restrictive alternative available to reach the desired goal. See Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 Duke L. Rev. 766.

Similar issues arise when courts are requested to modify a protective order issued in a previous litigation. Modification is sought to avoid duplication of discovery efforts and to save time, cost, and labor. If modification requests are frequently granted, however, parties may become fearful that the protective orders they rely on in making disclosures will likewise be modified, and they may ultimately react by failing to cooperate in the discovery process. The lack of cooperation in discovery is precisely the problem the issuance of the orders sought to remedy. Thus, if modification is denied, the requesting party must duplicate efforts and expend resources; if the modification is granted, the judicial goals of encouraging disclosure and cooperation may be undermined.

In addition to policy considerations, the courts must be mindful of potential constitutional conflicts created when protective orders are modified. For example, the disclosing party may have failed to assert a Fifth Amendment privilege against self-incrimination because of her reliance on the confidentiality mandated by the protective order, and due process rights may be infringed upon since the disclosing party assumed and relied on the inability of her opponents to disseminate the information obtained.

In addressing the conflicting interests implicated when a modification of a protective order is sought, courts have used varying and inconsistent standards, at times placing the burden of proof on the requestor to show a need for the documents and at other times requiring the disclosing party to show a need for protection. One standard proposed would grant a modification only upon a showing by the requesting party that it could not obtain the material through other means; this standard would eliminate the Fifth Amendment privilege problem. If this burden is not met, then reliance by the protected party overrides the requestor's need. In addition, the requestor must show that there would be a savings of time, money, and labor if the documents were obtained through the process of modification of the protective order instead of through the alternate means. As a final measure, the protected party must be allowed to assert any rights retroactively, and should the party establish that access would violate the constitutional rights, modification should be denied. For a more detailed discussion of these issues, see Note, *Modification of Protective Orders: Balancing Practical Considerations and Addressing Constitutional Rights*, 14 Suffolk U. L. Rev. 1011 (1980) and cases discussed therein.

claim for the particular document, but for any other document relating to the same subject matter. For this reason, the risk it poses is enormous. This permitted relatively free exchange of the exceptionally large mass of demanded and subpoenaed materials. As things worked out in practice, in many instances an adequate level of protection was achieved merely by the designation "protected"—a procedure that avoided the time, trouble, and expense required to make formal privilege assertions.

To guide the parties in asserting privilege claims and to minimize the number of inappropriate claims, we promulgated substantive guidelines for resolving those claims.⁴⁷ We tried to make these guidelines specific enough that marginal claims, as well as the clearly inappropriate ones, could more readily be distinguished. We hoped that as a result the parties would examine each document more carefully and critically before asserting a privilege claim. We also realized that making a claim could be initially "cheap" unless a party was required to support the claim factually. And we realized that if claims could be made cheaply, it would be expensive for everyone to hear and determine them. Hence, we wanted a procedure in which successfully asserting a claim necessitated submitting written evidence sufficient to substantiate each element of the claim. This requirement would deter inessential, although technically arguable, claims and also would help us give careful review to the claims that were raised.⁴⁸ Accordingly, we also promulgated appropriate procedural guidelines for submitting all claims.⁴⁹

In this connection we must remark on two points. First, most lawyers and perhaps many courts seem not to fully appreciate the evidentiary showing required to establish a privilege claim. As a result, the business of claiming privilege seems to be conducted more casually than it should. Second, the privilege claim procedure devised in *United States v. AT&T* reveals an interesting insight into the relationship between short run costs and total costs in a procedural mechanism. The procedure for making a privilege claim in *United States v. AT&T* was relatively complicated and therefore made the task of initial claim relatively costly. Indeed, some lawyers for third parties were outraged by the technicality required. However, the material supplied in support of an initial claim under our system also was *prima facie* sufficient to sustain the claim. It was also a sufficient description of the document to constitute fair notice to the opposing

47. These guidelines were promulgated after extensive briefing and comment by the parties.

48. For large case litigators, the attorney-client privilege caused discovery problems in 36 percent of their cases, and other privileges and protections created obstacles in 50 percent of the cases. Brazil II, *supra* note 31, at 833. Some litigators suggested that one reason for the impairment of discovery efforts was the lack of clarity of the waiver doctrine as it applies to corporate parties. But see note 42 *supra*.

49. See appendix 12.

party to make informed objection. Hence, the first cost in the procedure was also most of the total cost. That cost was laid on the party seeking the benefit of the privilege. A less technical procedure with a lower initial cost would probably have entailed a greater total cost for each claim, would have shifted more of the cost to the objecting party, and therefore probably would have resulted in more claims.

b) Substantive and procedural guidelines □□ The substantive and procedural guidelines for claiming privilege were promulgated by order of the special masters and submitted to the presiding judge for his approval.⁵⁰ This was done to establish the substantive and procedural law of the case so that there could be no appeals of individual privilege decisions on any basis other than the application of the established standards. This approval process resulted in a reduction in both the number and scope of appeals and in the inherent uncertainty of the process.⁵¹

A note is appropriate as to how the substantive guidelines were drafted. In essence, we held a rule-making proceeding. Each party was asked to tender substantive proposals in the form of rules or a restatement of the law of privilege, together with supporting analysis and authorities.⁵² We revised and integrated these submissions into a draft, which we circulated to the parties for comment. We revised the draft in light of the comments and then submitted the product to Judge Greene for review. The parties were given the opportunity to object. The rules were then settled by Judge Greene and promulgated by him through a declaratory order establishing the rules as guidelines.

