

IV. THE FEDERAL RULES IN PRACTICE

JUDICIAL ADJUNCTS REVISITED: THE PROLIFERATION OF AD HOC PROCEDURE

LINDA SILBERMAN†

INTRODUCTION

This birthday celebration of the Federal Rules is a time to marvel at the enduring character of the 1938 Federal Rules of Civil Procedure. Given the dramatic changes that have taken place in litigation over these decades, it is no surprise that the proponents of the philosophy of uniform and trans-substantive rules believe that time has proved their case. I want to suggest, however, as indeed others already have,¹ that trans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules. One clear example of such ad hoc proceduralism comes via the increased number of judicial adjuncts, who customize procedure for particular and individual cases. This example supports those who call for a different approach to federal rulemaking.²

The judicial adjuncts to whom I refer are primarily masters and

† Professor of Law, New York University School of Law. B.A. 1965, J.D. 1968, University of Michigan. My special thanks to Professors Steve Burbank and Steve Subrin for the many intense conversations on the subject of trans-substantive procedure. I am also grateful to Dean John Sexton, Professors Oscar Chase, Rochelle Dreyfuss, Samuel Estricher, Judith Resnik, Victor Goldberg, Richard Revesz, and Mr. Sol Schreiber for their comments and suggestions on prior drafts. And my appreciation to my former student, Barbara Quackenbos, now a graduate of New York University School of Law and present clerk to Magistrate Kathleen Roberts, for her extensive research, help and, as always, her unbounded enthusiasm and devotion to the project.

¹ See Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941-42 (1989); cf. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2048 (1989) (“[N]on-trans-substantive procedure is already here; some cases already have special predetermined procedural rules”).

² For a critique of the informalism and discretion which has come to dominate the conduct of litigation under the Federal Rules, see Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922-25 (1987); see also Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988) (noting trend in modern procedural law away from rules that make policy decisions and toward rules that confer a substantial amount of normative discretion on trial courts).

magistrates.³ There are also the newly created arbitrators in court-annexed arbitration used in a number of districts, but that experience is relatively new, and I bypass them for purposes of present discussion.⁴ There is no doubt that the use of judicial adjuncts has been extremely valuable in processing our expanding and complicated contemporary litigation caseload, and thus I intend my comments less as an attack on the use of masters and magistrates than as an example of why more dramatic procedural reform is in order. In short, I think delegations of judicial power to masters and magistrates have become the substitute for a more precise and specialized procedural code. To some extent then, the debate can be seen as one between those who are satisfied with an individual case-by-case customized procedure⁵ put in place by judicial adjuncts versus those who advocate more formal rules that do not slavishly adhere to a uniform and trans-substantive format.⁶ These divisions are also not as sharp as I first described them because I think the development and customization of specialized procedures under the present judicial adjunct models actually provide some of the building blocks on which a more formal system of particularistic rules can be erected.

Thus, the case study I present has a two-fold purpose. First, I make the claim that a close examination of modern judicial adjuncts exposes the myth that there is in fact a single set of "federal rules of civil¹ procedure," and I advocate establishing formal alternative proce-

³ Masters and magistrates have been the primary source of adjunct judicial help in the federal courts. See Weinstein & Weiner, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 *ST. JOHN'S L. REV.* 421, 436-38 (1988); see also Note, *Masters and Magistrates in the Federal Courts*, 88 *HARV. L. REV.* 779, 789-93 (1975) (summarizing the use of masters in federal courts during the first half of the twentieth century).

⁴ The 1988 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 has provided for court-annexed arbitration in certain district courts. 28 U.S.C. § 651-58 (1989). Prior experimentation had already taken place in these districts. See McMillen & Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 *NOTRE DAME L. REV.* 431, 432-38 (1985); Nejelski & Zeldin, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 *MD. L. REV.* 787, 800-07 (1983). The premises of alternative dispute resolution (ADR) are discussed in Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 *U. CHI. L. REV.* 424, 427-31 (1986). Some concerns with ADR are expressed in Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 *U. CHI. L. REV.* 366, 376-89 (1986).

⁵ See Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 *U. PA. L. REV.* 2067, 2081-85 (1989); Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 *U. PA. L. REV.* 1901, 1923-24 (1989).

⁶ See Burbank, *supra* note 1, at 1935-37; Subrin, *supra* note 1, at 2051.

dural tracks for processing different types of cases.⁷ Second, and on a less ambitious note, I believe that given the way special masters are now being used, specific revisions in Rule 53 itself are necessary. Because both of these proposals have more to do with the use of special masters than magistrates, my emphasis will be on the use of special masters. But it is worth looking at both models for points of contrast.

