

# Michigan Law Review

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Volume 68 | Issue 2

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1969

## Observations on the Manual for Complex and Multidistrict Litigation

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303 (1969).

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## Observations on the Manual for Complex and Multidistrict Litigation

In recent years there has been increased pressure on the federal judicial system for improved efficiency in dealing with "the big case." Such cases typically involve either large numbers of plaintiffs, suing in many district courts on essentially the same facts, or many complex and interrelated issues which require the evaluation of large quantities of data. Because those cases require considerable amounts of judicial time which cannot lightly be spared from dealing with the mounting backlog of cases faced by virtually all courts, and because a great deal of potentially protracted litigation is certain to arise in the future, it is imperative that means be devised to deal expeditiously with big cases. Responding to that demand, the Co-Ordinating Committee for Multiple Litigation of the United States District Courts<sup>1</sup> promulgated the *Manual for Complex and Multidistrict Litigation (Manual)*<sup>2</sup> in an attempt to outline methods for dealing efficiently with such cases. The purpose of this Comment is to discuss the *Manual's* significant proposals and to focus attention on recommendations which may prove troublesome in application.<sup>3</sup>

The first officially organized attempt to deal with the big case was prompted by a series of protracted antitrust cases arising during and after World War II.<sup>4</sup> A committee, chaired by Judge

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1. The Co-Ordinating Committee for Multiple Litigation was a special subcommittee of the Committee on Pretrial Procedures and Practices of the Judicial Conference of the United States. The original members of the subcommittee were appointed by Chief Justice Earl Warren in January 1962.

The actual administration of complex cases has been delegated to the Judicial Panel on Multidistrict Litigation. 29 U.S.C. § 1407 (Supp. IV, 1965-1968).

2. The *Manual* has been published in 1 J. MOORE, FEDERAL PRACTICE pt. 2 (2d ed. 1969) [hereinafter MANUAL].

A board of editors, headed by Senior District Judge Thomas J. Clary of the Third Circuit, has been appointed to supervise publication and revision of the *Manual*. Comments and recommendations regarding the *Manual* should be directed to:

The Board of Editors  
Manual for Complex and Multidistrict Litigation  
The Federal Judicial Center  
Dolley Madison House, 1520 H Street  
Washington, D.C. 20005

3. This Comment is not meant to be a thorough analysis of all the many problems that will no doubt be encountered as the *Manual* becomes widely accepted and used. Rather, the Comment's purpose is to serve as a general introductory critique of the *Manual* and to focus attention on various difficulties which must be recognized and dealt with by the judges and lawyers in order to implement the *Manual* as a workable guide for handling potentially protracted litigation.

4. E.g., *United States v. Aluminum Co. of America*, 44 F. Supp. 97 (S.D.N.Y. 1941), 91 F. Supp. 333 (S.D.N.Y. 1950); *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949); *United States v. New York Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626 (D.C. Ill. 1946); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945); *United States v. Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio 1942); *United States v. Food & Grocery Bureau*, 43 F. Supp. 974 (S.D. Cal. 1941); see McAllister,

E. Barrett Prettyman and composed of circuit and district judges, was appointed in 1949 by Chief Justice Vinson to study protracted litigation. The committee in its report, entitled *Procedure in Anti-Trust and Other Protracted Cases*,<sup>5</sup> defined its duty as the elimination of the "unnecessary delay, volume and expense," caused primarily by "(1) vagueness of the issues, (2) proffers of masses of unnecessary evidence, and (3) lack of organization of material and personnel."<sup>6</sup> The committee's report stressed that the responsibility for streamlining these cases lay chiefly with the trial judge.<sup>7</sup> The principal recommendations called for the extensive use of pretrial conferences and for detailed rules for the handling of bulk documentary evidence. The pretrial conferences were to be directed at particularizing the issues and disposing of preliminary motions.<sup>8</sup> The recommendations concerning documents called for full disclosure of such documents to all parties prior to the use of the documents at trial, and they set forth a procedure for proper identification techniques in order to save time at trial.<sup>9</sup> The recommendations were worded strongly, but the committee made it clear that their recommendations were "not . . . legislation or rules" but only "a description of remedial methods and measures thought by experienced judges to be effective."<sup>10</sup>

Several years later, Chief Justice Warren appointed a committee composed of members of the Judicial Conference of the United States to ensure that the Prettyman Report was properly "vitalized." The committee held seminars in the summers of 1957,<sup>11</sup> 1958,<sup>12</sup> and 1959<sup>13</sup> and ultimately produced the *Handbook of Recommended Procedures for the Trial of Protracted Cases (Handbook)*.<sup>14</sup> The *Handbook* consisted of a series of recommendations, based on the Prettyman Report, followed by extensive comments. As its foreword

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*The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 33-61 (1950).

5. Reprinted in 13 F.R.D. 62 (1953) (dated Sept. 26, 1951).

6. *Id.* at 65-66.

7. *Id.* at 65.

8. *Id.* at 66-73.

9. *Id.* at 74-75. In this connection, the committee's report suggested a shifting of the burden of proving relevancy, materiality, and competency to the party introducing the documents. *Id.* at 76.

10. *Id.* at 64.

11. See *Proc. of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F.R.D. 395 (1958) (held Aug. 26-30, 1957, at New York Univ. Law Center).

12. See *Proc. of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319 (1959) (held Aug. 25-30, 1958, at Stanford Univ. School of Law).

13. See *Proc. of a Seminar Held at the Univ. of Colorado School of Law*, July 13-15, 1959 (unpublished report).

14. Reprinted in 25 F.R.D. 351 (1960) (adopted March 1960).

made clear, it similarly was not a set of rules to be strictly followed, but merely a basic outline of procedures culled from judicial experience to be used as judges saw fit in individual cases.<sup>15</sup>

The most immediate stimulus for the *Manual*, however, was the massive private antitrust litigation arising from conspiracies in the electrical equipment industry in the early 1960's. Over 1,900 civil actions were filed in thirty-five district courts between 1961 and 1963.<sup>16</sup> It was feared not only that this wave of cases might flood the federal courts, but also that absent unusual measures, duplication of efforts in discovery and conflicting decisions on the same evidence would be unavoidable.

In 1961, the Judicial Conference of the United States set up a special panel to deal with the problem. It was named the Co-Ordinating Committee for Multiple Litigation of the United States District Courts. The Committee suggested that a means of communication be established among all the judges involved in the cases, that those judges follow the pretrial control techniques prescribed in the existing *Handbook*, and that procedures be devised for avoiding repetitious discovery. Among the devices eventually used were nationwide pretrial hearings and orders, nationwide depositions, a central information center, and a central document center.

Having found many of these somewhat novel procedures to be effective tools in handling the electrical equipment cases, the Committee undertook to produce the *Manual for Complex and Multidistrict Litigation* as a guide for judges who would have to deal with similar cases in the future. The *Manual* incorporates many of the techniques which were employed for the first time in the electrical equipment cases, along with several procedures based upon the *Handbook*.

The *Manual* is divided into two main parts. Part I contains pretrial and trial procedures recommended for complex or multidistrict cases; it is divided into four main sections: Introduction; Pretrial Procedures in Complex Civil Cases; Pretrial Procedures in Multiple and Multidistrict Civil Litigation; and Pretrial Procedures in Complex Criminal Cases. Part II of the *Manual* is an *Appendix of Materials* which might be useful in following the recommended procedures. The materials include suggested local court rules, sample court orders, and extended discussions and citations of authority on some of the points raised in Part I.

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15. *Id.* at 355.

16. See Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964); Address by Chief Justice Warren, 44th Annual Meeting of the ALI, May 16, 1967, in 44 ALI Proc. 6-7 (1967).

## I. IDENTIFICATION PROCEDURES

The first step in dealing with protracted litigation is to identify the cases to which application of special procedures may ultimately prove useful.<sup>17</sup> The *Manual* recommends three means of making that identification. All three essentially involve an attempt to canvass everyone who might be able to identify a potentially protracted case.

The first identification device is an inspection of complaints by the clerk of the district court.<sup>18</sup> To facilitate his identification of potentially big cases, the *Manual* lists eleven categories into which protracted litigation normally falls.<sup>19</sup> If the case falls within any of those eleven categories, the clerk is to notify the judge assigned to that case, the chief district judge, and the Administrative Office of the United States Courts.<sup>20</sup> If the case involves potential multidistrict litigation, the chief circuit judge is to be notified as well. But the overinclusiveness of the list, which covers practically all federal-question civil litigation, minimizes its utility.<sup>21</sup> Clearly, the often complicated procedures of the *Manual* should not be applied automatically to every case that comes within one of the categories listed.<sup>22</sup> Thus, the procedure results only in shifting the identifica-

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17. MANUAL § 0.2, at 9.

18. *Id.* § 0.23[1], at 10.

19. *Id.* § 0.22, at 9. The eleven categories are (1) antitrust cases; (2) cases involving a large number of parties or an unincorporated association of large membership; (3) cases involving requests for injunctive relief affecting the operations of a large entity; (4) patent, copyright, and trademark cases; (5) common disaster cases; (6) individual stockholders', stockholders' derivative, and stockholders' representative actions; (7) products liability cases; (8) cases arising as a result of prior or pending Government litigation; (9) multiple or multidistrict litigation; (10) class actions or potential class actions; and (11) other cases involving unusual multiplicity or complexity of factual issues.

20. *Id.* § 0.23[1], at 10.

21. The categories have been specifically criticized on at least two counts. Both actions involving a large number of parties and actions by shareholders are often class actions handled under Federal Rules of Civil Procedure 23 and 23.1 and are inappropriate for many of the procedures in the *Manual*. Moreover, both trademark and products liability actions frequently are small and should be handled under the usual civil procedures. See Cravath, Swaine & Moore, New York City, Memorandum for the ABA Special Comm. on Complex and Multidistrict Litigation, July 10, 1968, at 10-11 [hereinafter Cravath Memorandum] (Copies of the memoranda, letters, reports, and drafts of the *Manual* cited in this Comment are on file in the offices of Chief Judge William H. Becker, United States District Court for the Western District of Missouri, United States Court House, Kansas City, Missouri 64106.)