The principal goal in promulgating the guidelines was to clarify the re-

50. As in all other aspects of the pretrial process, flexibility is the key when guidelines are used as a management technique. Guidelines that functioned well in one case must be tailored to meet the particular needs of another case. For example, the guidelines used in *AT&T* served as the basic structure in a patent infringement case, but changes were made regarding the application of the attorney-client privilege to patent agents. See *In re Amoxicillin Patent and Antitrust Litigation*, M.D.L. Docket No. 328, Misc. 78-0145, All Cases, D.D.C.

51. Judge Greene issued only ten rulings in response to appeals taken from the pretrial Orders and Opinions of the Special Masters. There were only six appeals challenging the application of standards to a claim of work product or attorney-client privilege. The order of the special masters was affirmed in five of these appeals while the sixth was remanded in light of issues raised by the court and not considered by the special masters. (Two of these appeals were subsequently vacated and reversed when the United States Court of Appeals for the District of Columbia Circuit reversed a court ruling.)

Aside from privilege decisions, two appeals challenged orders regarding party compliance with the stipulation process: one appeal was dismissed, and the other led to a clarification of the stipulation process, vacating the order of the special masters insofar as it was inconsistent with the clarification.

After the trial began, many of the special masters' decisions regarding the admissibility of findings of fact under Rule 803(8)(C) of the Federal Rules of Evidence were appealed. The court applied the "clearly erroneous" standard of review to these appeals (a standard higher than that normally applied to a master's conclusions of law) and only overturned those findings where the masters applied the guidelines that had been promulgated by the court in a way that the court had not contemplated.

52. One judge has observed that parties are more cooperative during pretrial when they have participated in forming the process. See Peckham, *supra* note 21, at 782.

quirements for the successful assertion of claims and to expedite their resolution. Although we sought to minimize the number of claims, the procedure was intended to achieve that result through voluntary relinquishment rather than substantive default. Consequently, when a claim was pressed, the Guidelines provided the parties two opportunities to furnish adequate documentation. The first was at the time of the filing of the documents, on the basis of which we issued draft rulings. At that point, the procedures provided a second opportunity, a ten-day period within which the parties could submit comments and additional supporting materials in response to the draft ruling. Only thereafter was the final order issued.

The procedural guidelines defined the mechanics of the system. There were two aspects to the mechanics: getting the process going as to any privilege claimant, and carrying it through once it got going. Getting the process going as to each privilege claimant turned out to be unexpectedly difficult. There were many private third parties involved. Each had to be made aware that their documents were under subpoena (many were fuzzy about this), and each had to be informed that there was a privilege claim procedure and that we—those professors down in Washington—had authority to administer it. This took time and patience. It also required time and patience to get the same message across to the various government departments that were under document production demands made by defendant AT&T. But beyond this was the peculiarity that there had never been a pretrial order specifying when document production was to begin, although there was a specification when it should end. Furthermore, at that point we had no authority over discovery as such but only over privilege claims. Our privilege claim procedure could not go into action until a document was withheld, and a document could not be withheld until there was an obligation to produce it!

We solved this problem by sheer effrontery and the cooperation of the parties. We indicated to the various document holders that they should begin making their privilege claims. This induced them also to complete document production itself, so that the tail wagged the dog.

Of course, we could have obtained a clarifying order from the court. We were reluctant to do so, however, because we had found that orders often resulted in an immobilization or recalcitrance while simple cajolery usually worked reasonably well. In any event, putting the privilege mechanism in place, with our accompanying informal supervision, energized the process of document production, particularly from third parties.⁵³ A

53. A few third parties who were outside the jurisdiction of the court informally questioned our authority to impose our privilege procedures on them. In response we informed them that if their objections were formally raised and found to be meritorious, prompt action would be sought in the appropriate jurisdiction. The claim was never raised.

process that had been dragging for several years became organized and completed in a relatively short time. With the exception of one company, such periods never exceeded 6 months; for a few of the government agencies it took a little longer.

The second aspect of the mechanism was its operation once it got going. The process required that all documents for which privilege claims were anticipated should be indexed, with the index filed with the court. In the index each document had to be identified by number, date, file, or files in which it was located, by author, by distribution (addressees and distributees), and by general content. In addition, all applicable privileges had to be delineated.⁵⁴ Within three weeks after the submission of this index, delivery to us had to be made of a revised index of documents for which privilege claims were asserted and copies of each such document with substantiating evidentiary materials. Copies of everything but the actual documents were served on the demanding party. We could thus make in camera inspection, while the opposing party had a description of the document from which challenges to each claim could be formulated. In the revised indexes that were delivered with the actual documents, we found that from 25 to 30 percent of all claims were abandoned.

Simultaneous with the filing of the revised index and documents, each party was required to file an initial index for all additional privileged documents discovered in the preceding 3-week period. This would begin another 3-week cycle as described above.