I. CONTRASTING THE SYSTEMS OF MASTERS AND MAGISTRATES

The introduction of federal magistrates and the increasing use of special masters is but one by-product of the dramatic changes in litigation since 1938. A variety of factors are responsible for this transformation of litigation: revisions in the 1938 Rules over the years,⁸ congressional expansion of new federal rights,⁹ and a judicial acceptance of an expanded role for courts and judges in the evolution of rights and remedies.¹⁰ To some degree, one would have expected a dramatic procedural overhaul to cope with the amount and new breed of cases. Instead, the existing system has been made functional by improvising with an adjunct judiciary, which does not have the status, tenure, and/or accountability of Article III judges.¹¹

At the outset, I want to distinguish the two main "systems" of adjuncts — masters and magistrates. Federal magistrates, unlike special masters, do have a formal and institutional role within the federal system. They were introduced into the federal judicial system with the passage of the Federal Magistrates Act of 1968,¹² replacing the commissioners (who had assisted in the preliminary stages of criminal cases) and taking on additional duties in civil cases. Under the statute, magistrates are salaried judicial officers, appointed for a term of years with qualifications established for their selection.¹³ Their duties are

⁷ See *infra* notes 210-18 and accompanying text.

⁸ Important revisions to the Federal Rules have been made over the past fifty years. In 1966, for example, substantial amendments to the joinder and class action rules were enacted. In 1970, a basic overhaul of the discovery rules took place, and in 1983, provisions for the imposition of sanctions were added to the pleading and discovery rules.

⁹ See R. POSNER, *THE FEDERAL COURTS* 80 (1985).

¹⁰ See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302-09 (1976); Galanter, *Reading the Landscape of Disputes; What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious Society*, 31 UCLA L. REV. 4, 18-26 (1983).

¹¹ Magistrates are appointed for an eight-year term pursuant to statutory procedures. See *infra* notes 13-14 and accompanying text. Special masters are appointed to aid the judge in the handling of a particular case. See *infra* notes 15-16 and accompanying text.

¹² 18 U.S.C. §§ 3401-02, 3060 (1982); 28 U.S.C. §§ 604, 631-39 (1982).

¹³ The existing requirements are set forth in 28 U.S.C. § 631 (1982). Magistrates

spelled out in both the Magistrates Act and the Federal Rules.¹⁴

In contrast, special masters are private lawyers, retired judges, or legal academics who are appointed to assist the judge in the handling of a particular case.¹⁵ No standards exist for their appointment, other than the requirement of an "exceptional condition" that appears in Rule 53(b) of the Federal Rules of Civil Procedure.¹⁶ The history of special masters is a much longer one, going back to early English chancery practice, continuing in federal equity practice, and introduced into the Federal Rules in 1938.¹⁷ Historically, special masters were used primarily to assist judges during trial in matters of account and often to report on matters of evidence.¹⁸ In early federal practice before 1938 special masters participated in virtually all aspects of the case,¹⁹ including those aspects that occurred prior to trial, but Professor (now Magistrate) Wayne Brazil argues that the 1938 adoption of Federal Rule 53, which expressly authorized the use of special masters, did not include a pre-trial role for special masters.²⁰ In addition, while the Clark Papers did indicate that the original advisory committee intended to continue "the long tradition in equity of using special masters to per-

are appointed by the concurrence of a majority of the judges of the relevant district, subject to the standards and procedures promulgated by the Judicial Conference, for a term of eight years. *See id.* at § 631(a), (b)(5), and (e). Their salaries are fixed by the Judicial Conference, up to an annual rate equal to 92% of a district judge's salary. *See* 28 U.S.C. § 634(a) (Supp. IV 1986).

¹⁴ *See* 28 U.S.C. § 636 (1982 & Supp. IV 1986); FED. R. CIV. P. 72-76.

¹⁵ *See* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 454-55 (1958); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1320 (1975).

¹⁶ Federal Rule 53(b) provides:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult compensation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

FED. R. CIV. P. 53(b).

¹⁷ The development of Rule 53 by the original advisory committee is discussed in Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 A Source of Authority and Restrictions?*, 1983 AM. B. FOUND. RES. J. 143 [hereinafter Brazil, *Referring Discovery Tasks*], revised and reprinted in Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, in MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS 305 (W. Brazil, G. Hazard & P. Rice eds. 1983) [hereinafter MANAGING COMPLEX LITIGATION].

¹⁸ *See id.* at 149-51.