22. "If the recommended procedures outlined in the Manual were followed in all cases falling into the categories specified, both court and counsel would be unnecessarily burdened, and interminable delays would result from unproductive adherence to the outlined procedures." American College of Trial Lawyers, Report of Special Comm., May 27, 1968, at 8 [hereinafter A.C.T.L. Report]. "Automatically to invoke the cumbersome procedure set forth in the [Manual] in relatively simple patent cases would be like using a sledge hammer to drive a thumb tack." Letter from Stuart A. White of Ward, McElhannon, Brooks & Fitzpatrick, New York City, to Walther E. Wyss of Mason, Kolehmainen, Rathburn & Wyss, Chicago, June 11, 1968, at 1.

tion burden from the clerk to the judge, for the latter must still cull the actual complex cases from the large universe of cases within the eleven categories. Accordingly, after notification, the judge must develop criteria for deciding which of the many cases in these categories may prove to be complex.

The second method suggested to aid in identifying cases subject to *Manual* procedures has limited usefulness, since it pertains only to cases either based on or arising from governmental action. In such cases, the assigned judge or the chief district judge is to contact the appropriate governmental agencies for aid in determining whether the case may be complex or multidistrict.<sup>23</sup> An earlier draft of the *Manual* suggested that the judge contact these governmental agencies without consulting counsel,<sup>24</sup> but that suggestion aroused criticism because of the possibility that the Government's spokesman might make statements adverse to the interests of one or more of the litigants.<sup>25</sup> If, for example, a representative from the Justice Department, while in the process of informing the judge that he should anticipate private damage suits to be filed in several circuits, should describe to that judge evidence which his office had found of price-fixing conspiracies in several parts of the country, the judge might be prejudiced about the case he was about to hear. For this reason, the *Manual* indicates that counsel should be consulted before outside contacts are made.<sup>26</sup> If, after consultation, the judge decides to contact a governmental agency, he may satisfy the objections of counsel by permitting their presence at the meeting.

The third suggested means of identifying complex or multidistrict litigation is to require each attorney who files a complaint or an answer in a civil case to notify the clerk of the district court in writing of the nature and details of the case, indicating whether any action which is or may be related to the case has been filed in any federal or state court.<sup>27</sup> If related actions have been filed, the attorney must provide the titles, docket numbers, and courts of all such cases. In some circumstances, the burden imposed by this requirement would be overwhelming. For example, a litigant wishing to recover for the wrongful death of a passenger in the crash of a commercial airliner would have to search the records of every court in the country in order to discover all the suits that had been filed to recover for the deaths of the other passengers. Moreover, it seems

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23. MANUAL § 0.23[2], at 10.

24. Proposed Draft of the *Manual*, May 2, 1968, at 12.

25. E.g., Cravath Memorandum, *supra* note 21, at 12. See also ABA Section of General Practice, Ad Hoc Comm. Comments on "The Manual," July 1, 1968, at 1 [hereinafter ABA Section of General Practice Memorandum].

26. MANUAL § 0.23[2], at 10.

27. *Id.* § 0.23[3], at 10.

superfluous to require written notice to the clerk in every civil action filed. On the other hand, if in fact the attorney is aware of pending related actions, it does not seem impractical to require him to bring those cases to the attention of the court clerk. However, the attorney's obligation of notice should include only those related cases about which he or his client has actual knowledge.<sup>28</sup>

Each of the *Manual's* suggestions has certain drawbacks. Only two of the proposed methods are directed toward the goal of identifying complex cases—inspection of pleadings by the clerk and contact with governmental agencies. The third suggestion, attorney identification of related cases, is designed solely to discover multi-district litigation. Moreover, even the first two methods are limited in their potential for identification. If the clerk's only screening function is to determine whether newly filed cases fall into one of the eleven categories of complex cases, it is unlikely that the potentially big cases will be discovered, since those categories are over-inclusive.<sup>29</sup> In addition, contact with the Government will help a judge only insofar as the governmental agency has information about the problem that spawned the litigation.

There are, however, more direct and possibly more accurate methods that a judge might employ to decide whether a new case warrants special treatment. For example, when the clerk has noted that a case falls into one of the eleven categories, and when the judge's own perusal of the papers filed indicates that the case may be complex, the judge could contact the attorneys in the case in order to ascertain their current views of possible issues involved and their opinions as to the applicability of some or all of the *Manual's* procedures. Instead of holding a formal hearing,<sup>30</sup> such contact could be made effectively by telephone with less attendant cost and delay. To overcome fears that the judge might be prejudiced through telephone contact with one party alone, and to minimize the judicial time taken by that procedure, a "conference call" with attorneys from both sides would be the best method of obtaining the information.

Another desirable method for identifying complex and multi-district cases, and one that the *Manual* has ignored, is the use of computers for data processing. Indeed, the portion of the *Manual*

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28. Letter from Julian O. von Kalinowski of Gibson, Dunn & Crutcher, Los Angeles, to Whitney N. Seymour of Simpson, Thatcher & Bartlett, New York City, July 12, 1968, at 4 [hereinafter Gibson Memorandum]; Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Memorandum for the ABA Special Comm. on Complex and Multi-District Litigation, June 26, 1968, at 4-5 [hereinafter Kirkland Memorandum].

29. See notes 19-21 *supra* and accompanying text.

30. The *Manual* provides that at the first principal pretrial conference, the court should ascertain the current views of counsel concerning the issues in the case. MANUAL § 1.2, at 20. See text accompanying notes 34-35 *infra*.

dealing with identification procedures is indicative of the document's general failure to incorporate new ideas and techniques. Although a guidebook that is meant to be of present utility to the bench obviously cannot rely too heavily on currently impractical techniques, the *Manual* has restricted itself unnecessarily to the traditional framework of judicial administration and has ignored modern technology. A number of courts are now using automatic data processing techniques to reduce their backlogs through improved scheduling, more sophisticated statistic-gathering, and similar procedures.<sup>31</sup> The basic tool of those computer-assisted administrative systems is a punch card—made when the case is filed—which contains, in coded form, the names of the litigants and their attorneys and the issues involved in the action. The information derived from such cards could be electronically transferred to a Judicial Data Center, where it could be processed for cross references to cases involving related issues, parties, and transactions or occurrences.<sup>32</sup> That procedure would accomplish the task of identifying multidistrict litigation—a task which the *Manual* now unrealistically assigns to each attorney. Likewise, through statistical analysis and simulation, it would be possible to determine what factors tend to make a case complex.<sup>33</sup> That determination, in turn, would generate a realistic indicator of complexity to replace the clearly overinclusive categories set forth in the *Manual*. While the use of computers for identification involves only a few of the many possible applications of technological advances to judicial administration, that use could be so beneficial that the *Manual*, and those actually dealing with complex and multidistrict cases, should not ignore it altogether.

## II. PRETRIAL PROCEDURE

The *Manual* recommends that the handling of complex cases prior to trial be done in four stages. Each stage begins with a conference which is designed to focus attention on the real issues in the case and to refine those issues for a more speedy and effective trial. The preliminary pretrial conference is to be held as soon as it is apparent that the case may involve protracted litigation.<sup>34</sup> At that conference the judge should assume active control of the case and ascertain the current views of all counsel on the issues. Also at this

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31. See Davidson & Davidson, *Computerized Court Calendaring*, 54 A.B.A.J. 1097 (1968).

32. For a discussion of the use of Data Centers, see Halloran, *Judicial Data Centers*, 4 TRIAL 14 (Dec.-Jan. 1967-1968).

33. See Navarro & Taylor, *An Application of Systems Analysis To Aid in the Efficient Administration of Justice*, 51 JUDICATURE 47 (1967); Higginbotham & Freed, *The Trial Backlog and Computer Analysis*, 44 F.R.D. 104 (1967).

34. MANUAL § 1.0, at 17.



point a timetable is to be established for the filing of pleadings and nondiscovery motions. Moreover, according to the *Manual*, the judge should fulfill several other functions at the first conference; those functions include investigating the possibilities for consolidation of related cases, inquiring about joinder of additional parties or the pursuance of a class action, scheduling the submission of preliminary legal questions, considering the appointment of liaison counsel, and urging counsel to cooperate in eliminating unnecessary objections and motions. Finally, at this time, the judge should schedule the "first wave" of discovery—discovery unrelated to the merits of the case.<sup>35</sup>

The second pretrial conference is to be held after most of the preliminary discovery has been completed and before discovery on the merits begins.<sup>36</sup> At this conference the court is to dispose of any threshold questions of law, such as the permissibility of a class action or the effect of a statute of limitations. In addition, the court should set a time for completion of the first wave of discovery and establish a schedule for the second wave—discovery on the merits. Finally, the judge should explore the need for creation of document depositories, set dates prior to which discovery will not be permitted, inquire about the possible use of expert or computer evidence, and discuss estimated trial dates.

The third conference<sup>37</sup> serves primarily as an opportunity for the judge to compile final schedules for the completion of discovery, to set dates both for the final pretrial conference and for the trial, and to appoint a neutral expert, if one is desired. In addition, it is the time at which counsel must file pretrial briefs, witness and exhibit lists, *voir dire* questions, and proposed jury instructions.

The fourth and final conference is designed to streamline the actual trial of the case.<sup>38</sup> At that conference, the judge should rule on objections to offers of proof, to depositions, or to documentary evidence, and should issue preclusion orders for matters not contained in the pretrial briefs. It is also the time for the court to appoint spokesmen or liaison counsel for trial and to set limitations on opening statements, on the number of witnesses, and on scope of testimony. Finally, at the fourth conference, the use of alternate jurors or of fewer than twelve jurors and the possibility of settlement should be discussed.

The timetable established by the *Manual* for the pretrial han-

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35. The first wave of discovery should cover the identity and location both of witnesses and of physical (documentary) evidence, information needed for motions on legal defenses such as that of privilege or that of the statute of limitations, and any discovery designed to define or narrow the ultimate issues. *Id.* § 1.0, at 17-18; § 1.3, at 21; § 1.5, at 22; § 1.7, at 24; § 1.8, at 25.

36. *Id.* § 2.0, at 28.

37. *Id.* § 3.0, at 58.

