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Procedures for Management of Non-Routine Cases

Dennis A. Kendig
PROCEDURES FOR MANAGEMENT OF NON-ROUTINE CASES

by Dennis A. Kendig*

I. INTRODUCTION

The great majority of cases brought before the courts are routine; that is, they are actions by individual plaintiffs against individual defendants which are not highly publicized, present factual issues of no more than usual complexity, and are based on areas of substantive law with which the courts are quite familiar. They are discrete actions in which the stakes are not unusually high and the parties are not intent on disrupting the court proceedings. There are, however, other cases that are non-routine, in that they present special administrative problems for the courts and may consume an inordinate amount of judicial resources unless special judicial procedures and countermeasures are developed and utilized. This article concerns this class of cases.

After briefly tracing the development of procedures for handling complex cases in the federal system, this article will analyze criteria and suggest methods by which non-routine cases may be identified, and conclude with a discussion of specific procedures which might be applicable to state court systems in the managing of such cases.

II. COMPLEX CASES IN THE FEDERAL COURT SYSTEM

In the federal system, special attention first officially focused on non-routine cases following a series of protracted antitrust cases which arose during and after World War II. These cases typically involved either large numbers of plaintiffs suing in many districts on the same basic facts, or many complex and interrelated issues requiring the evaluation of large quantities of data.¹

A special report issued in 1951 by a committee of district and
circuit court judges under the chairmanship of Judge Prettyman, and the Handbook of Recommended Procedures for the Trial of Protracted Cases produced in 1960 by a committee consisting of members of the Judicial Conference of the United States, put forth a variety of recommended procedures for handling protracted cases. The recommendations did not constitute rules or regulations, but were only "a description of remedial methods and measures thought by experienced judges to be effective."

Renewed attention was paid to non-routine cases following the avalanche of antitrust suits filed against electrical equipment manufacturers in the early 1960's. The courts were faced with over 1,900 civil actions containing over 25,000 claims in twenty product lines filed in 36 different districts between 1961 and 1963. Never before had the courts been confronted with litigation of comparable magnitude. Without extraordinary countermeasures, the courts would inevitably have been faced with duplication of discovery, conflicting decisions and huge backlogs.

Recognizing the need for cooperation among the various judges handling these cases, Chief Justice Warren, in January, 1962, appointed a committee known as the Co-ordinating Committee for Multiple Litigation of the United States District Courts. The committee established a national discovery program, a program for intercircuit transfer of certain cases to avoid multiple trials of the same issues with the same defendants, and eventually produced the Manual for Complex Litigation as a guide for judges who would face similar cases in the future.

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5. 13 F.R.D. 62, 64 (1953).


7. See M. Conant, Antitrust in the Motion Picture Industry (1960).

8. For details on the actions taken by the Committee in processing these cases, see Comment, supra note 4, at 305 and Peterson, supra note 6, at 737-38.

9. The Manual for Complex Litigation has been published in 1 J. Moore, Moore's Federal Practice pt. 2 (2d ed. 1948 with amendments to Jan. 1, 1973 [hereinafter cited as MANUAL]. The title of the Manual was originally the Manual for Complex and Multidistrict Litigation. This title was changed to emphasize that use of the Manual is recom
The Manual combines several procedures recommended in the Handbook with many of the techniques first employed in the electrical equipment cases, placing its emphasis on "uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings." It reiterates a statement made in the Handbook that it contains "neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial and pretrial procedures must be cast." Rather, the Manual professes to be no more than a "collection of procedures" which are recommended on the basis of experience for consideration by all judges and attorneys handling complex or multidistrict litigation.

III. Non-Routine Cases in the State Courts

A. Identification Criteria

The analysis and procedures recommended by the Manual were largely based on judicial experience with the electrical equipment antitrust cases. State courts, however, may be faced with a greater variety of cases that also present administrative problems. Specific types of cases that experience has shown will often present administrative problems for the courts include not only antitrust cases, but also patent, copyright, or trademark infringement actions, class actions, conspiracy cases, suits against public figures, major criminal indictments, suits against ideological groups, common disaster cases, test cases, and multiple actions based on common facts. An analysis of these and other cases to determine which factors cause a greater than average strain to be placed on judicial resources leads to the following list:

1. extensive pretrial
2. complex proof
3. multiple parties
4. large stakes
5. sensational aspects
6. public questions

Manual, xix-xx. The Manual consists of (1) an introductory section that sets out definitions of non-routine cases, indicates classes of potentially complex cases and suggests methods of early identification of these cases; (2) a large section recommending pretrial and trial procedures for complex or multidistrict cases; and (3) an Appendix of Materials which might be helpful in effecting the suggested procedures.
7. multiple cases containing one or more common questions of fact.