¹⁹ *See id.*

²⁰ Professor Brazil argues that Rule 53 is aimed only at trial-stage functions and that the early drafts of the 1938 discovery rules indicated an intention by the original advisory committee to dispense with "discovery masters." *Id.* at 160-72.

form tasks after a court had determined liability,"²¹ the wide-ranging role that remedial masters now have²² is unlike their historic function. Indeed, existing Federal Rule 53, which provides for the appointment of special masters on a showing of exceptional conditions and envisions a report by the master subject to a "clearly erroneous" factual review by the district judge, does not quite fit the circumstances in which special masters are used today.²³

Notwithstanding the compelling historical evidence that a more limited role was intended, masters have consistently been used under Rule 53 to assist in trial, pre-trial, and post-trial phases of litigation.²⁴ Masters are usually private attorneys, retired judges, or legal academics, appointed by a judge under an order of reference in an individual case to assist the judge in the handling of a case when warranted by an "exceptional condition."²⁵ Concerns over the delay and expense often associated with the use of special masters and a fear that such references amounted to an abdication of the judicial function led the Supreme Court in *La Buy v. Howes Leather Co.*²⁶ to limit the circumstances under which a special master could be appointed. It should be noted that the reference in *La Buy*—for what was then a large and complicated antitrust action—to a "special master" (a practicing attorney as was the prevailing custom) was a general reference for the master to make findings of fact and conclusions of law and, in essence, to take over the adjudicatory task of the judge.²⁷

The modern uses of special masters are often quite different from the very general reference invoked in *La Buy*. To some extent, special masters' functions are often more sharply focused: to supervise various *pre-trial* phases of litigation (particularly in the large or complicated case), to facilitate settlement under a broad charter to act as a negotiator and conciliator between the parties, or to assist in shaping, monitor-

²¹ Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753, 757 (1984).

²² See *infra* notes 147-80 and accompanying text.

²³ For example, the report procedure with its concomitant "clearly erroneous" factual review does not make much sense when the master superintends discovery. Moreover, on dispositive motions magistrates make "recommendations" subject to *de novo* review; certainly special masters should not be given greater deference on similar references.

²⁴ The pre-trial role of special masters is discussed in Kaufman, *supra* note 15, at 468-69; Silberman, *supra* note 15, at 1338-46.

²⁵ See *supra* note 16 (quoting FED. R. CIV. P. 53(b)).

²⁶ 352 U.S. 249 (1957).

²⁷ The reference provided that the special master should attend the six-week trial in order to "take evidence and to report . . . to this Court, together with his findings of fact and conclusions of law." *Id.* at 253 (quoting the reference).

ing, or enforcing compliance with post-judgment relief.²⁸ It should be noted that the "exceptional condition" requirement is applicable to *all* references to masters in non-jury cases (other than magistrates),²⁹ except in matters of account and damage calculation,³⁰ but this lesson of *La Buy* seems to be honored more in the breach than in the observance in the recent cases in which special masters have been appointed.³¹

Masters and magistrates have taken on burdensome discovery tasks, orchestrated settlements, and issued rulings on preliminary issues. Although both have relieved the inordinate pressures on judges' time, there are practical objections to the delegations of these tasks. Discovery disputes and other pre-trial matters are now outside of direct control by the judge. The broad discretion inherent in the system of discovery rules is exercised by persons once-removed from the judge. This trend itself is inconsistent with the recent emphasis on strong and

²⁸ For a more extensive discussion of the various functions, see *infra* notes 61-146 and accompanying text.

²⁹ When a magistrate serves as a special master with consent of the parties, no exceptional condition is required. See 28 U.S.C. § 636(b)(2) (1982); FED. R. CIV. P. 53(b). References to magistrates — when not expressly made as a special master under Rule 53 — are not subject to Rule 53 at all. See FED. R. CIV. P. 53(f).

³⁰ See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2605 (1971). However, such references are proper only if the accounting or calculation is difficult. See *id.*; see also *infra* note 189 and accompanying text. It also should be noted that in jury cases the standard for referring a case to a master is "only when the issues are complicated . . ." FED. R. CIV. P. 53(b); see, e.g., *United States v. Horton*, 622 F.2d 144, 148-49 (5th Cir. 1980) (Medicare provider reimbursement case complicated enough to warrant special master).