38. *Id.* § 4.0, at 75.

dling by the court of a complex case has been criticized for its apparent rigidity.<sup>39</sup> Although the *Manual* professes to encourage judicial flexibility and inventiveness in dealing with complex cases, it frequently cautions against deviations from its suggestions concerning procedure and timing, on the ground that those suggestions constitute the most effective methods that have been devised.<sup>40</sup> The procedures recommended in the *Manual*, however, are based heavily upon judicial experience with the electrical equipment cases,<sup>41</sup> and some of the procedural problems in those cases were sui generis, if only in terms of the number of cases involved. Methods effective in dealing with the problems in those cases are not directly applicable to all the varied situations in which complex cases arise. Nonetheless, it cannot be denied that judicially structured pretrial procedures are required in big cases to avoid inefficient use of the judicial process. When a case involves nearly a hundred parties, or when discovery involves thousands of documents and weeks of depositions, the judge cannot allow the attorneys to proceed with pretrial at their own leisurely pace. Some freedom of counsel in the management of the case, therefore, must necessarily be sacrificed.

The *Manual* has also been attacked for its emphasis on the establishment by the trial court of strict timetables—ones to which all parties are expected to adhere—for pleadings, motions, and stages of discovery.<sup>42</sup> In the area of discovery, for example, the *Manual* suggests that different waves of discovery be used, with specific objectives to be reached in each wave before proceeding to the next.<sup>43</sup> Since, in that procedure, all parties are to move simultaneously through the various stages, the court will be forced to delay the parties who already possess the preliminary information of the first wave<sup>44</sup> from proceeding to discovery on the merits, until such time as *all* parties have completed their preliminary discovery.<sup>45</sup> Although an exception may be granted when an emergency situation exists—such as when discovery on the merits of a narrow issue may be decisive of the case<sup>46</sup>—such variations are discouraged.<sup>47</sup> Some

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39. See A.C.T.L. Report, *supra* note 22, at 12-13; Cravath Memorandum, *supra* note 21, at 7, 15-16, 19-21.

40. MANUAL 6.

41. *Id.* at viii-ix. See Memorandum on Suggestions and Comments Received on Outline 1 (prepared by the staff of the subcommittee in charge of drafting the *Manual*) [hereinafter Outline Memorandum].

42. *E.g.*, MANUAL § 1.3, at 21; § 1.5, at 22; § 2.3, at 30; § 2.7, at 57; § 3.3, at 64-68; *id.* § 4.7, at 83 (days and hours of trial); *id.* § 3.4, at 69 (date for final pretrial conference); *id.* § 3.1, at 59. (time schedules).

43. *Id.* § 1.5, at 22; § 2.3, at 30.

44. *Id.* § 2.3, at 30. See note 35 *supra*.

45. *Id.* § 0.5, at 16; § 2.3, at 30.

46. *Id.* § 1.7, at 24.

47. *Id.* § 2.4, at 31.

commentators have argued that because this procedure is so strict, and because it requires so much involvement by the court, it is inconsistent with the Federal Rules of Civil Procedure, which are designed to permit great latitude and flexibility in the discovery process by allowing discovery to be handled primarily by counsel with a minimum of resort to the court.<sup>48</sup> Nonetheless, while this is true in the abstract, arguably the procedures of the *Manual* have not run afoul of the discovery policy of the Federal Rules. Rather, the *Manual* has attempted to achieve a reasonable accommodation between permissible freedom and the unrestrained chaos which could arise from lack of organization in a protracted case.

There is little doubt that schedules for discovery and for other proceedings will serve a useful function as guidelines or target dates for the accomplishment of the various stages of the litigation. Therefore, to the extent that the time limits are reasonable, adherence to such schedules should be maintained. Nevertheless, the time limits could have an unforeseen prejudicial effect in some situations, such as when a litigant, despite a diligent effort, has been unable to locate a certain person prior to the deadline for taking depositions on the merits. Thus, the level of prejudice which a litigant must show to obtain an adjustment of deadlines should not be high.<sup>49</sup>

### III. LIAISON COUNSEL

The *Manual's* recommendation that liaison counsel be appointed when there are multiple parties on one or both sides of a complex case<sup>50</sup> has caused repeated comment from members of the bar.<sup>51</sup> The *Manual* suggests that the court's difficulty in communicating with multiple counsel may make it desirable for the court to request the parties to select at pretrial one or more from their number to serve as liaison counsel. Although the *Manual* contemplates that the parties themselves stipulate the functions of such counsel, it makes several recommendations as to what functions should be stipulated. According to the *Manual*, the liaison counsel should receive notice on behalf of all counsel when such meetings are needed for coordi-

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48. Although this policy is not specified in the Federal Rules of Civil Procedure, it is implicit in rules 26-37. See Letter from David J. Armstrong of Dickie, McCamey & Chicote, Pittsburgh, to Cyrus V. Anderson, Associate General Counsel, PPG Industries, Inc., Pittsburgh, May 24, 1968, at 3 [hereinafter Dickie Memorandum].

49. "Experience in the electrical cases indicates that once a lengthy schedule is published, 'tentative' or not, it becomes difficult to alter even for what normally would be 'good cause shown.' Judges are reluctant to extend an early date because that change snowballs." Kirkland Memorandum, *supra* note 28, at 5-6.

50. MANUAL § 1.9, at 26.

51. See, e.g., Co-Ordinating Comm. on Complex and Multidistrict Litigation, Special Meeting on Recommended Changes in the Proposed Manual for Complex and Multiple Litigation, San Francisco, July 24, 1968, at 45 (remarks of Don H. Jackson of Jackson, Barker & Sherman, Kansas City, Mo.) [hereinafter Special Meeting].

nating discovery, for agreeing upon responses to questions and suggestions of the court, or for initiating proposals, suggestions, proposed orders, and proposed schedules during pretrial proceedings. During the trial, the liaison counsel should be authorized to act on minor procedural matters without specific prior consultation.<sup>52</sup> Objections made by him may be relied on by any other party without repetition.

The *Manual* states that in the event that the parties are not able to agree upon who should act as liaison counsel, the court has the power to make the appointment.<sup>53</sup> The source of that power is Federal Rule of Civil Procedure 42(a), which permits the court to "make such orders . . . as may tend to avoid unnecessary costs or delay." The few courts that have appointed liaison counsel, however, have viewed the action as an extraordinary measure which should be taken only under compelling circumstances and not when more conventional remedies are available.<sup>54</sup> In addition, the court-appointed general counsel in those cases was not intended to be either a substitute for the counsel of each party or a court-appointed master of litigation. Rather, his function was to supervise and coordinate the activities of the other attorneys; each attorney was still free to present his own case, to examine witnesses if he wished, and to open and close before the jury. Furthermore, the burden was placed upon the party seeking the appointment of a liaison counsel to show sufficient justification for such an appointment.<sup>55</sup> In any event, the appointment of a liaison counsel lies within the discretion of the judge. If opportunity does exist for conserving substantial amounts of time and expense, appointment should be made unless prejudice to a litigant's case would result.

It seems to be generally accepted that the use of liaison counsel may in many instances be an extremely useful device which may result in the conservation of both time and money for all parties involved.<sup>56</sup> For example, in many cases, briefs on the primary issues may be combined to avoid needless repetition of substantially the same points. Likewise, questioning of witnesses at trial may often be

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52. MANUAL § 4.8, at 84. A principal examining counsel for each side during trial is also recommended. Presumably, however, that does not preclude other counsel from making additional objections and responses.

53. MANUAL § 1.9, at 26 n.27. However, the *Manual* states that caution should be observed in appointing liaison counsel over the objection of one or more parties.

54. *MacAlister v. Guterman*, 263 F.2d 65 (2d Cir. 1958); see *Rando v. Luckenbach Steamship Co.*, 25 F.R.D. 483 (E.D.N.Y. 1960). The *MacAlister* court suggested that the use of a single judge (see note 166 *infra* and accompanying text) may obviate the need for liaison counsel.

55. *MacAlister v. Guterman*, 263 F.2d 65, 68 (2d Cir. 1958).

56. See Outline Memorandum, *supra* note 41, at 4. That consensus is absent, however, when the parties' interests differ. In such instances, no appointment of liaison counsel should be made.

handled by one or two counsel from the group in order not to antagonize the judge or the jury by subjecting them to tedious, repetitive examinations.<sup>57</sup>

One concern that has been expressed over the *Manual's* recommendation is that a liaison counsel may be appointed to represent litigants whose interests are related but not identical.<sup>58</sup> The *Manual* has responded to that problem by stating that many conditions, including conflicts of interest and of legal theories, may make it undesirable to compel the delegation of authority to a single representative counsel.<sup>59</sup> But when minor conflicts do exist, it may be possible for the court to select several liaison counsel—one representative of each position. In a large shareholders' derivative suit, for instance, it might be best to appoint one liaison counsel to represent the holders of each class of securities. By doing so, each major interest group would have representation, but some measure of the efficiency gained by dealing with a relatively small number of counsel would be preserved.

Another objection to the use of liaison counsel is that, even when the parties' interests are virtually identical, counsel will often wish to use differing litigation strategies or legal arguments.<sup>60</sup> There is also a fear that disparities in tactical abilities between the liaison counsel and the various other counsel might adversely affect the position of those parties whose counsel do not serve as liaison. The answer to these objections is that the liaison counsel's primary function is to serve as a coordinator between the court and the many parties, not to exercise binding authority on behalf of the coparties. What representative authority he does possess is limited to procedural matters unless the parties agree that he should have such authority for other purposes. In that light, then, it does not seem overly harsh to permit liaison counsel to fix the dates for pretrial hearings or to commit others to a discovery timetable. It is true, however, that procedural decisions sometimes will have a direct effect on the substance of a case. Accordingly, if a party is able to show that possible material prejudice to his case has arisen from the actions of a liaison counsel, he should be granted relief. For example, if liaison counsel's deposition of a witness has been incomplete, another counsel, upon showing potential material prejudice, should be afforded the opportunity to depose the same witness. Of course, continual objections and the resultant hearings to show prejudice would cause delay and would perhaps negate the intended benefits of the use of liaison counsel. Therefore, the authority granted to

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57. See Cravath Memorandum, *supra* note 21, at 17.

58. *Id.* at 18.