Two weeks after the submission of each revised index and the accompanying documents, challenges based on the information in the indexes and supporting materials had to be filed. One week after the challenges were filed, replies were due. Decisions on the documents contained in each index were made as quickly as possible. The decisions were issued as

54. An index page to a document for which a privilege claim was contemplated would appear as below:

<i>DOCUMENT NO.:</i>	739 LL												
<i>DATE:</i>	12-11-68												
<i>FILE SOURCE:</i>	Marketing Department												
<i>AUTHOR:</i>	F.M. Garlinghouse, Esq.												
<i>DISTRIBUTION:</i>	<table border="0"> <tbody> <tr> <td>*R.R. Auray</td> <td>*J.K. Loolian</td> </tr> <tr> <td>*H.M. Boettinger</td> <td>*C.H. Miller</td> </tr> <tr> <td>*L.E. Eastmond</td> <td>*J.H. Miller</td> </tr> <tr> <td>*W.M. Ellinghaus</td> <td>*R.E. White</td> </tr> <tr> <td>*A.M. Froggatt</td> <td>*E.J. Woods</td> </tr> <tr> <td>*R.R. Hough</td> <td></td> </tr> </tbody> </table>	*R.R. Auray	*J.K. Loolian	*H.M. Boettinger	*C.H. Miller	*L.E. Eastmond	*J.H. Miller	*W.M. Ellinghaus	*R.E. White	*A.M. Froggatt	*E.J. Woods	*R.R. Hough	
*R.R. Auray	*J.K. Loolian												
*H.M. Boettinger	*C.H. Miller												
*L.E. Eastmond	*J.H. Miller												
*W.M. Ellinghaus	*R.E. White												
*A.M. Froggatt	*E.J. Woods												
*R.R. Hough													
	R.J. Cohen, Esq.												
	R.B. Holt												
<i>SUMMARY:</i>	Transmits outlines by individual witnesses of proposed rebuttal evidence, ICW Docket 16258												
<i>PRIVILEGE CLAIM:</i>	Attorney work product.												

findings in draft form. Comments and supplemental filings were accepted for a period of ten days. This cycle was repeated until all documents were either produced or held privileged.

On a number of occasions a pattern of deficiencies appeared in the documentation of claims, generally in a party's initial filing. In these circumstances we supplemented the draft order by informally advising the party about the deficiencies by letter.⁵⁵ We took this action so that the errors would not be repeated in subsequent filings and to provide the party with additional time to submit supplemental materials without delaying the filing schedule.

After experiencing the deficiencies in the initial filings by the litigants, we attempted to minimize the same problem with third parties by informing them that upon request we would informally discuss the substantive requirements of the privileges and the procedural mechanism established for their assertion. We reviewed the Guidelines, delivered copies of correspondence with other parties, answered questions, and provided samples of documentation. These informal meetings were conducted, of course, only with the consent of the party litigants. Without exception the offer of guidance was accepted, and it resulted in a substantial reduction in the deficiencies that previously had been experienced.

These procedures were initiated in the spring of 1979. In a period of 12 months we ruled on 4,320 claims involving 3,604 documents.

c) *The illusion of costs* □□ We wish to reiterate a point about costs. The requirement for filing all evidentiary support with each document appeared to increase the cost of asserting privilege claims. However, it was the responsibility of a party claiming privilege to substantiate its legitimacy. Our guidelines merely made explicit, prior to the time of assertion, the evidentiary support that the party was required to produce in any event. Moreover, by carrying the entire evidentiary burden through the written submissions, rather than holding evidentiary hearings, resolution of the claims was significantly expedited. We hate to think what it would have cost if back-and-forth briefs, objections, and argument had been made on each document as to which privilege was claimed. To the extent that the procedures may have increased the cost of individual privilege assertions, however, in the long run they were certainly more cost efficient since they substantially diminished the number of claims raised. The cost mechanism made a claimant ask himself seriously whether a claim on a particular document was really worthwhile.⁵⁶ It has been our experience that it is essential to force this decision on parties be-

55. See appendix 13.

56. See section IV.C.2d) of this article on the product of stipulation negotiations.

cause many materials for which protection from disclosure is sought, particularly under the work product immunity, are innocuous papers.

2. Isolating the Contested Issues

a) *Statements of contention and proof* □□ In the normal course of litigation, particularly in complex actions, the litigants draft their pleadings with sufficient ambiguity to "leave their options open." Broad allegations compel each party to develop evidence supporting or responding to all factual contentions the other party might conceivably advance under the pleadings. If uncontrolled, this situation not only inflates discovery but makes trial a dumping ground for every piece of evidence that either side believes might have some relevance to any factual contention or legal theory in the case.⁵⁷ Such is the modern system of simplified pleadings as it works in big cases.

The pleadings in *United States v. AT&T* were of this kind.⁵⁸ Discovery was correspondingly broad and expensive. To identify the issues as discovery was completed, the court required the parties to file a series of Statements of Contentions and Proof.⁵⁹ In these Statements the parties were re-

57. The proposed amendment to Rule 26(b) was a statutory solution to this inflated discovery. The change would have limited the "relevance" of discovery to the "issues raised by the claims and defenses" and not, as the Rule currently reads, to the "subject matter of the pending action." This proposal was rejected and therefore not incorporated into the 1980 Amendments to the Federal Rules of Civil Procedure. An alternate system views the possible area of discovery as a series of concentric circles surrounding a central "core." Initial discovery is confined to the "core" issues central to the controversy. If settlement is not reached and there is reason to believe that additional discovery will provide relevant evidence, discovery is expanded from this "core" to the next concentric circle. Brazil, *supra* note 8. A third approach to the discovery difficulties resulting from notice pleading would be changing the pleading requirements to require narrow and more specific allegations. Commission, *supra* note 1; Seminar on Protracted Cases, *supra* note 14, at 432, 441.