One or more of these factors are present in every non-routine case.

1. **Extensive Pretrial**

   While in most cases the use of discovery is limited, when cases are severely contested or involve higher than usual stakes, far greater discovery is sought. Extended discovery and frequent motions mean extensive pretrial preparation by the litigants and necessarily places further demands on the time of the trial judge. Greater discovery also generates increased conflict between opponents, creating still more work for the courts.¹² For example, defendants’ charges about harassment, inquiry into irrelevant and privileged matter, excessive scope in document inspection, and undue expense are reported most often in the heavy-discovery case.¹³ Likewise, plaintiffs’ complaints about late or evasive answers to interrogatories are more common in the larger cases.¹⁴ In general, a heavy-discovery case is eight times as likely to generate a motion over discovery as a case using two and one-half or fewer days for discovery.¹⁵

   Lawyers in heavy-discovery cases will more likely take their grievances to the court instead of seeking informal solutions.¹⁶ This additional effort yields much information in terms of new evidence and new issues but no increase in settlements.¹⁷ Nor is there an adequate incentive for the attorney occupied with many matters at once to try to curtail or speed up the pretrial proceedings. From the perspective of judicial administration, any measures that can expedite lengthy pretrial practice without prejudice to the rights of the litigants will be a great help in freeing judicial time for more productive use.

2. **Complex Proof**

   Some cases present problems for the courts because they involve unusually complex or esoteric factual issues. In a patent infringement action, for example, the court may be asked to com-

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¹² W. Glaser, Pretrial Discovery and the Adversary System 197 (1968).
¹³ Id.
¹⁴ Id.
¹⁵ Id. at 197-99. Glaser defines the “heavy discovery case,” as having twenty or more lawyer-days by both sides initiating and/or responding to discovery. Id. at 192.
¹⁶ Id. at 199-200.
¹⁷ Id. at 200.
prehend, analyze and evaluate extremely complex testimony and documents. If the court lacks experience or a special expertise in the area, the strains on judicial resources will be severe. Absent special procedures, the judge must take time to educate himself in the subtleties of the area of dispute or risk reaching an unjust decision based on an incomplete understanding of the facts.

In other cases, the problem may be that a particular issue will only be susceptible to proof through the aggregation of myriad details. If underlying bulk documents must be introduced into evidence on such an issue, the problem is compounded, especially if the records are computer-maintained (a form less familiar to the courts). A jury, presented with a mass of undigested technical data, complex and contradictory medical testimony, or raw figures and elaborate factual computations, will be confused and less likely to reach a just and accurate factual determination than in a case involving less complex factual issues.18

The adversary system cannot be relied on to prevent such problems because the attorneys themselves may not wish to confront them for strategic reasons, or may lack the competence to do so. Also, their duty to their clients may in practice put a strain on their duty to the court. Even if the issues are well drawn by counsel, disparities in legal skills may make it vital that the judge adopt special procedures to ensure that the trier of fact has a thorough understanding of the issues at hand to prevent injustice.

3. Multiple Parties

Although presenting factual issues of no more than usual complexity, cases involving multiple parties will frequently place great demands on scarce judicial resources by requiring more time for processing.

Multiple parties may not present severe problems for efficient case presentation if the parties have common interests and can agree on a unified strategy and utilize common or liaison counsel. Often, however, the parties will have conflicting interests or strategies and will consider the use of liaison counsel infeasible and unjust. Multiple defendants joined in the same lawsuit, for example, may each wish to avoid liability by placing the blame elsewhere. Each defendant in such a situation would demand, and be entitled to, his own effective representation. This may

mean that each plaintiff or prosecution motion or attempted offer of proof will be met by objections of counsel for each of several defendants who may have slightly different bases for objection. Similar problems will occur prior to trial as each party seeks to conduct his own discovery, make his own objections to interrogatories, and prepare his own witnesses. Protracted litigation is the natural result.

4. Large Stakes

Another characteristic of protracted cases is the presence of large stakes, whether in dollars, reputation and status, or ideology. When parties stand to gain or lose a great deal on the outcome of a particular case, they are more inclined to exercise to the fullest their legal rights.19 An individual defendant in a million dollar tort suit, or a prominent public figure suing for libel or being sued for corruption, or a Black Panther on trial for murder, will each have strong motivation to explore every possible legal avenue to secure a favorable verdict.