59. MANUAL § 1.9, at 26.

60. Cravath Memorandum, *supra* note 21, at 18.

the liaison counsel should, at the outset, be carefully delineated and limited so as to exclude the power to bind the litigants on matters of substance and thus to preclude frequent objection.<sup>61</sup>

The necessity of compensating liaison counsel for the time he spends discharging representative functions raises another problem. Parties may well be reluctant to permit their attorneys to serve as representatives when there is little chance that they will recover the additional expenses involved.<sup>62</sup> In fact, some litigants simply may not be able to bear the burden of paying their attorneys for the added time required to carry out the duties of liaison counsel.<sup>63</sup> There are various possible solutions to this problem. In *Rando v. Luckenbach Steamship Company*,<sup>64</sup> cited by the *Manual* as authority for the court to appoint liaison counsel on its own motion, the appointment was made upon agreement of counsel to serve in a liaison capacity without additional compensation. Absent such agreement, the costs could be allocated in relation to the benefit derived. Thus, if a party has been spared the time and expense of repeated production of documents, that should be reflected in a partial payment of fees by him to the liaison counsel. In addition, the expenses saved by attorneys for the other parties could be used to offset any increased cost of having a representative attorney. However, because the potential savings resulting from the use of liaison counsel could be greater than the added expenses, and because the allocation described above may be difficult and time-consuming, perhaps the best solution is to have all parties being represented by a particular liaison attorney agree to divide his expenses equally.

#### IV. DOCUMENT DEPOSITORIES

A procedure recommended by the *Manual* and used quite extensively during the course of the electrical equipment cases is the establishment of document depositories.<sup>65</sup> The purpose of such depositories is to eliminate the duplication of discovery efforts which arises when many parties are seeking discovery of the same material. For instance, if several plaintiffs alleging a price fixing conspiracy seek to discover the correspondence of marketing executives in each defendant company, all of the requested documents normally would have to be duplicated several times or the files of each company

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61. A.C.T.L. Report, *supra* note 22, at 14.

62. *E.g.*, Letter from Theodore W. Anderson, Jr., of Pendleton, Neuman, Seibold & Williams, Chicago, to Walther E. Wyss of Mason, Kolehmainen, Rathburn & Wyss, Chicago, June 14, 1968, at 8 [hereinafter Pendleton Memorandum].

63. See Cravath Memorandum, *supra* note 21, at 17.

64. 25 F.R.D. 483 (E.D.N.Y. 1960).

65. MANUAL § 2.5, at 32; see Baldridge, *Problems Raised in Multiple Litigation*, 11 ANTITRUST BULL. 635, 638 (1966).

opened repeatedly in order to permit inspection. When the number of plaintiffs is in the hundreds, as in the electrical equipment cases, the duplication can run to over a million documents and the hours devoted to inspection of the files may exceed several thousand. If each plaintiff must travel to each plant of every company to inspect the files, the time and expense involved in discovery can be very great. By setting up centralized depositories for such documents, the burden and expense of document discovery is minimized. Hours for inspection under the supervision of defendant's agents can be arranged without burdening the normal operations of the party being discovered. Moreover, expenses of travelling to the central depository will be, in most instances, substantially less than would be incurred otherwise.

The *Manual* extolls the use of document depositories as "a major step forward in the orderly, efficient and economical processing of the complex case."<sup>66</sup> Some members of the bar, however, argue that depositories will often not be profitable and should be employed only in unusual circumstances.<sup>67</sup> The basic criticism of depositories is directed at the time and expense involved in their maintenance.<sup>68</sup> The *Manual* appears to meet that criticism by recommending that this procedure be used only when depositing documents at one or more convenient locations will result in reduced expenses, time, and effort.<sup>69</sup> The determination as to the propriety of establishing depositories is to be made by the judge after consultation with counsel. In that determination, problems concerning available space, hours of access, and custodial expense should be considered;<sup>70</sup> but they are only some of the factors to be weighed in exploring the feasibility of using a depository and should not be determinative. Certainly in many cases, such as massive multidistrict litigation, the use of depositories will prove to be the most efficient means for implementing discovery. In a close case, the interest of the party undergoing discovery in the continued smooth operation of his business, free from the excessive burden of repetitive discovery, should militate in favor of the central depository.

The *Manual* suggests that control of the depository may be either retained by the parties or taken by the court.<sup>71</sup> The suggestion that

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66. MANUAL § 2.5, at 32.

67. See, e.g., A.C.T.L. Report, *supra* note 22, at 15; Cravath Memorandum, *supra* note 21, at 21-22. "[T]he overwhelming consensus is that depositories should only be used under extraordinary circumstances. Unless so used, document depositories are too expensive and time-consuming to maintain." Outline Memorandum, *supra* note 41, at 5.

68. Outline Memorandum, *supra* note 41, at 5.

69. MANUAL § 2.5, at 32.

70. A.C.T.L. Report, *supra* note 22, at 15.

71. MANUAL § 2.5, at 32.

the court can maintain control of the depository has been criticised on the ground that it will encourage the court to move outside the area of its permissible functions.<sup>72</sup> According to that criticism, the court's control will force it to be in continual, intimate contact with the materials produced for discovery, and will thereby prompt it to determine on its own initiative what documents have or have not been produced and to compel compliance with discovery orders. Performing such functions, it is argued, is the obligation of opposing counsel, rather than of the court; and, in any event, is incompatible with the goal of efficient judicial administration.<sup>73</sup> That argument, however, is not convincing. Indeed, it is quite consistent with the goal of efficient judicial administration for the court to take steps to ensure compliance with court orders. Such affirmative action may obviate the need for in-court skirmishes initiated by the parties over refusals to produce ordered documents. There is some validity to the argument that the court should not be exposed needlessly to documents which may or may not be later offered in evidence.<sup>74</sup> But judges are constantly required to rule on the admissibility of evidence in nonjury cases, and thus are presumably able, in arriving at their decisions on the merits, to recognize the inadmissible material that they have seen and to give it no weight. It also is unlikely that the judge will assume direct personal control over the depository; probably he will in practice assign that function to clerical personnel.

There are several ways, according to the *Manual*, in which the utility of document depositories could be increased. For example, the use of a master would eliminate much of the administrative burden that would otherwise be on the judge.<sup>75</sup> Categorization and summarization of the materials submitted to the depository are only two of the many functions that a master could perform. Similarly, depositories may be made even more functional if the techniques of electronic data processing are employed to ease the very large discovery burden which exists in cases producing thousands of pages of discoverable matter.<sup>76</sup>

The expense of maintaining a depository is to be borne by the party who controls the depository and who benefits from not having to make multiple production of the same documents.<sup>77</sup> A strong

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72. A.C.T.L. Report, *supra* note 22, at 15.

73. "If orders are not complied with, opposing counsel, who after all is expected to inspect documents produced at his request no matter where located, has every opportunity to make a motion pursuant to [Federal] Rule [of Civil Procedure] 37." Cravath Memorandum, *supra* note 21, at 21-22.

74. A.C.T.L. Report, *supra* note 22, at 15.

75. See text accompanying notes 78-95 *infra*.

76. See note 99 *infra*.

77. MANUAL § 2.5, at 32.



argument can be made, however, that when several parties are contributing to a single depository, the persons conducting discovery realize substantial savings by not having to travel to many separate depositories and should therefore share in the depository expense. The *Manual* makes no mention of who should bear the expense of a court-controlled depository; presumably the cost should be allocated, as nearly as possible, in proportion to the estimated savings to each party.

#### V. APPOINTMENT OF MASTERS

The *Manual* deals rather extensively with the advisability of appointing a master to perform special functions in connection with a complex case. Suggested functions include supervision of the discovery process, fact-finding on preliminary motions, and the performance of complicated accounting.<sup>78</sup> The *Manual's* remarks concerning the employment of this procedure, however, are very cautionary. Appointment of a master is to be reserved for exceptional cases and is then to be made only after discussion with the counsel of all parties.<sup>79</sup> If a reference is made, the court is advised to meet shortly thereafter with the master in an informal conference to discuss possible problems. The *Manual* advises that frequent contact be maintained between the judge and the master and that further pretrial conferences concerning the master's activities be held if necessary.

The apparent hesitancy with which the *Manual* approaches the use of masters seems to stem from the statement in Federal Rule of Civil Procedure 53(b), that "reference to a master shall be the exception and not the rule," and from the United States Supreme Court's decision in *La Buy v. Howes Leather Company*,<sup>80</sup> interpreting that language strictly. In *La Buy*, the Court of Appeals for the Seventh Circuit had issued a writ of mandamus to a district judge to vacate an order referring an antitrust suit to a master. The court of appeals held that the congestion of the trial calendar and the complexity of the issues did not constitute the exceptional conditions that under rule 53 may alone justify reference of a nonjury case in its entirety.<sup>81</sup> The Supreme Court upheld the decision of the court of appeals, noting that if court congestion were in itself sufficient to warrant reference, the use of masters in some populous districts

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78. *Id.* § 3.2, at 60-63. It is the broad consensus of opinion that the use of masters to supervise discovery should be made only in exceptional cases in which there is a compelling showing of need. A.C.T.L. Report, *supra* note 22, at 13; Outline Memorandum, *supra* note 41, at 6.

79. See MANUAL § 3.22, at 62; Kirkland Memorandum, *supra* note 28, at 6.

80. 352 U.S. 249, 256 (1957).

81. 226 F.2d 703, 707 (7th Cir. 1955).

would become the rule rather than the exception. The Court's attitude was further reflected in the statement that masters were not to "displace the court," but were to be used only to assist the judge in specific duties.<sup>82</sup>

The *La Buy* decision makes it clear that reference of a case in its entirety should be extremely rare.<sup>83</sup> When the master's duties are limited in scope, however, the standard of exceptional circumstances has been somewhat relaxed.<sup>84</sup> It has been suggested that when a master is appointed to supervise the pretrial discovery in a complex case which in other respects remains under the general direction of the trial judge, the reference is sufficiently limited in scope so that the rule of *La Buy* is inapplicable.<sup>85</sup> Indeed, when reference is limited to big cases, the "exception not the rule" policy of rule 53 is preserved; and when the scope of the referral is confined to supervising discovery, there is only a minor usurpation of the judicial function. Nevertheless, the *Manual* has apparently adopted the narrower position reflected in *La Buy*.