³¹ A review of cases reveals a substantial number of references to special masters for discovery in "unexceptional" cases. See, e.g., *Celpaco, Inc. v. MD Papierfabriken*, 686 F. Supp. 983 (D. Conn. 1988) (master appointed to oversee discovery in RICO litigation); *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, No. 83 C 3150, (N.D. Ill. Dec. 27, 1988) (insurance dispute); *Roberts v. Heim*, 670 F. Supp. 1466, 1495-96 (N.D. Cal. 1987) (special master appointed to monitor discovery in litigation of RICO and securities violations); *National Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 560-61 (N.D. Cal. 1987) (master appointed to monitor defendant's compliance with its own internal plan for meeting discovery requests); *L. Knife & Son, Inc. v. Bonfi Prods. Corp.*, 118 F.R.D. 269, 270 (D. Mass. 1987) (special master appointed to recommend rulings in discovery proceedings for dispute between wine supplier and wine distributor over unfair trade practices); *Price v. Viking Press, Inc.*, 113 F.R.D. 585, 586 (D. Minn. 1986) (master used to oversee discovery in defamation case). It is unclear whether judges believed these pre-trial references to be warranted under Rule 53 or whether they were relying on their "inherent authority." Notwithstanding the extensive use being made of special masters at the pre-trial stage, Professor Brazil has persuasively made the case that Rule 53 did not contemplate a pre-trial role for masters under the Rule, in Brazil, *Referring Discovery Tasks*, *supra* note 17, at 160-72. Some courts, of course, exercise self-restraint and refuse to appoint a special master, despite a party's motion. See *Weissman v. Fruchtmann*, No. 83-8958 (S.D.N.Y. Apr. 14, 1986) (landlord/tenant case; judge denied motion on grounds that calendar considerations, complexity of issues, and possibility of long trial not "exceptional" condition under Rule 53).

close judicial management because the magistrate and not the judge has control of the case. The delegation of case management functions itself may create an incentive for expansion of the pre-trial phase of litigation, and an additional danger comes with layering the pre-trial phases with magistrates' and masters' decisions requiring further review by the district judge.

To the extent that cases are shaped, ad hoc procedures embraced, settlements influenced and even coerced, and law articulated, special masters may represent an even greater threat to the integrity of the process because they are private individuals who are not institutionally entrusted with judicial powers. The danger of a new cottage industry, enhanced by large fees for special masters and endangered by potential cronyism and conflicts of interest, cannot be ignored when assessing the system of special masters presently in vogue.³²

In raising these objections to the adjunct judiciary that has developed, I do not overlook the tremendous demands of modern-day case management. But I do believe that the ability to delegate many judicial tasks to judicial adjuncts partly explains why we have failed to undertake more comprehensive procedural reform. I want to tell the larger story of magistrates and special masters in order to help rethink a more particularistic formal procedure for many kinds of cases—cases that are presently given ad hoc and improvised treatment by judicial adjuncts.

II. FEDERAL MAGISTRATES AS JUDICIAL ADJUNCTS

The introduction of federal magistrates into the judicial system was a conscious effort to relieve district judges of their substantial pre-trial burden in civil cases, leaving judges free to devote more time to the central task of adjudication—hearing cases and writing opinions.³³ Furthermore, the addition of a full-time judicial officer to handle pre-trial aspects of the litigation was thought preferable to the delegation of those duties to part-time special masters, occasionally appointed to assume such tasks.³⁴ Therefore, in 1968, magistrates replaced the former commissioners (who assisted in the preliminary stages of criminal cases)³⁵ and in addition assumed a central role in handling pre-trial

³² See *infra* notes 143-46 and accompanying text.

³³ The magistrate's role in civil cases under the 1970 Act is described in Silberman, *supra* note 15, at 1321-50; see also *Federal Magistrates Act: Hearings on S. 3475, S. 945 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., and 90th Cong., 1st Sess. 31, 34-37 (1966-67).

³⁴ See Spaniol, *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 568.

³⁵ See Peterson, *Federal Magistrates Act: A New Dimension in the Implementa-*

matters in civil litigation.³⁶ The original Act provided that these full-time judicial officials could be assigned, when so authorized by a majority of the district judges, "such additional duties as are not inconsistent with the Constitution and laws of the United States."³⁷ The original statute, with language designed not to restrict potential uses of magistrates, referred expressly to the tasks of (1) traditional special masters, (2) pre-trial and discovery assistance, and (3) recommendations on whether to hold post-conviction relief hearings.³⁸ Following some confusion about the extent of magistrates' duties under these rather vague guidelines and conflicting authority concerning the standard of review by judges of magistrate rulings,³⁹ the Magistrates Act was amended in 1976 and again in 1979 to spell out more precisely the powers of magistrates. Under these provisions, non-dispositive pre-trial matters may be determined by the magistrate subject to traditional review by the district court;⁴⁰ other dispositive-type matters, such as summary judgment, judgment on the pleadings, and motions to dismiss or to maintain a class action may be heard by a magistrate whose "recommendation" will be subject to "de novo determination" by the district court.⁴¹ In addition, magistrates may, with consent of the parties, conduct jury and non-jury trials.⁴²

tion of Justice, 56 IOWA L. REV. 62, 66-67 (1970).