58. For example, the Complaint alleged that "the defendants and co-conspirators have been engaged in an unlawful combination and conspiracy to monopolize, and the defendants have attempted to monopolize and have monopolized, the aforesaid interstate trade and commerce in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in violation of Section 2 of the Sherman Act" (§ 27, p. 11); that the defendants and co-conspirators agreed to "attempt to prevent, restrict and eliminate competition from other telecommunications common carriers, . . . from private telecommunications systems, . . . [and] other manufacturers and suppliers of telecommunications equipment," (§ 28, p. 12); that the defendants have "attempted to obstruct and obstructed the interconnection of Specialized Common Carriers, . . . Miscellaneous Common Carriers, . . . Radio Common Carriers, . . . Domestic Satellite Carriers with the Bell System," (§ 29, pp. 12-13); that "defendants have achieved and maintained a monopoly of telecommunications service [and] . . . equipment; . . . actual and potential competition . . . has been restrained and eliminated; [and] purchasers . . . have been denied the benefits of a free and competitive market." (§ 30, p. 13.)

In similarly broad terms, the Answer "den[ie]d each and every allegation contained in paragraph 27 . . . 28 [and] . . . 29 of the Complaint" (§§ 54, 55, 56, p. 20); that "Congress has determined that telecommunications carriers should be regulated, and the telecommunication industry should be structured, under the standard of the public interest in good, universally available, service at reasonable rates, rather than under the policy of favoring competition applicable to enterprises generally under the Sherman Act" (§ 18, p. 10) and the "highly integrated structure of the telecommunications industry thus reflects the considered will of Congress" (§ 17, p. 9).

59. This is a common procedure followed in administrative proceedings before the FTC. This has been employed for a number of years in massive litigation (see Seminar on Protracted Cases, *supra* note 14, at 411, 458, 507, 509 (1958) and is recommended in the Manual for Complex Litigation.

quired to describe with particularity each factual contention it was advancing in support of its claims or defense and to list the witnesses and documentary evidence to be used to prove each factual contention. There were to be three iterations of these statements as discovery progressed. Theoretically coordinated with completion of phases of discovery, the successive statements were to be progressively more focused in substance,⁶⁰ nonconclusory in form, and preclusory in effect.⁶¹

This process seems to us to have had little effect in narrowing discovery. For one thing, the order contemplated that discovery would be substantially accomplished before the Second Statements were due; it was only in the second iteration that the parties had to be really specific. Moreover, in the Second Statements the parties held open the full width of their cases by being specific about everything and making safely compendious references to the supporting evidence. We do not see how this situation can be remedied except to the extent that the parties decide on second thought to abandon contentions.

The Supreme Court has construed the pleading rules to permit a party to go forward with very general allegations until after discovery. So long as this view obtains, it would seem impermissible to require parties to make, through Statements of Contention, binding positional commitments in advance of discovery. For better or worse, present law means to discover relevant facts, then plead the case that makes them relevant. That being so, we do not see how Statements of Contentions can be used to limit discovery. At any rate the Second Statements in *United States v. AT&T* elaborated the parties' positions but did not focus or narrow them. We think they were for this purpose mostly a waste of time, coming as they did before discovery was substantially completed.

Limiting discovery is one thing, guiding it is something else. It seems to us that the early iterations of Statements of Contentions should be used not to limit discovery but to provide an agenda for discovery. This approach would entail two modifications from present practice regarding Statements of Contention. First, the initial iteration should be required at the outset of litigation, before discovery is launched. Second, each party should be able as a matter of right—not restricted by “good cause”—to amend its Statement until discovery is substantially completed on the matters for which amendment is made. At any given point in the discov-

60. The parties' filings were sequential. After the First Statement by the Government the defendants' First Statement was to be factually responsive and follow the same organizational structure employed by the plaintiff, except for the factual contentions relating to their affirmative case. Correspondingly, the government's Second Statement was to be responsive to the defendants' First and to follow their organizational structure relative to their affirmative case.

61. Except for good cause shown, specific contentions not advanced could not be proven at trial, and specific evidence that was not listed could not be offered as proof on any issue.

ery stage, the Statement would give a picture of the whole and afford some sensible basis for determining the sequence of discovery. More should not be asked at this stage.

Requiring detailed Statements of Contention and Proof *after* discovery is substantially completed is also something else. Here the purpose is not to limit discovery but to pull together the sprawling evidence, to find out what is in dispute, and to arrange an order of proof for trial. The Second Statements of Contention and Proof in *United States v. AT&T* did not quite do this. They had been filed before discovery was complete, when the parties were not ready to "close the books" on available evidence. Also, they were not explicitly intended as an order of proof. Indeed, the pretrial order anticipated that there would be a Third Statement of Contention and Proof after discovery completion and before trial.

As things worked out, however, the Second Statement of Contentions became the basis of something like a massive pretrial conference that did isolate the issues in dispute and establish, tentatively at least, an order of proof.⁶² All along AT&T had said that many of the relevant facts were a matter of record and could be stipulated. Judge Greene agreed that this was a reasonable possibility. As discovery was beginning to wind up, he ordered the parties to see whether they could not stipulate as to matters not in dispute. They were to do this concurrently with completing discovery and with the parties' preparation of their Second Statements of Contention and Proof. Hence, the first phase of the search for agreement on facts was based on the First Statements of Contention. But as the situation evolved, it was the Second Statements that became the basis of what we have come to call the stipulation process.⁶³

b) *The stipulation process* □□ This process achieved a considerable measure of success. The final explication of allegations in the Second Statements took up 1,872 printed pages for the plaintiff and 2,147 pages for the defendants. In many instances, however, the factual explication amounted to little more than a concatenation of conclusory allegations with ambiguous factual contentions. Hyperbole was rampant. The task was twofold: first, to extract from this often cloudy and sometimes purple prose the factual allegations that were not genuinely in dispute; second, where matters were in issue, to compare the competing contentions along with the proposed proof.