Even assuming that federal law permits the pretrial handling of a complex case to be referred to a master, that referral procedure, as the *Manual* has noted, is subject to several objections. One is that the judge will not familiarize himself with the case during its pretrial phase as completely as he would have if he had personally supervised discovery, and that, therefore, he will be less competent and efficient in deciding pretrial motions and in trying the case.<sup>86</sup> That criticism, however, is valid only if, as the *Manual* suggests, a single judge is assigned to the complex case for all purposes.<sup>87</sup> If so, it may be true that proper attention during pretrial proceedings will result in a more effective trial. But it is arguable that subjecting the trial judge to a mass of raw evidentiary material rather than to digested compilations of the same material could cloud his over-all understanding of the evidence and result in a less organized trial. Moreover, when a case is sufficiently complex to warrant the use of a master, the greater importance of other uses of the judge's time would seem to justify a referral. In one large case, for example, there were over 100,000 pages of depositions, 173 witnesses, and 45,000 documents the combined pages of which totaled 700,000. The master supervising discovery in that case spent more than

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82. 352 U.S. at 256.

83. 352 U.S. at 256-60. See 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1162 (C. Wright ed. 1961, Supp. 1968).

84. See Note, *Reference of the Big Case Under Federal Rule 53(b): A New Meaning for the "Exceptional Condition" Standard*, 65 YALE L.J. 1057, 1065 (1956).

85. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 465 (1958).

86. MANUAL § 3.22, at 62.

87. *Id.* § 0.3, at 12.

twenty hours a week in hearings for a period of 350 days.<sup>88</sup> In such a situation, it would be a prodigious waste of judicial manpower for a judge to devote that much time to discovery hearings in one case. Certainly, much more productive use can be made of his time in disposing of the trial backlog existing in most courts. Moreover, allowing a master to sift through the documents would help to prevent the judge from being prejudiced by arguably inadmissible evidence.<sup>89</sup>

Another major limitation on the employment of masters arises from the likelihood that reference will add appreciably to the cost of litigation.<sup>90</sup> While judicial supervision of discovery is provided at public expense, the master's compensation as well as other costs of reference are charged to the litigants. That factor is especially significant when the litigants have unequal economic resources. If, in such circumstances, the costs of an impending reference are too great, the poorer litigant may be compelled to acquiesce in an otherwise unacceptable settlement.<sup>91</sup> Thus, it is questionable whether the cost of conserving judicial manpower should be allocated entirely to the few litigants whose disputes are expected to require lengthy trials.<sup>92</sup>

It is quite possible, moreover, that reference to a master would actually protract the litigation.<sup>93</sup> A master appointed by the court may be able to devote only a limited amount of time to the referred case. In addition, repeated resort to the court to obtain decisions concerning disputes over rulings of the master and court hearings to determine whether the conclusions of the master are to be accepted, may tend to prolong the case.<sup>94</sup> The *Manual* attempts to deal with that problem by recommending that the delegation of authority to the master be explicitly defined and that the judge avoid substituting his judgment for that of the master in a decision which does not involve legal error. Those recommendations, if carried out, should discourage unnecessary requests for review of the master's evidentiary rulings, and should minimize the extent to which factual disputes

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88. *Ferguson v. Ford Motor Co.*, Civil No. 44-482 (S.D.N.Y., filed Oct. 1, 1948); see Kaufman, *supra* note 85, at 466.

89. See text accompanying note 74 *supra*.

90. See, e.g., Dickie Memorandum, *supra* note 48, at 5. See also *Lyman v. Remington Rand, Inc.*, 188 F.2d 306 (2d Cir. 1951) (\$100,000); *Robertshaw-Fulton Control Co. v. Patrol Valve Co.*, 106 F. Supp. 427 (N.D. Ohio 1952) (\$18,000).

91. See Note, *supra* note 84, at 1061.

92. *Id.* at 1062. It does not seem inappropriate to suggest that when judges and masters serve the same function, and the latter is chosen in order to conserve the former's time, the public should bear the expense of the master's employment.

93. *Id.* at 1062.

94. See Cravath Memorandum, *supra* note 21, at 24.

resolved by the master are reopened in a judicial review of his findings.<sup>95</sup>

In general, then, although a court should not lightly order a referral, it seems clear that when the evidence on an issue involves a mass of undigested technical data, of complex scientific testimony, or of raw figures and elaborate computations, such an issue is particularly suited for the abilities of a special master. The master can distill the confusing mass of evidence and can present to the fact finder, with brevity and precision, the questions to be resolved. Thus, as long as the litigants are not deprived of a judicial determination of the issues of law, and, as long as the costs are not prohibitive to a party, reference to a master should be made whenever conservation of time would result.

## VI. PROOF OF COMPLEX FACTS

Significant gains in clarity and efficiency can be achieved in many complex cases by using automated processing techniques to prove facts which require the manipulation of a great bulk of underlying data.<sup>96</sup> Accordingly, a large segment of the *Manual* has been devoted to a comprehensive discussion of computer samples, polls, and survey evidence.<sup>97</sup> The *Manual* makes several basic recommendations concerning the use of such techniques. Voluminous or complicated data should, if possible, be presented at trial in a summarized form, such as a chart, graph, or extract.<sup>98</sup> By thus eliminating both the introduction into evidence of volumes of raw data and the resultant in-court objections to it, substantial savings of trial time will result. The supporting raw data, however, must be made available to opposing counsel sufficiently in advance of trial to permit objections to be raised to the admissibility of the summarized data. In addition, the methods of interpretation and summarization which were used, as well as the conclusions drawn, should be made available in advance

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95. MANUAL § 3.22, at 63.

96. For an example both of the unreasonable size of the materials presented to the court in these cases and the techniques for using electronic devices for indexing and arranging those materials, see Freed, *Improved Information Processing in the Conduct of Large Trials*, in *COMPUTERS AND THE LAW* 72 (R. Bigelow ed. 1966); Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with Law*, 71 *YALE L.J.* 239 (1961).

97. Special Meeting, *supra* note 51, at 78-91 (remarks of Professor Arthur R. Miller of the Univ. of Michigan Law School).

98. MANUAL § 2.611, at 36. For a detailed example of how to set up and use computer data in the trial of a complex case, see Freed, *Machine Data Processing Systems for the Trial Lawyer*, 6 *PRAC. LAW.* 73, 78-96 (April 1960); Lozowick, Steiner & Miller, *Law and Quantitative Multivariate Analysis: An Encounter*, 66 *MICH. L. REV.* 1641, 1674-78 (1968).

of trial.<sup>99</sup> That procedure will frequently permit decisions on the admissibility of the summarizations to be made prior to trial. Moreover, by submitting the research design or a presampling before the full-scale data gathering and tabulation is undertaken, it may be possible to correct or to eliminate legal and practical flaws in the mechanics of a proposed survey before a major research investment is made.<sup>100</sup>

The *Manual* takes the position that polls and surveys should be encouraged whenever the tests of trustworthiness and necessity are met.<sup>101</sup> The trustworthiness of survey evidence depends mainly on whether the techniques employed in conducting the survey are within accepted principles of survey research.<sup>102</sup> The necessity for the use of samples or polls depends upon whether proof by other methods is shown to be impractical. The more subjective the data to be surveyed, that is, the more it is based on beliefs or opinions, the higher the standard of necessity should be.<sup>103</sup> The *Manual* therefore suggests that the court inquire as to how the parties intend to use such evidence.<sup>104</sup> That inquiry is to be made early in the pretrial process so that the court may issue appropriate pretrial orders concerning both the discovery and the proposed use at trial of electronically derived material. Subsequently, at the third principal pretrial conference, the court, having previously inquired as to the possible use of computer runs, should require divulgence of the raw data, of the method or program which has been employed in summarizing or evaluating the data, and of all the results derived, both favorable and unfavorable.<sup>105</sup> The last requirement has met with some opposition. It is argued that required disclosure of unfavorable results will discourage experimentation in the use of data processing to gather evidence—an objective the *Manual* clearly intends to advance.<sup>106</sup> According to that argument, in many areas in which computer evidence may be useful, certain basic hypotheses upon

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99. MANUAL § 2.613, at 43.

100. It is important to realize that survey results are neutral; only the conclusions drawn from them favor a particular side. Therefore both parties can cooperate to set up the survey. Early, *The Use of Survey Evidence in Antitrust Proceedings*, 33 WASH. L. REV. 380, 397 (1958).

101. MANUAL § 2.612, at 37-42.

102. See Zeisel, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322, 339 (1960).

103. See generally Sorenson & Sorenson, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U. L. REV. 1213 (1953); Wheaton, *What Is Hearsay?*, 46 IOWA L. REV. 210, 218 (1960).

104. MANUAL § 2.6, at 33.

105. *Id.* § 3.52, at 72. For an evaluation of differing results and the means to handle the problem, see Sorenson & Sorenson, *supra* note 103, at 1240-57.

106. A.C.T.L. Report, *supra* note 22, at 16; Cravath Memorandum, *supra* note 21, at 25.

which the ultimate survey is to be based must be chosen by trial and error. If unfavorable conclusions based on false hypotheses must be disclosed in discovery, those conclusions can be subsequently used by the opposition to discredit, perhaps unduly, the program eventually employed. Accordingly, inhibitions against utilizing survey evidence will naturally result.<sup>107</sup> While that criticism is valid, it may be argued in defense of the *Manual's* position that if more than one answer is possible, that factor itself is relevant to the validity of the results actually used and should be discoverable and thus made available to the trier of fact. If the original hypothesis is actually mistaken, that fact can be explained in direct examination. Furthermore, disclosure of conflicting results may be the best way to remove any notion that the conclusions are an infallible scientific determination.<sup>108</sup>

By its extended and favorable discussion of the evidentiary value of data processing, the *Manual* has taken bold steps into an area where courts for too long have neglected to venture. Perhaps the *Manual* may provide the impetus needed to move reluctant judges to use technologically complex, but extremely valuable electronic and computer-formulated evidence.

## VII. COURT-APPOINTED EXPERTS

The *Manual* recommends that upon completion of discovery, and prior to the final pretrial conference, the court should consider appointing its own expert.<sup>109</sup> That procedure is to be employed when the experts presented by the parties have expressed irreconcilable opinions on important issues in the case,<sup>110</sup> for it is thought to be unwise to require a lay trier of fact to resolve conflicts of complex opinions without the benefit of hearing an expert chosen by the court.<sup>111</sup> If the irreconcilable views are a function of divergent factual

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107. A.C.T.L. Report, *supra* note 22, at 16.