³⁶ See *supra* note 33.

³⁷ Pub. L. No. 90-578, 82 Stat. 1108, 1113 (1968) (codified at 28 U.S.C. § 636(b) (1982)).

³⁸ See *id.* at § 636(b)(1)-(3). "Additional duties" held to be appropriate under the original statute included review of the administrative record in Social Security benefit cases. See *Mathews v. Weber*, 423 U.S. 261 (1976).

³⁹ See, e.g., *DeCosta v. Columbia Broadcasting Sys.*, 520 F.2d 499, 503-04 (1st Cir. 1975) (presenting question of whether magistrate may preside at trial with the consent of the parties), *cert. denied*, 423 U.S. 1073 (1976); *TPO, Inc. v. McMillen*, 460 F.2d 348, 359 (7th Cir. 1972) (holding that case-dispositive matters could not be referred to a magistrate); see also *Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 22 (1975) (report of William Hastie, Chairman) (magistrates "are the final judges in many instances, and hold in [their] hands broad and sweeping powers"); S. REP. NO. 625, 94th Cong. 2d Sess. 7-8 (1976) (magistrate has authority to make final determination of pre-trial issues subject to review by the court under the "clearly erroneous standard").

⁴⁰ See 28 U.S.C. § 636(b)(1)(A) (1982). The power of magistrates to hear and make recommendations on dispositive motions, subject to *de novo* review was upheld in *United States v. Raddatz*, 447 U.S. 667 (1980) (criminal suppression hearing).

⁴¹ See 28 U.S.C. § 636(b)(1)(B) (1982).

⁴² See *id.* at § 636(c)(1). The courts have consistently upheld this power as within constitutional bounds. See, e.g., *Goldstein v. Kelleher*, 728 F.2d 32, 36 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984); *Collins v. Foreman*, 729 F.2d 108, 120 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984); *Wharton-Thomas v. United States*, 721 F.2d 922, 924-30 (3rd Cir. 1983); *Puryear v. Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984); *Lehman Brothers Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984).

With the 1983 amendments to the Federal Rules of Civil Procedure, specific rules implementing the provisions of the Magistrates Act were introduced.⁴³ The statute had contemplated and relied on local rules as the means of offering and implementing flexibility in the use of magistrates within individual district courts. As magistrates assumed a substantial presence within the system, it made pragmatic sense to include within the Federal Rules themselves the statutory reference procedures for using magistrates.

The Magistrates Act, the Federal Rules, and individual local rules combine to permit judges to use magistrates to ease their caseloads with an eye to the particularized needs of an individual judge and the circumstances of a given case. As Professor Carroll Seron reports in her *Nine Case Studies*, the use of magistrates varies substantially from district to district—often depending upon the caseload demands of the particular district and the district's organizational philosophy about the relationship between judge and magistrate.⁴⁴

Although questions still arise over the propriety of particular references,⁴⁵ the statutory scope of magistrates' civil jurisdiction is generally clear. They may hold pre-trial conferences (including the initial 120 day conference required under Rule 16(b) when authorized by local rule);⁴⁶ they may be given a general reference to supervise discovery and hear and determine disputed matters that arise in the course of discovery, or they may take a reference to rule on a specific discovery dispute;⁴⁷ they may hear and make recommendations on other types of matters, including dispositive pre-trial motions such as summary judg-

(en banc), *cert. denied*, 469 U.S. 1158 (1985); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 542-43 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984). However, strong dissents regarding the constitutional power have been registered. *See, e.g., Geras*, 742 F.2d at 1045-54 (Posner, J., dissenting); *Lehman Brothers*, 739 F.2d at 1319-20 (Arnold, Lay, and Bowman, JJ., dissenting). The Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.* 458 U.S. 50, 87 (1982), striking down legislation granting bankruptcy judges broad Article III judicial power, is not inconsistent with permitting magistrates to conduct trials since such references must be with the consent of the parties.

⁴³ *See* FED. R. CIV. P. 72-76. The author served as Assistant Reporter to the Advisory Committee on Civil Rules when these Rules were added.