When the stakes are high, the parties are willing to expend more in money and effort because the additional expense is minimal compared to the possible rewards of victory or the costs of defeat. The stakes need not be monetary but may involve principles dear to the participants; for example, the vindication of the freedom of the press to the professional journalist. Similarly, while the defendant in a burglary prosecution may bargain for a reduced sentence in exchange for a guilty plea, the defendant who views himself as a symbol for an oppressed ideological minority will not only refuse to bargain for his freedom, but may challenge the court proceedings at every stage in an all-out effort to achieve victory.

5. Sensational Aspects

Other cases present a need for special control because they have generated wide publicity prior to their resolution. Such cases typically are criminal matters that achieve their notoriety due to the heinousness of the crimes, as in the trial of Charles Manson, or due to the public image of the parties involved, as in the trials of Angela Davis or Bobby Seale. Certain civil matters may also attract widespread public attention, such as a libel suit

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by a prominent public figure, or a damage suit by a movie star. In all such cases, their public nature makes paramount the importance of control by the judge over the proceedings in order to ensure a fair and efficient trial.

6. Public Questions

The great majority of lawsuits involve a plaintiff with an interest personal to himself and adverse to that of the defendant. In contrast, in public question litigation the interest plaintiff asserts is one transcending his own rights; for example, a suit protesting action by an administrative agency or a taxpayer's action challenging a public expenditure.

Few public question cases present special administrative problems for the courts because there is usually a relatively specific issue for determination, i.e., whether the executive or agency has failed to follow statutory guidelines. Similarly, if such suits call solely for the review of procedural guidelines, the courts will have ample resources and experience for the resolution of the issues. When, however, a citizen's suit asks the court to make a more substantive pronouncement, different administrative considerations are introduced. Many separate interests may bear on the issue, and precedents may be scarce. In such a situation the participation of intervenors may be desirable to insure court expertise and adequate representation of conflicting interests. Some suits may be private in that they are not brought in the name of the public interest; the plaintiff will not claim to be acting as a "private attorney general," and the government may not be one of the original parties. Yet such suits could have very broad significance, as in a case raising an important constitutional question or suggesting a new interpretation of a state regulation affecting a whole industry. In these cases, too, the public may have an interest in the court's availing itself of a presentation of the government's perspective on issues of constitutionality or the administrative expertise of the agency which administers the regulation in question.

Thus, four general administrative problems are presented by private suits involving public questions: (1) the identification of

21. The court could accomplish this by inviting the appropriate agency or governmental group to intervene or to file an amicus brief on the issues affecting the public interest.
a public question in a particular private lawsuit; (2) the determination that the question requires special treatment; (3) the identification of the private interest in such special treatment; and (4) the reconciliation of competing interests. If the trial court fails to provide a suitable forum for adequate resolution of the issues, the case will settle very little and will have been a waste of judicial resources.

7. Multiple Cases Containing One or More Common Questions of Fact

The presence of multiple cases containing one or more common questions of fact is an administrative problem for the courts because there will be duplication of judicial effort unless unifying procedures are adopted. Frequently the same occurrence or set of facts will give rise to many lawsuits; for example, where there is a common disaster with many victims, or a commercial fraud case with many individual plaintiffs filing suits against common defendants.

Duplicate use of judicial resources arises not only when related suits are brought in the same court, but also when they are brought in different courts of the same jurisdiction or different courts in different jurisdictions. For example, air and water pollution show no respect for artificially drawn geographic boundaries and it is not uncommon for a major polluter to cause damage in several different jurisdictions. Probably more common is the disaster occurring in a single jurisdiction but injuring persons from many jurisdictions who are able to satisfy venue requirements in several counties or states. Each individual plaintiff may then call on the court to entertain his complaint, supervise his discovery, and conduct his trial, even though the factual issues that underlie all the actions are the same. Without additional incentives for the attorneys to seek to bring class actions or consolidated suits, the strain on judicial manpower, money, and time may be immense.

B. Identification Procedures

Fundamental to solving the problems presented by non-routine cases is their early identification. The earlier they are identified, the sooner appropriate measures may be taken to insure their efficient handling and the release of scarce judicial resources.