108. See Sorenson & Sorenson, *supra* note 103, at 1221; Zeisel, *supra* note 102, at 344.

109. MANUAL § 3.51, at 70.

110. At the third principal pretrial conference, the parties are to submit, along with their final pretrial brief, written offers of proof including summarization of the opinions of their experts. *Id.* § 3.3, at 64-68. The *Manual* also contemplates the use of preclusion orders to prevent the raising of any factual matter not included in the final brief. See text accompanying notes 130-38 *infra*. The *Manual* urges early disclosure of the contents of the proposed testimony of the experts. However, "unless postponed to a date when discovery has been completed, [such a procedure] works a hardship on the parties. Proper preparation of an expert cannot be completed early in the discovery stage. Any early summary will, of necessity, not be very meaningful." Kirkland Memorandum, *supra* note 28, at 8.

111. See Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080 (1966); Prettyman, *Proof of Scientific and Technical Facts*, 21 F.R.D. 466 (1957); Whinery, *Court Experts and the Proof of Scientific Fact—An Experiment in Law Reform*, 23 F.R.D. 481 (1958).

assumptions rather than a result of different underlying theories, the court is to determine whether the resolution of the factual issues is within the competence of the trier of fact. If not, appointment of a court expert may be indicated. When the dispute concerns the proper theoretical approach to the evidence, the judge is to acquaint himself with the well-recognized schools of thought in the field, in order to determine whether it would be worthwhile to present experts with viewpoints not presented by the parties.<sup>112</sup>

The problems raised by the court appointment of an expert depend upon how the expert is to be used. In general he may be employed either to interpret evidence which has been introduced by the parties or to present additional evidence.<sup>113</sup> While both functions present serious problems, it is the second which has caused the expert section to evoke stronger criticism than has been directed toward any other part of the *Manual*.<sup>114</sup> It is argued that the court has abandoned its traditional role of neutrality and, by employing its own experts to produce additional evidence, has donned the cloak of an advocate.<sup>115</sup> The proponents of that position admit that the court still has no interest in the outcome of the case; but they argue that, by searching out a representative of a school of thought not explored or presented by the parties, and by permitting him to produce new evidence or to render new opinions, the court has initiated an action that could substantially affect the outcome of the litigation by aiding or injuring some litigant. In an adversary system, the risk of nonpersuasion normally falls upon the litigants; and if the burden imposed upon a party is not met, the party cannot prevail.<sup>116</sup> That burden, critics feel, should not be made lighter or heavier by the introduction of testimony which originates with the court.

The criticism of the *Manual's* proposal appears to have much merit. Once the court-appointed expert testifies, it would be difficult, if not impossible, for a jury to avoid the conclusion that the parties' experts are unduly biased and that their testimony is therefore deserving of little weight.<sup>117</sup> Similarly, in a nonjury case, the judge

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112. Some lawyers contend that an impartial expert cannot have the knowledge and experience of the parties' experts and that therefore the information needed by the judge should be obtained in conference with the parties' experts and lawyers. See, e.g., Andrus, *The Court Appointed Expert*, 23 F.R.D. 519 (1958).

113. See Sink, *The Unused Power of a Federal Judge To Call His Own Expert Witness*, 29 S. CAL. L. REV. 195, 211-13 (1956).

114. See Outline Memorandum, *supra* note 41, at 6-8; Special Meeting, *supra* note 51, at 55-58 (remarks of Don H. Jackson of Jackson, Barker & Sherman, Kansas City, Mo.).

115. See Dickie Memorandum, *supra* note 48, at 4.

116. Sink, *supra* note 113, at 212.

117. A.C.T.L. Report, *supra* note 22, at 21. The parties would naturally have the opportunity to cross-examine and to rebut the testimony of the court's expert. See Coleman, *Use of Inter-Parties Neutral Witnesses in Patent Cases*, 21 F.R.D. 548, 550 (1957).

may have greater respect for the expert he has appointed. Indeed, with the appearance of a court-appointed expert, there is a very strong possibility that the fact finder may give almost conclusive weight to that expert's testimony, because it was produced by judicial intervention, and therefore implicitly approved by the court.<sup>118</sup> The *Manual* has attempted to respond to that criticism by providing that, in a jury case, an appropriate cautionary instruction be given in order to prevent the jury from ascribing undue weight to an expert's testimony solely because of his court appointment.<sup>119</sup> But such instruction, while better than no guidance at all, does not seem to be a sufficiently strong repudiation to prevent the "court-expert" from becoming in fact the ultimate juror.<sup>120</sup>

In an earlier draft of the *Manual*, it was stated that a court-appointed expert need not be available for deposition by the parties, and that the data upon which his opinion was based was not required to be made accessible to the parties.<sup>121</sup> The *Manual* now provides that the expert's data must be available to the parties and that his deposition may be taken;<sup>122</sup> but before deposing the court-appointed expert, the party must obtain permission from the court.<sup>123</sup> That requirement of obtaining permission suggests that the court's expert is still not to be as freely accessible as are the litigants' experts, who may be deposed as a matter of right.<sup>124</sup> Surely, however, if the court is permitted to select an additional expert, it is not unreasonable for the parties to be able to depose him on the same basis as other witnesses.<sup>125</sup> In the *Appendix of Materials* related to this portion of the *Manual*, it is even suggested that the expert need not be made available at trial, but can advise the court "in camera."<sup>126</sup> That proposal has elicited strenuous objection on the ground that it denies the parties not only the right to cross-examine, but also the right to know the content of the information conveyed to the trier of fact during out-of-court sessions.<sup>127</sup>

In light of the serious problems created by the use of court-

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118. Cravath Memorandum, *supra* note 21, at 35.

119. MANUAL § 3.51, at 70-71.

120. See Special Meeting, *supra* note 51, at 56 (remarks of Don H. Jackson of Jackson, Barker & Sherman, Kansas City, Mo.). See also Note, *The New York Medical Expert Project: An Experiment in Securing Impartial Testimony*, 63 YALE L.J. 1023, 1029 n.39 (1954) (remarks of I. Halpern, Attorney, New York City).

121. Proposed Draft of the *Manual*, May 2, 1968, at 37.

122. MANUAL § 3.51, at 71.

123. *Id.*

124. FED. R. CIV. P. 26(a), 30(a), 31(a).

125. See Letter from Don M. Jackson of Jackson, Barker & Sherman, Kansas City, Mo., to Cyrus V. Anderson, Associate General Counsel of PPG Industries, Inc., Pittsburgh, July 1, 1968, at 4 [hereinafter Jackson Memorandum].

126. MANUAL, APPENDIX § 3.51(f), at 277.

127. Jackson Memorandum, *supra* note 125, at 5.



appointed experts, it is fortunate that the *Manual* indicates that such an appointment should be the exception rather than the rule.<sup>128</sup> Indeed, commentators on the *Manual* have suggested that this procedure should be employed only with the consent of counsel.<sup>129</sup> That strict limitation seems especially appropriate for jury trials when a cautionary instruction may be of limited effect.

#### VIII. PRECLUSION ORDERS

In an effort to streamline the trial process in complex cases, the *Manual* recommends the use of orders which prohibit the parties from offering into evidence or otherwise raising any legal or factual matters not included in their final pretrial briefs unless they can show "good cause" for doing so.<sup>130</sup> However, requiring a litigant to show good cause for admitting additional evidence—that is, that a refusal to admit new matter at trial could prejudice his case—may be inconsistent with Federal Rule of Civil Procedure 15(b). That rule provides that if the admission of evidence is objected to at trial on the ground that it is not within the issues formed by the pleadings, the court should allow the pleadings to be amended, and should do so freely as long as the presentation of the merits will be furthered and as long as the objecting party fails to show that the admission will be prejudicial to his action or defense. Thus, preclusion of additional evidence except upon a showing of good cause appears to be contrary to the federal policy of liberal admission of evidence.<sup>131</sup> It can be argued, however, that rule 15(b) was intended to deal with the "average" case, such as a personal injury suit. In such cases, hurried preparation often raises the likelihood that new evidence will come to light or that a change in legal theory will be necessary subsequent to any cursory pretrial attempt to frame the issues or to limit the evidence. But in a complex suit, when several pretrial conferences are held in order to define the issues, and when all parties are aware of the evidence that has been discovered and is to be introduced, rule 15(b)'s objective of attempting to insure that the merits of the case are fully heard will be satisfied even if preclusion orders are allowed. Admittedly, the *Manual* has placed the burden of demonstrating prejudice upon the counsel who is seeking to offer the new evidence rather than upon the party objecting to its introduction, as contemplated by rule 15(b).<sup>132</sup> Yet, if the purpose of

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128. MANUAL § 3.51, at 70.

129. Pendleton Memorandum, *supra* note 62, at 9; Kirkland Memorandum, *supra* note 28, at 6.

130. MANUAL § 1.4, at 21; § 2.4, at 31.

131. See Jackson Memorandum, *supra* note 125, at 3; ABA Section of General Practice Memorandum, *supra* note 25, at 2.

132. See text following note 130 *supra*.

the rule has been otherwise fulfilled, then the use of preclusion orders to avoid delay and disorder at trial is in the interest of justice. Any conflict that still remains with the spirit of rule 15(b) can be eliminated by admitting precluded evidence whenever a relatively low level of good cause has been shown.