⁴⁴ Professor Seron examined the activities of magistrates in nine districts. *See* C. SERON, *THE ROLES OF MAGISTRATES: NINE CASE STUDIES 1* (1985) [hereinafter *NINE CASE STUDIES*]; *see also* C. SERON, *THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS 71* (1983) [hereinafter *ROLES OF MAGISTRATES*].

⁴⁵ The most recent conflict—whether magistrates may preside over jury selection in a federal trial—was decided by the Supreme Court this past term. *See Gomez v. United States*, 109 S.Ct. 2237 (1989) (holding that the Magistrates Act does not authorize a magistrate to preside over jury selection).

⁴⁶ *See* FED. R. CIV. P. 16 & advisory committee note.

⁴⁷ *See* *ROLES OF MAGISTRATES*, *supra* note 44, at 16-20; *see also* 28 U.S.C. §636 (b)(1)(A) (West Supp. 1988).

ment;⁴⁸ they may be used to assist in settlement aspects of the case; and they even may, with the consent of the parties, preside at trials.⁴⁹

Professor Seron's empirical work offers a more realistic sense as to how magistrates are actually functioning in civil cases.⁵⁰ In a number of districts, magistrates are hearing substantial numbers of post-conviction relief and social security cases, in which the magistrate makes only a "recommendation," to be accepted or rejected by the district judge. Although critics often object that such references amount to a kind of "second-class justice" for these parties,⁵¹ the caseload proportions of the federal docket indicate that jurisdictional reshuffling of some type will be necessary. When weighed against other alternatives, such as more dramatic limitations on access to the federal courts or the creation of specialized courts for some of these cases, the magistrate referral option with *de novo* review by the district judge remains attractive.

The area in which magistrates seem to have the highest degree of civil case participation is at the discovery stage, where magistrates not only superintend pre-trial, but also "hear and determine" non-dispositive motions.⁵² This trend is not unexpected. The Magistrate's Act was intended to provide relief for trial judges to insure that judges are free to perform their crucial adjudicatory duties without undue distraction. Moreover, the practice of providing for magistrate control over discovery is part of the larger judicial trend toward a case-management philosophy and more tightly controlled pre-trial handling of civil cases.

That magistrates have an important pre-trial discovery role is inevitable; what price the judicial system pays for that is less clear. One advantage that magistrates have (at least when compared to other adjunct alternatives, whether they be special masters, arbitrators, or mediators) is their institutional accountability. Magistrates are salaried judicial officers; proceedings before them and assignments to them are within a structure of formal rules. Qualifications for their appointments are mandated. Relationships between judges and magistrates, although not uniform across districts, are well-developed.

As a long-time advocate of the magistrate system,⁵³ I recognize the important and valuable role magistrates have in processing the heavy

⁴⁸ See ROLES OF MAGISTRATES, *supra* note 44, at 16-20; see also 28 U.S.C. § 636 (b)(1)(B) (West Supp. 1988).

⁴⁹ See ROLES OF MAGISTRATES, *supra* note 44, at 16-20; see also 28 U.S.C. § 636 (c)(1) (West Supp. 1988).

⁵⁰ See NINE CASE STUDIES, *supra* note 44, at 5-14.

⁵¹ Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 438 n.243 (1982).

⁵² See NINE CASE STUDIES, *supra* note 44, at 69-82.

⁵³ See Silberman, *supra* note 15, at 1372; Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070, 1106-08 (1975).

civil litigation caseload. I merely raise a two-fold concern that comes with substantial reliance on judicial adjuncts. First, an uncensored, almost reflexive response to refer all pre-trial discovery to magistrates is developing. As a result, there may be a hydraulic effect on discovery, now that there is an "institutionalized setting" in which discovery disputes may flourish. Litigants are somewhat insulated from the judge, and to some degree the recent emphasis on strong and close judicial management is undercut because the magistrate and not the judge has control of the case.⁵⁴ The conclusion that magistrates are another catalyst for increased discovery is mere speculation, but the thought is worth consideration. Second, the institutional response—to take burdensome discovery away from judges and place it elsewhere in the system—may have relieved some of the pressure on the rulemakers to reassess the discovery rules more generally. Ad hoc attention to and discretionary-based treatment for different kinds of cases—in the form of magistrate supervision—continue to give sustenance to the myth that we operate in a system of trans-substantive procedure. Systematized, formal rules for particular kinds of cases may be an alternative that the creation of the magistrate system has allowed us to forsake.