The identification procedures suggested by the Manual, however, are not wholly adequate for a broad range of non-routine
cases. The Manual lists eleven categories of cases which “may require special treatment in accordance with the procedures in this Manual.” These categories are:

(a) antitrust cases
(b) cases involving a large number of parties or an unincorporated association of large membership
(c) cases involving requests for injunctive relief affecting the operations of a large business entity
(d) patent, copyright and trademark cases
(e) common disaster cases
(f) individual stockholders’, stockholders’ derivative, and stockholders’ representative actions
(g) products liability cases
(h) cases arising as a result of prior or pending Government litigation
(i) multiple or multidistrict litigation
(j) class actions or potential class actions
(k) other civil and criminal cases involving unusual multiplicity or complexity of factual issues.

The listing, however, is unsatisfactory in that it does not analyze what it is about these cases that makes them candidates for special treatment. Category (k) is a frank recognition that the specified categories are at best merely categories in which a disproportionately large number of cases will benefit from special procedures. Thus, the listing is simultaneously overinclusive and underinclusive. It is overinclusive in that not all cases in a given category will merit special attention. For example, most products liability and trademark cases are small and not deserving of special treatment. To apply to them the recommended procedures of the Manual would probably result in an even greater burden on judicial resources. The listing is underinclusive in that not all cases which may require special treatment are identified except in a general way in section (k). The reader must draw his or her own conclusions as to what criteria or characteristics distinguish the cases in the categories from all other cases.

The list of categories is, however, the basis for the primary method of identification suggested by the Manual; namely, that the clerk of each district court inspect each initial pleading filed and report those cases that fall within the categories to the judge.

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22. Manual, §0.22.
23. Comment, supra note 9, at 306 n.21.
24. Id. at n.22.
to whom each such case is assigned, to the Chief District Judge, and to the Administrative Office of the United States Courts.\textsuperscript{23} Unless all cases falling into the categories are automatically to receive the special procedures of the \textit{Manual}, the judge himself must devise criteria for distinguishing those cases most likely to prove complex. It is suggested that non-routine cases may be identified by combining disclosure by the parties and examination of the pleadings by court staff with a monitoring system.

1. \textit{Disclosure by Attorneys}

The attorneys could be required to state whether they have reason to believe a case raises unusually complex factual issues, or public questions, or is likely to be protracted. Asking attorneys to draw conclusions of this sort is defensible on the theory that they are in the best position to make this judgment due to their greater familiarity with the facts of the case. Some attorneys, however, are likely to overestimate or underestimate the complexity or potential lengthiness of cases they are preparing.

To avoid subjective errors, the attorneys could instead be asked to make estimates of more objective factors, such as the length and quantity of discovery to be utilized, the number and types of witnesses and experts to be called, or whether their case is one of several based on the same facts. Unfortunately, some attorneys may not know the answers to these questions at this stage of the case. Others may be reluctant to make a voluntary disclosure regarding complexity or possible protraction if withholding this information appears to offer a tactical advantage.

2. \textit{Examination of Pleadings}

Rather than place reliance on the attorneys, having members of the court staff attempt to identify non-routine cases might be more reliable. Court personnel could examine the pleadings at the time of filing for certain objective factors which experience indicated were significantly correlated to non-routine cases. For example, it would be possible to note the existence of multiple parties or counsel, a large prayer for relief, or certain categories of cases which typically involved complex proof or extensive pretrial preparation.

It might be argued that the identification of complex and protracted cases should await the perusal of the pleadings by a

\textsuperscript{25} \textit{Manual}, § 0.23, ¶ 1.
judge, because his experience and expertise place him in a unique position to appreciate the subtleties involved and make an accurate evaluation of the nature of the case. To the extent that a judge would rely on objective factors to reach a determination, however, the same judgment could be made by other court personnel. Ideally, such factors should be integrated into an indicator system that would enable rapid, reliable identification of these cases. Special evaluation forms could be developed to capture the data required for measuring the complexity or likely protractedness of cases and statistical methodologies developed to enable a manual indicator system or a computer to interpret data and assign a score to each case that would reflect its demand for special handling. These systems could also be used to integrate data received later in the processing relating to the number of motions or the extent of discovery going on in a particular case. Thus, cumulative indicators could be utilized to identify non-routine cases. Related cases would also be more readily identifiable through a computer-organized grouping of cases based on similar or common facts.