62. In *Life Music, Inc. v. Broadcast Music, Inc.*, 31 F.R.D. 3 (S.D.N.Y. 1962), the parties could not agree on a definition of the triable issues. Apparently convinced that the counsel were unable to proceed effectively, the judge filed a pretrial order imposing his views as to what the issues were on the parties. See Comment, *The Role of the Court in Simplifying the Triable Issues at Pre-Trial Conference*, 72 Yale L.J. 383 (1962).

63. See appendix 3.

As originally planned this process required each litigant to go through the opponent's Statement and indicate on worksheets whether it would stipulate to allegations and to the authenticity of documentary evidence. Allegations that could be directly agreed to were to be immediately stipulated. To the extent that a party was prepared to stipulate to an allegation with changes in language, this was to be tendered with the proposed changes. If the counterproposal was acceptable to the opponent, the language as altered would be incorporated in the tentative stipulations. If the counterproposal was rejected, the reason for rejecting the proposal had to be given along with an alternative counterproposal. If that counterproposal was unacceptable, the matter was to be referred to the special masters for supervised negotiations.

If a party refused to stipulate to the opponent's contention on the ground that it was factually incorrect, the objector was required to indicate how the contention was incorrect and why the inaccuracy was material. If a refusal to stipulate resulted from a need for further discovery, each worksheet had to indicate: (1) the additional discovery required, (2) whether such discovery had been sought and from whom, and (3) the current status of the request.

This process proved unsuccessful. It generated thousands of pages of worksheets, required the expenditure of tens of thousands of man-hours over a 6-month period of exchanges, and resulted in agreement on only a few paragraphs of factual contentions.⁶⁴ And a substantial number of the contentions had not even been addressed.

When the process was referred to the special masters for supervision, most contentions that had been addressed were in various stages of proposals and counterproposals. Each was on a single sheet of paper and was cross-referred to the relevant paragraph in the Statement and counterproposals to which it responded. The status of any single proposal could not be determined from its face. Thousands of worksheets were organized loosely in file folders for each contention. There was no single report aligning the two Statements and the status of various proposals concerning the constituent contentions within each Statement. The process, as structured, was unmanageable.

The process failed to produce stipulations for several reasons. The process initially was based on the parties' First Statements of Contention and Proof. These had been written long before discovery was complete and before it had been decided that there would be a stipulation process in which negotiations would focus on the precise language of the conten-

64. The government had agreed to stipulate to about 150 paragraphs of the defendants' 2,147 pages of contentions, and the defendants had agreed to stipulate to over 1,500 paragraphs of the government's 1,872 pages of contentions.

tions. The contentions in these Statements were often cast in language that was not conducive to stipulations. As previously indicated, multiple factual contentions were frequently concealed in single conclusory allegations and surrounded by hyperbole. Many statements were incomplete or inaccurate because discovery was not complete.

Second, although the Second Statements had been written with stipulation in mind, the court had required that they be filed concurrently rather than sequentially. Because they were incorporating significant revisions from the First Statements due to the completion of discovery and their intended use, the Second Statements differed in organization, structure, and content. At many points they simply talked past each other, making it very hard to clearly join legal and factual issues.

Third, the pretrial discovery process also had not been designed with the stipulation process in mind. The court merely set deadlines for the completion of various phases of discovery. This resulted in great disparities in the quantity and quality of the discovery that had been conducted by the two parties. At the initiation of the stipulation process, the government had not begun its formal deposition program. It had not even interviewed at length many of its own witnesses who had already been deposed by the defendants.

Finally, the procedure originally devised was too clumsy. It had been formulated at a stage when the government was quite unready for finally putting its case together and when both parties were very leery of stipulating themselves into trouble. Hence the elaborate provisions for proposal, counterproposal, etc. In immediate retrospect one of us remarked that it looked like a revival of the Hillary Rules—the hypertechnical rules of pleading that prevailed in mid-nineteenth-century England.

We report this failure in order to prove a couple of points. First, neither we nor Judge Greene nor the parties are procedural magicians. We simply failed to anticipate how badly the timing would go. Second, we were undeterred by the failure. Despite the failure of the original process, it seemed evident that many if not most of the contentions were not in real dispute. Hence, the goal of extensive stipulations still seemed reasonable. The task was to find a different means to achieve the goal. This is genuine experimentation—the search for successful technique by learning from failure. But learning from failure requires first admitting failure. We suspect that development of judicial administration will progress more rapidly if failures could be more openly acknowledged and searchingly analyzed.

It was therefore essential that the structure and organization of the Statements be maintained and built upon but that more efficient procedures be devised. The revised procedure included: the matching of the corresponding contentions of the Statements, connecting these contentions in

a single narrative statement of the case, presenting this single statement in a word processor printout for easy reading and editing, disclosure of evidentiary support, informal face-to-face discussions of each contention, and negotiations for compromise language.

The Statements were important because they required the parties to organize their cases. The Statements could be used in the negotiation of stipulations, however, only if their corresponding contentions were aligned. Through such alignment there is a specific joining of the factual issues upon which negotiations had to focus. Thereafter, the process of weaving the contentions into one narrative statement of the issues of the case would be a relatively simple matter of language modification.