III. SPECIAL MASTERS

Whatever objections one might have to the bureaucratization and proliferation of adjuncts that has come with the system of magistrates, those developments pale when measured by the recent and expanding phenomenon of delegations of authority to special masters.⁵⁵ It is ironic

⁵⁴ The recent emphasis on judicial management has been criticized as taking judges away from their core mission of adjudication. For an analysis and critique of managerial judging, see Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 328-34 (1986); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 534-39 (1986); Resnik, *supra* note 51, at 424-31. Not surprisingly, the judges themselves are more sanguine about the need to serve as "case manager." See Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770-73 (1981); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400, 402-06 (1978).

⁵⁵ Some of the objections to special masters—whether they serve as pre-trial assistants or in the broader role of fact-finders in complex litigation—are not necessarily applicable to magistrates. Magistrates, unlike masters, are salaried judicial officers with specified duties delineated by statute and local rules. Procedures for review of magistrate determinations and recommendations are defined, and the scope of judicial review is also provided. Neither the outside commitments of ad hoc special masters or the delay and expense characteristically associated with the schedules of private "masters" burden the magistrate system. Moreover, the appointment of magistrates is part of an institutional process. Indeed, for these reasons, the Magistrates Act permits the appointment of a magistrate as a special master, when the parties consent, without requiring that the ordinary requirement of an exceptional condition in Rule 53 be met. References to

that the special master role, particularly in the pre-trial phase of litigation, appears to have been expanded rather than reduced by the appearance of federal magistrates.⁵⁶ A survey and reading of reported cases reveals an increasing use of special masters in a variety of contexts.

For the moment, I want to bypass the oldest and least controversial role of special masters in matters of accounting, the calculation of damages,⁵⁷ and other ministerial roles in the administration and distribution of settlement or judgment funds.⁵⁸ There have been two broader interventionist roles for special masters that have emerged relatively recently: one is a case evaluation and case management function, which includes supervision of discovery, the resolution of discovery disputes and other pre-trial matters, and settlement;⁵⁹ the second is a post-relief role in helping the court implement and effectuate equitable decrees involving complicated institutional relationships.⁶⁰ Neither of the roles

magistrates generally are not within Rule 53 unless so specified.

⁵⁶ There was some thought that the availability of magistrates might alleviate the need for special masters. However, the example of the para-judge or assistant judge in the character of magistrate in fact may have glamorized the role of "assistant to the judge."

⁵⁷ For discussion of using special masters for matters of account and for computing damages, see *infra* note 189 and accompanying text.

⁵⁸ See, e.g., *Ex parte Peterson*, 253 U.S. 300, 306 (1920) (appointment of an auditor in an action at law). For a more modern example of a special master serving in this capacity, see *Brock v. Ing*, 827 F.2d 1426 (10th Cir. 1987).

⁵⁹ For a thorough discussion of the role of special masters in case evaluation and case management, see Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 397 (1986) [hereinafter Brazil, *Complex Cases*] (noting the pressure on judges to take a more activist role in managing litigation, and the related consequences of increased responsibility for special masters); see also Brazil, *Special Masters in the Pre-trial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 289, 294-317 (discussing the use of special masters in the pre-trial phase). For more specific case studies of how special masters function, see Hazard & Rice, *Judicial Management of the Pre-trial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RES. J. 375, 381-414 (1982); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 456-91 (1986) (describing his role as master managing the pre-trial phase in several large cases); see also Kaufman, *The Judicial Crisis: Court Delay and the Parajudge*, 54 JUDICATURE 145, 148 (1970) (encouraging the use of para-professionals to meet the increasing amount of litigation); Kaufman, *supra* note 15, at 466 (study of three complex cases demonstrated that appointment of special masters resulted in "an overwhelming savings of the court's time and labor").

⁶⁰ For an excellent overview, see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 805-09, 827-28 (1978); see also Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 491 (1980) (arguing that detailed supervision of institutional litigation is a response to complexity and intransigence); Weinberg, *The Judicial Adjunct and Public Law*, 1 YALE L. & POL'Y REV. 367, 368 (1983) (examining the role and effect of judicial adjuncts).

is characteristic of the special master envisioned by the 1938 Federal Rules.

A. *Pre-Trial*

The special master's pre-trial role is most relevant to our purposes in assessing the impact on what I sense is the retreat to an equity-based system of procedure, the failure to address troublesome procedural issues with more formalized rule-making, and the absence of specialized procedures for specialized cases. I say that notwithstanding the irony that it is precisely such "procedural specialization" that is brought to bear in cases in which special masters are used to supervise discovery.⁶¹ But the technique is ad hoc, informal, discretionary and expensive.