Most importantly, a computer system could be designed to conduct a retrospective analysis of what factors were common to troublesome cases previously before the courts. A scaling system could be devised to reflect the relative importance of each factor as an indicator of complexity and protractedness. Weights, modified to reflect policy judgments of experienced court personnel, could be assigned to the various factors. In this manner the court could constantly refine and update the criteria it relied on in identifying non-routine cases.

3. Monitoring System

Contact with the attorneys might also reveal which cases could be protracted because the lawyers might, from the outset, be raising challenges to all aspects of the proceedings. For example, motions for a bill of particulars, unusually elaborate discovery requests, extensive preparation for an evidentiary hearing, or challenges to a jury array may indicate a party who is going all out to achieve the desired result. A system should be established

26. Such a method has been suggested for the management of criminal court dockets; see Hamilton, Modern Management for the Prosecutor, 7 J. Nat'l Dist. Attr's Ass'n 472, 474 (1971).

whereby court staff would be required to report any case in which there was a second motion concerning discovery or other objective indicator of likely protractedness. Continuous surveillance of the status of each case is necessary in order to detect cases whose non-routine nature was not immediately apparent from the pleadings.

C. Case Management Procedures

Regardless of whether a particular jurisdiction has a crowded docket and large backlog of cases, the non-routine case may impose severe strains on the court system. In a fairly efficient court system the non-routine case may create a backlog by tying up a variety of judicial resources on one case. In an already congested court the non-routine case will make matters worse. A judiciary system will not enjoy public confidence when it cannot ensure the prompt, orderly and just adjudication of competing claims. Once non-routine cases are identified, therefore, the court must take affirmative action to ensure that the problems these cases present are handled as efficiently and effectively as possible.

1. Calendar Assignment

No matter why a case is classified as non-routine, it can usually be handled more efficiently and effectively if assigned to a single judge at the outset. A single judge can be expected to develop more of the expertise needed to cope with the unusually complex factual issues presented in complex cases. He can build on the knowledge gained at each stage of the proceedings. By contrast, under a master assignment system, each new judge to hear facets of a case must begin again the arduous process of familiarizing himself with the factual issues involved. The judge may not develop enough expertise under even the individual assignment system to handle adequately certain extraordinarily complex cases, but the likelihood of his developing the requisite expertise is lower under the master assignment system.28

Cases that are protracted due to the presence of multiple parties with conflicting interests or strategies will also be handled more effectively by assignment to a single judge. He will develop a familiarity with the case that will enable him to differentiate between situations that require multiple responses, pleadings and objections, and those that do not. The judge who is more familiar

with the case will be in a better position to evaluate the claims of the parties as to whether they each require separate discovery, pleadings or the like.

The single judge will also have a better perspective for ruling on various motions that will be raised in cases involving large stakes or extensive pretrial work. He will be able to distinguish between frivolous and necessary requests for continuances or additional discovery, for example, because patterns of deliberate protraction will be more apparent than if several judges each hear separate stages of the litigation. The judge who hears the case from the start should also be better able to effect a settlement or expedite the case through the judicious use of pretrial or at-trial conferences because he will have developed a perspective on the values each of the parties places on the outcome of the litigation.

Sensational cases are also better handled by the referral of all proceedings to a single judge because he will be better able to maintain a consistent control over publicity. It is vital in such cases that the judge assert control over what is reported about the case by the parties, their attorneys, and the court personnel. The parties to a sensational case should be on notice from the outset as to what disclosures to the news media will be permitted. A fair and efficient trial is one that is conducted in the courtroom, not in the newspapers or on television.

Public question cases will benefit from assignment to a single judge. The continuity that such an assignment provides will give him the needed perspective from which to evaluate the extent to which public questions are involved, whether these questions require special treatment, and how to bring the interests of third parties to bear if their views are desired.

Only if related cases are heard by a single judge can the court hope to maximize its judicial resources. Only if the judge has all relevant cases before him will he be able to exercise sound judgment on the question of whether such cases are appropriate instances for the use of class suits, or may be consolidated without prejudice to the rights of the parties.

The selection of a particular presiding judge is also a critical decision. Gains sought from assignment to a single judge may be dissipated if the judge selected is new to the bench, for example, and hopelessly at sea presiding over a protracted class action with large stakes. Efforts must be made to assign cases to judges who exhibit the level of dedication, sound judgment, and experience commensurate with the level of complexity of the case.
iment should be made by the presiding judge of the court or of a larger jurisdiction, and provisions should be made to permit judges from outside the district or jurisdiction to be transferred for the purpose of hearing a particular case. For example, if an unusually complex case arises in one area of a state, the chief judicial officer of the state should consider transferring an experienced judge from another area to preside if none of the judges in the first area exhibits the desired qualifications. To facilitate such coordination and transfer, centralized records should be kept indicating the judges that have presided over different types of non-routine cases so that a pool of experienced judges is readily identifiable.