It was agreed by the parties that the case would be divided into 82 episodes. Each episode constituted a distinct transaction or set of related transactions, and its narrative contained both parties' contentions. The word processor printouts displayed the integrated Statements in a two-column format. The right column was for Contentions, and the left was for Stipulations.⁶⁵ At the beginning of negotiations all contentions were, of course, displayed on the right side. The source of each contention was indicated by the prefix "Plaintiff contends" or "Defendants content." As factual allegations were agreed to, after the parties examined the supporting evidence and negotiated changes in the language, those allegations became tentative stipulations and were moved from the right to the left column. When a statement was moved to the left, all indications of source (whether plaintiff or defendant) and citations to supporting evidentiary materials were deleted. The contentions upon which agreement could not be reached remained in the right column along with the identification of source and of their evidentiary support. Following each contention the opposing party would indicate why it refused to stipulate. This indication served to join the factual issues.

Stipulation/Contention printouts served three general purposes. First, in advance of trial, a vast mass of factual data was organized into manageable, understandable segments or "episodes." Second, the undisputed factual matters were set forth in narrative, and the disputed ones were catalogued. Third, with regard to the contested allegations, the parties were required to organize their evidence and present a firm list of the witnesses and documentary evidence upon which they intended to rely. The end product was a combined narrative stipulation, pretrial order of issues in dispute, and a tentative order of proof. The printout focused all legal and factual issues in dispute and provided the judge with a tool for managing the trial and a format for the ultimate findings of fact.

65. See appendix 14 for a sample of the printout for one episode.

c) *Supervising the negotiations* □□ The negotiation process was long, arduous, and costly. It lasted for a period of 13 months, ultimately involving 19 negotiating teams for each side and a heavy cost in manpower and supporting services.

Each negotiating team was comprised of at least one attorney and a staff of two paralegals. Usually two attorneys represented each side. Frequently the defense teams also had technical consultants with them during the negotiation sessions.

Negotiations focused on revision of the contentions on the documentary evidence. Proposals for revision were sometimes exchanged on a daily basis but more frequently were prepared for an entire episode or major portions thereof and exchanged before face-to-face negotiations. Daily exchanges usually involved counterproposals. To encourage candor, the presiding judge had ordered that all submissions in negotiations would be sealed,⁶⁶ which prohibited them from being used for any purpose other than the negotiations until all tentative stipulations became final. This sealing of tentative proposals was particularly important because of the uncertain ramifications they might have in other pending litigation. Where stipulation proposals required consultation with third parties, as either transactional or expert witnesses, such consultation was permitted upon a showing of necessity and the condition that the third parties not use the materials for any other purpose.⁶⁷

To facilitate agreements, we allowed the parties to present argumentative notes (denoted as such) in the contention column. This allowed facts to be incorporated into the narrative which would otherwise have been contested because of their real or supposed implications.

Negotiations on a set of contentions continued until the negotiators had exhausted the material. Each set of negotiations developed its own pattern. Some met five days a week and prepared proposals each evening and on weekends. Others met for weekly periods and then broke for designated periods to engage in independent preparation. Still others negotiated for a limited number of days each week. During periods of independent preparation the parties were in contact with one another, often exchanging proposals by telephone.

Several factors contributed to the 13-month marathon of the negotiations. The enormous scale of the case was obviously the most important factor. The technical nature of the issues was clearly another major factor, as was the broad, imprecise argumentative, and sometimes inaccurate state of the contentions. Compounding the problems created by the

66. See appendix 15.

67. See appendix 16.

size and the complexity of the issues was the difficulty the parties had in stating simply, clearly, and in detail their factual contentions and in reserving their argumentative characterizations for concluding paragraphs in each episode.

In an effort to deal with the latter problem, we spent considerable time at the beginning of negotiations reviewing with each team its contentions and the product of its negotiations. This supervision proved to be essential to developing a common understanding of the process, establishing conventions by which common types of contentions would be addressed, dissuading negotiators of unproductive practices, and resolving debilitating doubts about the consequences of certain actions. We did not continue this supervision long enough, however, and thus the quality of some negotiations deteriorated.

At the beginning of the negotiations there were only a few teams. This allowed us to review the products from each week of effort. Each paragraph upon which tentative stipulations had not been obtained was examined for potential grounds of compromise. Each was explored with the negotiators to assist them in "unpacking" compound factual allegations and in clarifying the issues that were actually in dispute.

As the negotiations with the original teams proceeded, the need for weekly review sessions diminished. Meetings thereafter were scheduled only as problems arose. However, we required weekly productivity reports for each team and status reports for each episode (and in turn we made weekly reports to the judge based on these reports).⁶⁸ These reports were useful, but they did not allow us to understand and therefore to manage the dynamics of each team. We therefore had no basis upon which to gauge the quality, precision, and efficiency of the negotiation efforts. It was not realized until much later that all this could be accomplished only by continuous on-site observation.⁶⁹ Managing such a process on the basis of second-hand report rather than observation was inefficient and often ineffective. Some teams never achieved much productivity, and some negotiations deteriorated into wrangling over minutiae.

After we stopped having regular meetings with each team, pressure to complete the process necessitated greatly enlarging the number of teams. Some teams were manned by attorneys who were inexperienced, whose acquaintance with the litigation was new or quite narrow and who, in a few instances, were inept at negotiation. Some had received little negotia-

68. See appendix 17. See appendix 18 for the weekly reports we made to the judge based on these reports.

69. All negotiations were eventually conducted in one central location in Washington. One floor of a motel was leased, and each team was assigned a specific room in which to conduct negotiations and maintain records. This allowed each team to be observed conveniently on a daily basis.

tion instructions—and none from us—or no critique of their initial products. As a consequence, unproductive negotiation patterns and practices developed.⁷⁰ This in turn led to frustration on the part of the participants and a deterioration of the negotiation atmosphere. By the time we realized what kinds of problems there were, it was too late to rectify many of them. For these teams conciliatory attitudes that may have been fostered or preserved by closer supervision and control were lost in the frustration of the experience.