An earlier draft of the *Manual* stated not only that showing good cause was necessary before new evidence could be admitted, but also that "except in rare instances" preclusion orders should be issued after the submission of pretrial briefs.<sup>133</sup> Critics contended that the *Manual* erred in recommending that preclusion orders be used "except in rare instances."<sup>134</sup> They argued that, regardless of the degree of care exercised in discovery and in preparation for trial, the legal and factual issues involved in a complex case defy total mastery by the parties. It was therefore felt to be unreasonably harsh automatically to preclude litigants from introducing facts or legal theories which were discovered after the final pretrial conference.<sup>135</sup> It was likewise contended that unpredictable developments during the trial might make it necessary to offer additional evidence.<sup>136</sup> It is not clear, however, whether the phrase, "except in rare instances," was deleted in response to that criticism, nor what the present standard of using preclusion orders is. If the final version of the *Manual* contemplates a strict interpretation of "good cause" so that preclusion orders will be used extensively, the critics' arguments are still viable. But those arguments are not totally convincing today. The present *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.<sup>137</sup> In a complex antitrust or product liability case involving several parties and large damage claims, it seems likely that legal theories will be formulated well in advance of the final pretrial conference. Since most complex cases remain in the pretrial stage for two to three years, it does not appear unreasonable to expect adequate preparation by trial counsel during that period. Moreover, if unanticipated contingencies do arise, the judge may, upon a showing of good cause, disregard his own preclusion order as long as the new evidence will not cause material prejudice to the party against whom that evidence is to be used.<sup>138</sup> The requirement of showing good cause seems to be a small burden when contrasted with the possible advantages that can result from limiting the introduction of evidence at trial to that evidence which is sufficiently important to

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133. Proposed Draft of the *Manual*, May 2, 1968, at 34.

134. A.C.T.L. Report, *supra* note 22, at 19.

135. *Id.*

136. Jackson Memorandum, *supra* note 125, at 3.

137. MANUAL § 3.3, at 64.

138. MANUAL § 4.2, at 76.

be included in the final pretrial brief. Of course, it is arguable that using preclusion orders in this way will impel each litigant to include every remotely important matter in his brief, thus circumventing the thrust of the preclusion order. But it seems unlikely that an attorney would weaken the effect of his pretrial brief by including obscure matters in it, in an effort to avoid a preclusion order which could be overcome by a showing of good cause.

#### IX. MULTIPLE AND MULTIDISTRICT LITIGATION

The basic object of the *Manual's* recommendation on multiple and multidistrict litigation is to promote consolidation of cases which contain one or more common questions of fact, whenever such consolidation will eliminate repetitious litigation.<sup>139</sup> Once consolidation has been accomplished, the previously discussed procedures for complex cases are to be used.<sup>140</sup> When the identification process has located a group of related cases, the court is to investigate the possibilities of using a class action, rather than consolidation, to avoid multiple litigation.<sup>141</sup> A class action is a simpler and a more efficient means of combining related cases than is consolidation, and should therefore be used whenever possible. The *Manual* cautions, however, that courts must be careful to avoid entering parallel orders for the maintenance of actions based on the compulsory provisions of Federal Rule of Civil Procedure 23.<sup>142</sup> If such orders should be entered, resolution can be achieved only at the appellate level. The *Manual* suggests two methods of protecting against that occurrence:<sup>143</sup> that informal contacts be made among the judges involved in related actions which are potentially class actions; and that the Judicial Panel on Multidistrict Litigation, recently established by Congress,<sup>144</sup> exercise general supervision of the pretrial proceedings in all potentially multidistrict class actions.

If a class action is inappropriate, the *Manual* states, the related suits should be consolidated. Since the problems of consolidation vary, the *Manual* deals with a variety of possible situations. The simplest situation involves related cases pending in one division of

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139. The feeling of the Co-Ordinating Committee on this point was reflected in the statement of Judge Becker that "consolidated treatment of common issues in multidistrict litigation has in nearly all cases resulted in decreased costs to all concerned, even after traveling expenses are considered." Judge William H. Becker, Memorandum on Professor Miller's Suggestions to Chief Judge Alfred P. Murrah, May 3, 1968, at 6. [hereinafter Becker Memorandum].

140. MANUAL § 5.13, at 89.

141. *Id.* § 5.5, at 99-100.

142. *Id.*; see FED. R. CIV. P. 23(b)(1)-(2).

143. MANUAL § 5.5, at 99-100.

144. That panel was created in 1968 by the passage of Pub. L. 90-296 (April 29, 1968), 28 U.S.C. § 1407 (Supp. IV, 1965-1968). See notes 160-69 *infra* and accompanying text.

a single district.<sup>145</sup> The *Manual* recommends that, in those circumstances, a single judge be assigned to all of the related cases in order to gain the advantages of centralized management. Once that assignment is made, the judge can order consolidation of the cases pursuant to Federal Rule of Civil Procedure 42(a). If, however, there is a possibility of prejudice to a party's case through consolidation with several other cases or for any other reason, the judge may order the cases combined solely for limited purposes.<sup>146</sup>

If the related cases are pending in several divisions of a single district, consolidation becomes more complex.<sup>147</sup> The *Manual* states that authority to transfer all such cases to a single division is given by section 1404(b) of Title 28 of the United States Code.<sup>148</sup> If that interpretation of section 1404(b) is correct, transfer of the cases to a single division would permit the application of the consolidation procedure outlined above. The statute, however, provides that transfer is permissible "[u]pon motion, consent or stipulation of all parties . . ."<sup>149</sup> But, despite that language, the *Manual* contends that, while obtaining consent or stipulation of all parties is desirable, transfer can be made upon the initiative of the court, even over the objection of a party.

Even more complex problems arise when related cases are pending in two or more districts of a single circuit.<sup>150</sup> The first step in that instance is to transfer the cases in each district to a single division, pursuant to section 1404(b).<sup>151</sup> With that accomplished, the *Manual* states, four possible courses of action are then available:<sup>152</sup> (1) to coordinate pretrial proceedings through the judges of the separate districts; (2) to transfer all cases within the circuit to a single district pursuant to section 1404(a) of title 28;<sup>153</sup> (3) to assign one judge to all related cases in the various districts; or (4) to consolidate all cases for pretrial purposes pursuant to section 1407.<sup>154</sup>

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145. MANUAL § 5.1, at 87.

146. See Note, *Consolidation in Mass Tort Litigation*, 30 U. CHI. L. REV. 373, 377 (1962).

147. MANUAL § 5.2, at 90.

148. 28 U.S.C. § 1404(b) (1964) provides in pertinent part:

Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

149. 28 U.S.C. § 1404(b) (1964).

150. MANUAL § 5.3, at 93. The same problems arise from the filing of related cases in more than one circuit, and they should be handled by the same procedures discussed in the text.

151. See note 148 *supra*.

152. MANUAL § 5.32, at 94-97.

153. 28 U.S.C. § 1404(a) (1964) states in pertinent part: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

154. 28 U.S.C. § 1407 (Supp. IV, 1965-1968) states in pertinent part:

Coordination of the separate pretrials is suggested for instances in which the entire mass of litigation cannot be transferred because of lack of venue in the transferee forum or because of the great

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfer shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

burden placed upon a single judge. That method of proceeding may often prove quite effective; through coordinated planning, the economies of combined discovery can be achieved without requiring a party to forego his choice of forum.

If venue permits, and if justice and the convenience of the parties will be served, transfer of related actions to one district, pursuant to section 1404(a), is frequently the most desirable course of action. When cases are transferred from one district to another, however, questions of applicable law arise. The basic rule is that the law which the transferor district would have applied must be applied in the transferee forum.<sup>155</sup> Thus, the law applicable to one transferred case may be different from the law applicable to another, and a considerable amount of discord could result.<sup>156</sup> The possible confusion which may be generated by transfer, then, should be considered first by the original court before transfer is ordered, and again by the transferee court when determining for what purposes consolidation will be employed. Although potential conflicts problems may not pose a serious threat to the utility of a transfer, since most of the cases for which a transfer will be ordered are federal-question cases,<sup>157</sup> those problems may prove troublesome in consolidating related actions based on state law. For example, if a number of plaintiffs seek recovery for a product defect under the tort laws of various states, their cases should not be consolidated for all purposes, since differences in the applicable law may change the burdens of proof which must be met to recover or the facts which must be established for recovery. Even in such cases, however, consolidation for discovery purposes alone may prove to be both simple and economical. Thus, in appropriate cases, transfer should be ordered preparatory to that limited form of consolidation.

The value of assigning one judge to all related cases in the separate districts is highly questionable.<sup>158</sup> While some of the benefits of centralized management might be achieved by applying this assignment technique, the difficulties in efficiently scheduling motion hearings and trials, as well as the travel burden placed upon the judge, seem to outweigh any of the advantages of that technique.<sup>159</sup>

The *Manual's* last suggestion for dealing with multidistrict litiga-

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155. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

156. Letter from Professor Arthur R. Miller, Univ. of Michigan Law School, to Chief Judge Alfred P. Murrah, United States Court of Appeals for the Tenth Circuit, Jan. 15, 1968, at 5-6. See Comment, *The Search for the Most Convenient Federal Forum: Three Solutions to the Problems of Multidistrict Litigation*, 64 NW. U. L. REV. 188, 196-200 (1969).

157. See text accompanying notes 19-21 *supra*.

158. *MANUAL* § 5.32[3], at 96.

159. Cravath Memorandum, *supra* note 21, at 7.

tion has been made possible by the passage of section 1407, which provides for the creation of a Judicial Panel on Multidistrict Litigation.<sup>160</sup> Unlike section 1404(a), which requires that a case be transferred in its entirety to another district, section 1407 permits the transfer of cases solely for pretrial purposes. The order for consolidation under section 1407 is to be made by the Judicial Panel on Multidistrict Litigation, either on its own initiative or on petition of the parties, whenever such action is warranted by "the convenience of the parties and witnesses and the promotion of just and efficient conduct" of multidistrict actions.<sup>161</sup> The limitation on the section 1407 transfer, which differentiates it from a section 1404 transfer, is that the cases must be remanded to the transferor court for trial.<sup>162</sup> Under that procedure, pretrial discovery and motions can be coordinated without burying the individual case in the mass of related cases.

The *Manual* recommends that in some instances, after the section

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160. That panel consists of seven federal circuit and district judges designated by the Chief Justice of the United States, no two of whom can be from the same circuit. The concurrence of four members is necessary before any action can be taken. Section 1407(a) provides that when civil actions involving one or more common questions of fact are pending in different districts, the actions may be transferred by the panel to any one district so that there can be coordinated or consolidated pretrial proceedings. That transfer is to be made upon the panel's determination that the transfer will be for the convenience of the parties and witnesses, and will promote the just and efficient conduct of such actions. Section 1407(b) provides that coordinated or consolidated pretrial proceedings be heard by a judge or judges to whom such actions are assigned by the Judicial Panel on Multidistrict Litigation. That subsection also provides for the return of those actions to the transferor district upon completion of the consolidated or coordinated pretrial proceedings.