2. Pretrial Conferences

Like the Manual, this article recommends the extensive use of pretrial conferences as a means to streamline the non-routine case. This recommendation is generated by the principle that the judge in a non-routine case must exercise active, affirmative control over all its proceedings. A court operating on general principles of “active case flow management” will always exercise a positive role in seeing that cases before it are processed as expeditiously as possible. Such a role for the court is at odds with its historical passivity which permits attorneys for the parties to control the pace of litigation. Active control by the judge would be frank recognition of the fact that the court and the public have an interest in the speed with which private lawsuits are processed. The court values conserving its resources; the public values the assurance that its members may receive a speedy trial if the need arises.

The active participation of the court in processing cases is most crucial with respect to non-routine cases because the stakes, in terms of delay and drain on judicial resources, are higher. Pretrial conferences can be effective tools for the court in shaping the form and determining the speed of litigation. They can be used to assess the status of a case shortly after it is filed if it is thought that there are latent complex problems, for example, as well as to settle disputes over discovery and the issues that will ultimately go to trial. Perhaps most important, such conferences in the hands of an experienced trial judge can be effective occa-

sions for analyzing differences between the parties and exploring
the possibilities of an early settlement.  

3. Document Depositories

To the extent that cases in state courts resemble antitrust
cases, in which there is much time and expense devoted to discovery
of voluminous documentary evidence at various sites, the creation of document depositories will serve to expedite the proceedings. It is possible, however, that only in a few cases will the time and expense involved in their maintenance justify the development of such depositories. Therefore, the judge should consult with counsel for the affected parties before ordering their creation.

4. Liaison Counsel

The use of liaison counsel is an obvious device for expediting multiple party litigation, and the judge should suggest this procedure as early in the process as possible. If the parties are reluctant to surrender substantial control of their action or defense, liaison counsel may be authorized for limited purposes only. Relying on Rando v. Luckenbach Steamship Co., Inc., the Manual goes so far as to suggest that the court has the power to make the appointment over objections by the parties. This paper takes the position, however, that appointment of liaison counsel without specific consent of the parties should be viewed as an extraordinary action and should be employed only when the benefits to be gained are very great and no alternative measures are available.

5. Data Processing Techniques

For cases presenting unusually complex problems of proof

31. Comment, supra note 4, at 316.
32. When there are several parties on one or both sides of a case represented by different counsel, the court may request counsel for each side to select one of their number to exercise powers and perform duties on behalf of all of the parties on that side of the case. That person acts as "liaison counsel."
33. MANUAL, § 1.90.
34. 25 F.R.D. 483 (E.D.N.Y. 1960). This case involved more than 300 actions, approximately 500 plaintiffs and over 200 counsel.
35. See, e.g., MacAlister v. Guterm, 263 F.2d 65 (2d Cir. 1958).
because they require the introduction of masses of raw data or bulk documentation, the recommendations of the Manual on techniques for the proof of complex facts are pertinent.\textsuperscript{36}

6. Appointment of Masters

The judicious use of court-appointed masters can result in more expeditious and higher quality handling of many non-routine cases. The master usually holds hearings, receives material evidence, permits cross-examination, and gives all parties an opportunity to be heard. He then incorporates basic findings and conclusions into a written report, to which all parties may make objections only as to points of law. The report as accepted by the court will then be read to the jury.\textsuperscript{37}

Using masters for pretrial discovery duties would lighten the burden on judges, permitting them to put their time to other uses, such as presiding at trials. In addition, the master may be able to exercise a closer supervision over the case than a judge who feels the pressures of competing interests on his time. To the extent this is true, the parties may be more likely to effect an early settlement because they will have had a greater opportunity to appraise the relative strength of their respective positions. At the very least, they will come to trial better prepared and the discovery will have been more complete and orderly than without masters.\textsuperscript{38}

The use of masters can be refined by the appointment of experts as special masters to help, for example, in the determination of disputed scientific or technical facts of unusual complexity. Such experts have the advantages of being able to (1) understand better than non-experts the terminology used by other experts in testimony; (2) evaluate more accurately variances in qualifications of expert witnesses, in the material used by such witnesses, and in the processes by which such witnesses fashion conclusions from the materials used; and (3) more accurately formulate and express basic findings and conclusions upon such issues.\textsuperscript{39}

\textsuperscript{36} Manual, §§ 2.71, 2.711-.717.