In the large majority of instances, negotiations proceeded smoothly. It was the consensus of the participants, however, that even these negotiations would have gone better with closer supervision. Discussions could have been more focused, and disputes could have been resolved before giving rise to delay. In most instances the disputes that arose, even though intractable without intervention, were not perceived to be important enough to solicit special intervention by the special masters. Their cumulative effect, however, was significant.

d) The product of stipulation negotiations □□ About 80 to 85 percent of the factual contentions in the episodes were agreed to. Also, the inadequacy of several portions of the government's case was revealed. As a consequence, the government ultimately dropped 14 episodes from the case. The process compelled the litigants to examine, in a way that may not have occurred otherwise, the merits of the contentions in light of the available evidentiary support. As a consequence, the testimony at trial was more focused and more efficiently presented. Since the substance of each witness's testimony was set forth in the Contention column, abbreviated testimonial presentations were possible. The direct testimony of most witnesses was submitted in writing. Background and preliminary questioning of witnesses was entirely eliminated. The primary purpose of oral testimony on direct examination was not to convey information but to establish the credibility of the source. Such testimony was usually limited to a summary of the written submission. The cross-examinations at trial were correspondingly short. The effect on trial was substantial, perhaps radical. Presentations that normally would be estimated to require a half day took an hour or less. In fact, ordinary estimates of time for testimony were so disconcerted at the early stages of the trial that midweek adjournments were necessary to keep pace with the original schedule of presentations.

In view of the scope and complexity of the issues in the pleadings, it was originally conjectured that the trial of the largest antitrust case in his-

70. One notable practice was the tendency of many negotiators to use all time available and to respond to everything. They occasionally engaged in unnecessary interchanges over the merits of issues that had already been joined.

tory might be the longest in the history of federal jurisprudence.⁷¹ However, as we have noted, the trial took less than a year.⁷² That's not bad.

V. CONCLUDING REFLECTIONS

Our experience recounted here is very limited. That is a positive circumstance in one way, for we obviously have not become insensitized by habituation. On the other hand, it is not much of a data base.

A. Mechanisms

We think that three important mechanisms evolved in *United States v. AT&T*. One was the guidelines procedure for handling claims of privilege, and another was the supervised negotiation procedure for reaching stipulations. A third was a management technique that seems to have promise—what might be called informal case management. The evolution of this technique in *United States v. AT&T* was fortuitous in many respects and in all respects a matter of trial and error.

B. The Decision Rule

The informality of the process was partly the result of the decision rule we were obliged to adopt. There were two of us, with equal power and vote in the office of special master in this case. Hence, we had no decision rule, such as majority vote, judicial rank, or seniority, by which to resolve differences between us. One might expect that this arrangement would have hindered decision making. It did not. This, in large part, was due to the fact that responsibility for the daily supervision of the action and the management of the special masters' office and staff was delegated to one of us. Although consultation was always sought by the managing special master on decisional matters of moment or about which it was anticipated that there could be a difference of opinion, authority was delegated to the managing master to act unilaterally on issues requiring immediate decision. Another factor contributing to the success of the arrangement was the surprisingly few differences that arose as to either substance or technique.

In resolving our differences we found, quite to our surprise, that the bipartite arrangement enhanced the quality of our deliberations because neither of us, no matter how convinced that we were right, could lightly dismiss the views of the other. With reason being our only recourse and

71. See *United States v. AT&T*, No. 74-1698, slip op. at 4, n.6 (D.D.C. Sept. 9, 1980).

72. Although the trial lasted 11 months, during this time proceedings were recessed for 2 months, and trial on average was conducted only 3 days per week. This should be compared with the trial in the antitrust litigation of *United States v. IBM*, 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969), which is less complex in many respects and a fraction of the size of this litigation and which was in its *fourth* year of trial when it was dismissed by the government.

standard, we found that we listened more discerningly, explored alternatives more completely, and analyzed with greater precision. This translated into significantly greater confidence that we had in our decision. In addition, because these deliberations generated tough and frank discussions among “us” as to what “we” should do, it served to establish a model for similar discussions in which “we” included the parties. That is, the dialogue between us as equals established the norm for the counterpart dialogue with the parties, the only difference being that in the end we as special masters might have to cast a deciding vote.

C. Perspectives and Incentives

The litigants do not perceive the case the way the judge does, nor do they have the same interest in it. The judge knows little about the case, especially at the beginning, and in any event does not want to reach a firm view of its merits until the end of trial. But information about the merits of the case is also information that is necessary for administration of the case. In this respect the litigants have a great comparative advantage over the judge. The judge has great authority in administration of the case, however, and the parties comparatively little. From a management perspective, therefore, a massive case is an anomaly: the person with administrative authority has relatively little information about the matter and is severely inhibited from getting such information, while the people who have the information have no authority to act on it. Indeed, the litigants often have incentives to use their superior information to offset or to subvert the judge's efforts at administration.