Although the panel has been in operation for only a short time, it has already transferred massive multidistrict litigation comparable to the electrical equipment cases. See note 14 *supra*. See, e.g., *In re Plumbing Fixtures Cases*, 295 F. Supp. 33 (1968), 298 F. Supp. 484 (1968); *In re Protection Devices & Equip. Cases*, 295 F. Supp. 39 (1968). The panel has also consolidated smaller groups of related cases. See, e.g., *In re Gypsum Wallboard*, 297 F. Supp. 1350 (1969) (three cases transferred); *In re Mid Air Collision Near Henderson, N.C.*, 297 F. Supp. 1039 (1969) (two cases transferred). In both of the latter transfers, however, a considerable number of related cases were already pending at the time of transfer. In a case in which the motion concerned only two cases and they involved no "exceptional" common issues of fact, the panel denied transfer of the two cases. *In re Scotch Whiskey*, 299 F. Supp. 543 (1969).

161. 28 U.S.C. § 1407(a) (Supp. IV, 1965-1968). The panel has stressed this twofold test of transfer. The convenience test looks to the convenience of *all* the parties and *all* the witnesses; indeed, the panel has transferred several actions in which the inconvenience of one party has been overridden by looking at all the actions as a whole. See *In re Library Editions of Children's Books*, 297 F. Supp. 385 (1968); *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (1968); *In re Air Crash Disaster at Greater Cincinnati Airport, Constancy, Ky.*, 298 F. Supp. 353 (1968) (one defendant named in only one action; motion for severance from a § 1407 transfer denied). The promotion of just and efficient conduct is important in the transfer of cases which have different legal theories but similar fact situations (see note 163 *infra*), and in the denial of transfer when the pretrial proceedings in some of the related actions are nearly complete. See *In re Air Crash Disaster at Falls City, Neb.*, 298 F. Supp. 1323 (1969); *In re Protection Devices & Equip. Cases*, 295 F. Supp. 39 (1968); *In re Eisler Patents*, 297 F. Supp. 1034 (1968) (Most of the related cases in which transfer was requested had already been dismissed in court.).

162. 28 U.S.C. § 1407(a) (Supp. IV, 1965-1968).

1407 procedures are completed, further consolidation for trial through the use of section 1404 may be desirable.<sup>163</sup> However, an additional standard must be met to permit transfer under section 1404. Section 1404(a) requires that the transferee court be one "where the case might have been brought" in the first instance.<sup>164</sup> That provision preserves both the venue requirements for trial and the parties choice of forum. It also permits separate trials of local issues and avoids many of the problems of determining the applicable law. But most cases in which consolidation for pretrial purposes under section 1407 is advantageous seem likely to profit also from consolidation for trial under section 1404.<sup>165</sup> Still, if the standard of section 1404 is not met, the benefits of that consolidation will be lost.

When only a section 1407 pretrial consolidation is made and there is no consolidation for trial, further problems arise. For example, the close control of the case by a single judge—one of the principal recommendations of the *Manual*<sup>166</sup>—is lost when the case is returned to various district courts for trial. The *Manual* does suggest that conferences be held among all of the judges involved in such trials,<sup>167</sup> but that seems to be an inadequate remedy. Certainly, the possibility of conflicting judgments on similar facts is increased by the very fact that many different judges or juries are hearing the related cases. Nevertheless, that objection to the section 1407 procedure should not be controlling if it is determined that the interests in having local courts decide local issues, in preventing possible conflicts in the applicable law, and in preserving forum protection override the considerations which gave rise to the basic expediting procedures of the *Manual*.

Another objection that will have to be faced in attempting to use a section 1407 transfer is the suggestion that transfer be denied if there is a significant possibility of settlement before trial.<sup>168</sup> How-

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163. MANUAL § 5.32[4], at 96.

164. 28 U.S.C. § 1404(a) (1964).

165. In the electrical equipment cases, over twenty § 1404 motions followed the closing of consolidated discovery. Many were granted at the court's discretion over the parties' objections. See, e.g., *I.T.E. Circuit Breaker Co. v. Regan*, 348 F.2d 403 (8th Cir. 1965); *I.T.E. Circuit Breaker Co. v. Becker*, 343 F.2d 361 (8th Cir. 1965); see Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. CHI. L. REV. 558, 562 (1966). The panel, however, has transferred several cases in which the underlying legal doctrines differed and thus in which a combined trial would not be so advantageous. *In re Antibiotic Drugs*, 299 F. Supp. 1403, 1406 (1969); *In re 4th Class Postage Regulations*, 298 F. Supp. 1326 (1969); *In re Air Crash Disaster at Greater Cincinnati Airport*, Constancy, Ky., 295 F. Supp. 51 (1968).

Trials that may be transferred under § 1404(a) may not be transferred for pretrial consolidation under § 1407. For a discussion of the possible conflict in application of §§ 1401(a) and 1407, see Comment, *supra* note 156, at 203-05.

166. MANUAL § 0.3, at 12; § 1.1, at 18-19. These provisions are carryovers of the primary recommendations of the Prettyman Report and the *Handbook*.

167. MANUAL § 5.32[3], at 96.

168. See Comment, *Consolidation of Pretrial Proceedings*, *supra* note 165, at 573-75.



ever, experience in the electrical equipment cases and in other cases seems to indicate that there is a greater simplification of the issues and thus more out-of-court settlements when all related issues are consolidated for discovery.

A final problem with section 1407 involves the availability of a procedure for appealing the panel's orders. Section 1407(e) provides that appeals shall be by extraordinary writ and that they shall be made only in the appellate court which has jurisdiction over the transferee court. Furthermore, no review exists for the *denial* of a motion to transfer. Those rules may cause the parties some difficulty, particularly since any undue cost or burden on the parties arising from the transfer to a distant court would be increased by their having to process the appeal in the appellate court of that same jurisdiction.<sup>169</sup> Accordingly, unless section 1407 is amended to permit review of a transfer order by the appellate court having jurisdiction over the transferor court, the panel must be sensitive to the added and perhaps prohibitive costs of appealing its order. When the merits of a particular transfer are doubtful, the panel should refrain from ordering that transfer, since review of the decision by an appellate court is unlikely.

#### X. CONCLUSION

Out of the many procedures and recommendations of the *Manual* and the various responses to them, one prime requisite stands out: that adequate flexibility is needed in applying and adopting the suggestions of the *Manual*.<sup>170</sup> If those suggestions are applied only when their application is appropriate, they will greatly increase the efficiency of judicial administration while still providing the framework within which a just determination of the issues in controversy can be achieved. If they are used improperly or too rigidly, however, the achievement of both efficiency and justice may be frustrated.<sup>171</sup>

It has been argued that a member of the judiciary who has had limited experience in handling complicated litigation would be swayed by the fact that the *Manual* is the product of a distinguished panel of judges and was published with the imprimatur of the Judicial Conference of the United States.<sup>172</sup> Such a judge, the argu-

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That Comment also recommends that the panel, in determining whether to grant transfer, consider the number of cases to be consolidated and the number and complexity of the issues involved.

169. *Id.* at 565-73.

170. See Outline Memorandum, *supra* note 41, at 1; A.C.T.L. Report, *supra* note 22, at 1-6; Cravath Memorandum, *supra* note 21, at 1-5; Special Meeting, *supra* note 51, at 11-39 (remarks of Leonard J. Emerglick, Washington, D.C.).

171. Pendleton Memorandum, *supra* note 62, at 2.

172. See note 1 *supra*.

ment runs, might, mistakenly, give the *Manual's* suggestions the status of inflexible rules, rather than using them selectively to fit the needs of the specific case.<sup>173</sup> Moreover, since complex cases are generally unique, such unwaivering application will discourage needed experimentation.<sup>174</sup> Responding to that criticism, the *Manual* states that not all of the recommendations are suitable for every complex case,<sup>175</sup> and that both judges and lawyers are encouraged to adapt and improve them.<sup>176</sup> But that general implication of flexibility is tempered by the statement that the *Manual's* suggestions, when used in appropriate cases, are the most efficient and just procedures which have yet been devised.<sup>177</sup>

With the backlog of cases and the prolonged delays that now exist in most courts, there clearly is a pressing need for the development of effective modern techniques of judicial management. But the methods employed to clear dockets must ultimately comport with the fundamental goal of providing substantial justice in all cases.<sup>178</sup> Because the *Manual* has a potentially far-reaching effect, the attainment of that goal requires that the application of the *Manual's* recommendations be flexible.<sup>179</sup> Thus, while the *Manual* provides many potentially useful tools for the achievement of efficient judicial administration, each court, in order to maximize that potential, must retain the authority to apply those tools in a flexible and innovative manner.

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173. Special Meeting, *supra* note 51, at 42 (remarks of Don M. Jackson of Jackson, Barker & Sherman, Kansas City, Mo.); A.C.T.L. Report, *supra* note 22, at 2.

174. Cravath Memorandum, *supra* note 21, at 3.

175. MANUAL 7.

176. An important indication that the *Manual* is intended to be flexible and to reflect advances in technique is that the *Appendix* in the version put out by the Committee is in loose-leaf form. See Proc. of the Co-Ordinating Comm. on Complex and Multidistrict Litigation, Denver, June 4, 1968, at 37 (remarks of Professor Arthur R. Miller of the Univ. of Michigan Law School). In addition, members of the judiciary are asked to document important rulings on evidentiary and procedural matters arising in the big case in order that the *Manual* may be kept up to date. MANUAL 5 n.1. Finally, changes in language have been made throughout the text to emphasize the need for experimentation and the employment of a flexible approach suitable to the case at hand. Becker Memorandum *supra* note 139, at 1. See note 2 *supra*.

177. A similar "give and take" statement occurs in § 0.4 in which the *Manual* states:

It is not intended, however, to recommend an inflexible program of holding only four principal pretrial conferences. The suggestions made herein are subject always to the discretion of each judge to adapt the procedures to the particular case or to deviate and innovate where necessary or desirable. *However, the first principal (preliminary) and final pretrial conferences ordinarily should be held.* *Id.* at 14 (emphasis in original).

178. Cravath Memorandum, *supra* note 21, at 9.

179. Jackson Memorandum, *supra* note 125, at 6. See also text accompanying notes 170-71 *supra*.