\textsuperscript{37} Court appointed expert witnesses play somewhat of an analogous role. See text accompanying note 43 infra. For a discussion, see C. McCormick, Law of Evidence § 17 (2d ed. 1972).


\textsuperscript{39} Committee Report, supra note 2, at 80.
The factually esoteric case, for example one involving pollution or property valuation, presents a particularly appropriate context for the use of masters. In this context the traditional method of proof by expert witnesses is "cumbersome, unnecessarily time-consuming and uncertain in its results." Complex factual issues are particularly suited for reference to a special master who can clarify the issues and present to the judge or jury a precise formulation of the questions to be resolved.

Experience in an individual jurisdiction may indicate classes of cases, certain issues of which could justifiably be assigned to an expert master on a regular basis. A jurisdiction that has a large number of condemnation cases, for example, may find it desirable to refer the complexities of land and property valuation to a special master.

Cases involving complicated accounting problems arising, for example, from construction contracts, may be another category of cases that could benefit from the contributions of an outside expert. Due to the potentially large number of parties, such cases might otherwise be protracted as well as complex and their diversion to a master for this particularly complex issue could greatly alleviate the court's caseload.

A common disaster presents another type of situation that may have issues better handled by masters. In case of a dramatic explosion, fire, or other major misfortune, large numbers of persons may be injured with only a limited fund available for distribution in compensation. In a fashion similar to a bankruptcy proceeding, once the issue of liability is determined by the court, a special master might be appointed to determine each party's actual damages and devise a schedule to insure each his proportionate share of the fund. Even if the issue of liability is relatively clear-cut, such cases will likely be both complex (due to difficulties in determining damages) and protracted (due to the presence of multiple parties and perhaps larger stakes). A substantial amount of judicial time will therefore be released if these issues may be referred to a master.

It is not necessary that a reference procedure add appreciably to the length and cost of litigation. Closely and consistently supervised discovery should proceed more, not less, rapidly than usual, as the expert master will be particularly efficient in

40. Id. at 79.
41. Kaufman, supra note 18, at 460.
streamlining a case for trial. This advantage in speed may compensate the parties if they bear the additional cost of the master. If there is sufficient demand for the services of a particular type of master, the court system itself may retain one on a regular basis, spreading the cost over all litigants or taxpayers generally. It would even be possible to have periodic conferences with the assigned judge to review the situation to determine if the continued use of the master is necessary or desirable.\footnote{42}

7. Court-Appointed Experts

Experts may be appointed by the courts to provide neutral testimony. Experts for the parties still present their testimony to the court while the neutral expert, subject to full examination by all parties, testifies as a witness for the court.\footnote{43} Expert witnesses can thus promote the administration of justice by eliminating the time a trial judge would require to become familiar with a highly technical area of inquiry and by offering a frequently needed perspective on conflicting testimony over very confusing matters.

8. Preclusion Orders

The entry of preclusion orders after the parties have filed their final pretrial briefs should provide an incentive for them to complete their discovery on time and be well organized in advance of trial.\footnote{44}

\footnote{42} The \textit{Manual} stresses this in light of the Supreme Court's decision in \textit{La Buy v. Howes Leather Co.}, 352 U.S. 249 (1957), which strictly interpreted \textit{Fed. R. Civ. P. 53(b)} to mean that only in exceptional cases should reference to a special master be considered. Rule 53(b) provides that reference should be "the exception and not the rule," and that in actions to be tried without a jury, a reference should be made "only upon a showing that some exceptional condition requires it." In \textit{La Buy}, the Seventh Circuit Court of Appeals had issued a writ of mandamus to a district judge to vacate an order referring an antitrust suit to a master. It held that congestion of the trial calendar and the complexity of the issues did not constitute the "exceptional" conditions that alone could justify reference of the case in its entirety. The Supreme Court affirmed, noting that to hold otherwise would mean that the use of masters in some congested districts would become the rule rather than the exception. The standard of "exceptional circumstances" can be somewhat relaxed when the master's duties are of limited scope. Note, \textit{Reference of the Big Case Under Federal Rule 53(b): A New Meaning for the "Exceptional Condition" Standard}, 65 \textit{Yale L. J.} 1057, 1065 n.47 (1956). Thus, it is arguable that if reference is limited to the sorts of complex cases described in the \textit{Manual}, the policy of Rule 53 is preserved. \textit{Kaufman, supra} note 28, at 465. The \textit{Manual}, however, has adopted a more narrow view. \textit{Manual}, § 2.60(b).