A key to expediting massive cases is to develop *incentives* for the *lawyers* to advance rather than retard the case. Of course, both sanctions and directives can and should be used. However, we do not believe sanctions have worked well or can work well in managing large cases, nor do we believe that directives will work without either sanctions or incentives. That leaves incentives as a largely unexplored possibility. Factoring out the incentive system is tricky, but there seem to be at least two principles: reciprocity and reduction of risk and waste. Reciprocity simply means that as many transactions as possible should be set up so that the litigants are benefited and burdened in equal degree. For example, the procedure for producing documents should distribute burden approximately equally. Reduction of risk and waste takes account of what seems to be a fact, that most of what the lawyers do in preparing a big case is to protect against eventualities that never happen. This wasted preparation is costly to the client. Probably more important as a practical matter, it is boring and exasperating to lawyers who have been in the trenches for months and years. Measures that advance the case by reducing this kind of waste

benefit both court and litigants, except where one party has the primary aim of not getting to trial. We were not involved in such a case. The government wanted to go to trial because it wanted a decree and could not get an acceptable settlement. (Settlement failed by an eyelash.) AT&T wanted to go to trial for reasons that are not so evident, but one of them was the need for clarification of its legal status so that business planning could proceed.

D. The Informality of the Process

The technique we used is "informal" only from a legal viewpoint. From that viewpoint, it is informal in several important respects.

First, the procedures and methods used in the case were established largely by evolving agreements with the parties and were not initiated in orders of the court. True, we did not simply walk in off the streets and offer our services. We were established and given powers by court order. Yet the initial order was limited in scope and empty of procedural specifications. The responsibilities we wound up with developed by accretion, with the subsequent orders largely ratifying developments that were already under way. We were in some degree entrepreneurial in this development, offering new services to our "customers"—the court and the litigants—as we gained their confidence and our own self-confidence.

Second, only a small part of our work was done with orders and rules; most of it was done by conference and consensus or at least acquiescence. To be sure, we issued orders and made rules, and as we have said this structure of authority was essential. Indeed, there was an occasion early in our service where one of the parties was derelict in meeting a deadline, flagrantly and without excuse and in the face of warnings. We immediately issued an order rejecting all the claims of privilege involved. Then, as we had previously planned, we granted relief from the default after a humble application and some frank talk about who was in charge. That cleared things up, and we had to use a similar sanction perhaps only once thereafter. The overwhelming bulk of the business was done by "contract"—two-party contracts between the parties, or three-party contracts between them and us, or four-party arrangements in which the judge's decision or policy was an essential ingredient.

Third, almost all our exchanges with the parties were by conversation rather than petition and order. By "conversation" we mean conferences, telephone discussions, letters, reports, and drafts of formal orders.

Fourth, in most of the transactions we invited the parties to take the lead in proposing what should be done. When they agreed, and the agreement was consistent with the court's schedule, we simply endorsed the agreement. When they disagreed, our aim was to find out exactly where and why they disagreed, thereby simultaneously to enlarge the area of

real agreement and to isolate the center of conflict. The conflict could often be reduced to *de minimis*. If it could not, we resolved it by a ruling. But the process of peeling away to the core of conflict reduced to a minimum the scope of our arbitrament. In fact, most of our formal orders simply memorialized arrangements worked out by conversation.

Fifth, where the parties were required to take a position on a matter of consequence, as a general rule we allowed them to take an interim tentative position before having to commit finally. For example, in making privilege claims a party had a "second shot," after our draft ruling, in which to correct technical error or supply additional documentation. Again, in the stipulation process all stipulations were tentative until confirmed after a period for review and retraction. Again, in many other transactions, we would say, "Why don't you try it this way and see how it goes? If you don't like it, come back and we will hear argument and make a formal decision."

Such tentativeness and irresolution violates all the conventions of legal procedure, which entail binding court dispositions based on binding party dispositions. Yet we found this "trial run" technique more productive and firmer than "tough" technique. We have pondered why this is so, and suggest the following explanations. In the first place, a big case is a series of small, unrehearsed transactions in which there is no assurance that a particular technique will work. Why compel the lawyers to fight a proposal they have doubts about without letting them see whether their doubts are justified? In the second place, lawyers are trained to be sensitive to risk and hence are very averse to an unproven technique. Why subject their risk aversion to maximum stress? Third, a trial run can lead to modifications, or to abandonment. Lawyers are practical people, why not capitalize on their practical judgment?

Underlying this point is a very important proposition about the pretrial transactions in big litigation as compared with routine litigation. In routine litigation, most pretrial transactions happen only once or a few times. There are a few depositions, a few documents, a few motions, one pretrial conference, and so on. In a big case every type of event occurs dozens or even hundreds of times. A big case is a stream of "repeat business" and not a "one shot" transaction. Hence, it is important to establish techniques that will work when put to repeated use between parties who have incentives to cooperate but also incentives to commit sabotage or engage in opportunism. This makes it worthwhile to invest in evolving such techniques through little experiments rather than regarding the transactions as singular and isolated. In a sense, the big case should be regarded as its own universe with its own evolving practice and "common law" and its own self-critical and adaptive processes.

We have described the aspects in which the procedures we used were

legally informal. But that does not mean that they lacked form in political, psychological, or managerial terms. This is a hard point to get across to lawyers. To most lawyers "formal" means a court-like happening, and "informal" means every other kind of happening. However, a parliament has form, a partnership has form, a board of directors has form. All transactions can be analyzed into elements of goals, incentives and constraints, participants and powers, and information systems. The particular management form that evolved differed from that in conventional use, as we understand current conventions in pretrial management. The point is only that it had form, though not the form of adjudication.

We do not say that the form was "democratic," for it certainly was not, or that exercise of authority was not necessary, for it certainly was. What we say is simply that the form was relatively open rather than closed, experimental rather than presuming a priori knowledge, and propelled by party initiative rather than judicial directive. It gave relatively greater scope to the lawyers' instinct for creative craftsmanship as against their impulse to obstruct. Considered all in all, it could be described, in the current jargon, as management by participation.