\footnote{44} See \textit{Manual}, § 1.11. The \textit{Manual} provides that except for "good cause" shown,
It is not immediately clear that the preclusion of additional evidence except upon a showing of good cause is consistent with the federal policy of liberal admission of evidence under Federal Rule of Civil Procedure 15(b). That rule provides that if evidence is objected to at trial on the ground that it is not within the issues framed by the pleadings, the court should freely allow the pleadings to be amended so long as the presentation of the merits will be furthered, unless the objecting party can show that the admission would be prejudicial to his cause. One commentator has argued that there is no inconsistency because the Manual does not require that final pretrial briefs be submitted until after full discovery on the merits, and then only a short time prior to trial.

In complex cases, it is likely that legal theories will have been formulated well in advance of the final pretrial conference, especially if there has been a lengthy, well-organized pretrial stage. The fact remains, however, that the Manual places the burden of demonstrating prejudice on the party seeking to introduce the new evidence rather than on the party objecting to its introduction as provided in Rule 15(b). The Manual thus seems to favor the policy of Rule 16, which provides that a pretrial order “controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.” Although there are decisions tending to give the pretrial order a very narrow, binding effect, Wright and Miller point out that most courts faced with the issue have held that Rule 16 must be read in light of Rule 15(b).

In this regard, the Manual’s suggestion should not be favored.

9. Intervention

In private suits raising public questions, the interests of third parties or the public at large may be as much at stake as the interest of the particular plaintiff bringing the suit. For such cases, the jurisdiction should have available a procedure similar to Federal Rule of Civil Procedure 24, by which interested parties

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45. Comment, supra note 4, at 326.
48. C. Wright & A. Miller, Federal Practice and Procedure § 1491 at 455-56; see also 3 J. Moore, Moore’s Federal Practice §§15.13[1].
may apply for permission to intervene, with intervention by right provided under certain exceptional circumstances.

10. Consolidation

The duplication of judicial time and effort that results from separate treatment of related cases can be remedied by their partial or total consolidation. If the responsible attorneys do not suggest treating related cases as class action suits, the court should itself initiate discussions on this possibility. The victims of an industrial polluter, for example, would possibly be willing to join their complaints in a class action if the court emphasized the advantages to them of this procedure. If a class action were inappropriate, cases might still benefit by consolidation. Actions could be consolidated for some purposes, such as pretrial discovery, without being consolidated for other purposes, such as trial. If a series of related cases involves particularly complicated pretrial ingredients, even a consolidation for only pretrial purposes will substantially reduce the strain on judicial resources.

For a court system to maximize its potential benefits from consolidation of related cases, it should adopt procedures that will facilitate transfer of cases across geographic and jurisdictional boundaries. Ideally, an entire region would have similar venue and transfer provisions so that interstate transfers would also be feasible.

IV. Conclusion

In recent years much has been spoken and written about various aspects of crisis in judicial administration. The Chief Justice of the Supreme Court of the United States, for example, has delivered several speeches outlining many challenges facing the courts today.

The quality of judicial administration in the United States is influenced by many factors. Among the more important ones are an increasing population and a society that places increasing demands on law and legal institutions. Not only are there more


people who turn to the courts for adjudication of their interests, but there are new social interests seeking recognition and protection. This pressure is felt most acutely in the trial courts of general jurisdiction because it is before these courts that all issues must be afforded a thorough hearing. Therefore, it is at this level that innovative procedures must be instituted if our legal system is to respond effectively to the challenges which it faces.

This article has attempted to isolate a particular segment of cases that, due to their complexity or other special features, present special problems for the courts. Drawing on the experience of the federal courts in developing procedures for complex and multi-district litigation, it has analyzed what it is about these cases that makes them troublesome and has outlined special procedures for their more efficient and effective handling.

It remains only to say that the search for solutions to the problems of judicial administration is not merely an academic exercise. Our entire legal system depends on public confidence and respect, and the courts cannot be expected to instill such confidence and respect if they cannot adapt to the more complex and protracted forms of litigation.