A prime example of case management and *sui generis* procedural innovation is the Ohio asbestos litigation which involved two special masters, Professors Francis McGovern and Eric Green. In 1983, with 80 pending asbestos cases in the Northern District of Ohio (and 34 more on the way) assigned to different judges, some having been filed years earlier, Judge Lambros appointed the two special masters to oversee pre-trial and help prepare for a possible trial of these many claims.⁶² One early pre-trial activity undertaken by McGovern and Green involved the gathering of information from the parties about past trial outcomes and settlement amounts with a dual purpose of preparing for trial and establishing settlement parameters.⁶³ After interviewing the parties, the masters set up a limited discovery schedule which would enable each case to be developed sufficiently for a realistic evaluation. Then the parties were brought together to discuss possible settlement. If the initial settlement conference did not yield the desired resolution, the parties could then bear the expense of further discovery which might have greater relevance with respect to a projected trial.⁶⁴

In addition to equalizing the information available to the parties and promoting settlement before expensive discovery, the masters also

⁶¹ See *supra* note 31 and accompanying text.

⁶² The Ohio asbestos litigation is discussed at length in both Brazil, *Complex Cases*, *supra* note 59, at 398-402, and McGovern, *supra* note 59, at 478-91.

⁶³ Various of the defendants had kept their settlement offers secret from other defendants, with the result that the plaintiffs alone could assess the settlement value of many claims. According to McGovern, the defendants cared less about the absolute amount of money they spent and were concerned more about the amount relative to what other defendants paid out. The means of promoting future settlements, therefore, was to educate the defendants about each others' settlements. See McGovern, *supra* note 59, at 480.

⁶⁴ See *id.* at 484.

sought to group the cases into sub-categories which would conceivably lead to rapid disposition of most or all of the cases.⁶⁵ This "cluster" of a representative sample from each "disease category" would proceed through discovery, settlement negotiation, and trial in an effort to induce settlement.⁶⁶ According to McGovern, the sample contained both weak and strong cases for each side in an effort to convince each side of the possible flaws in its own case, and the strength of the other's.⁶⁷

Another *sui generis* procedural innovation adopted by the special masters necessitated the involvement of others besides the masters. "Neutral" individuals who had been trained for their data collection role completed for each plaintiff an extremely detailed protocol which then was computerized.⁶⁸ This information was supplemented by a computerized memory, in essence, of what asbestos cases had fetched in settlement, at trial, and in summary jury trials. The costs for special masters, experts, computers, and incidental design of the innovative program ran to over \$250,000.⁶⁹ The system, by now a small bureaucracy, became even more elaborate. The computers were programmed with theories of econometrics and "dynamic" decision making to include legal, economic, political, and psychological permutations that could influence the process of negotiation and accord.⁷⁰ Finally, as he had done in other cases, McGovern authored an "expert system" to mimic the decision-making process.⁷¹

In sum, special masters McGovern and Green performed their assigned task—customizing a system to process asbestos claims promoting settlement while minimizing substantive unfairness to any of the parties—with insight and imagination. Yet, like Professor Brazil, I am uneasy about the development of such an elaborate and makeshift procedure given the sobering outlay of resources. As Brazil points out, there is a nagging worry that reasonably accurate evaluations of a plaintiff's case could have been produced without resorting to a complex and specially-produced apparatus.⁷² Again, this is not meant as harshly as it

⁶⁵ See *id.* at 480.

⁶⁶ See *id.* at 484.

⁶⁷ See *id.* While ingenious in some respects, McGovern's streamlining of the pre-trial phase also raises some concern about the specter of parties feeling coerced into settling.

⁶⁸ See *id.* at 487.

⁶⁹ See *id.* at 489. McGovern notes that a grant from the National Institute for Dispute Resolution helped defray some of the cost to the parties. See *id.*

⁷⁰ See *id.* at 488.

⁷¹ See *id.* In the same article, McGovern describes his design of "a scorable game that would mimic the actual dispute" in the *United States v. Michigan* litigation, arising from a current dispute of an 1836 treaty between the United States and the Ottawa and Chippewa tribes. *Id.* at 461.

⁷² See Brazil, *Complex Cases*, *supra* note 59, at 402.

might sound. The number of plaintiffs in the Ohio court may have made traditional methods of case valuation impracticable and too time-consuming. But if such customized tailoring—or something like it—is desirable, perhaps there is an accumulated wisdom to be applied generically to other asbestos cases. Alternatively, perhaps the costs of such customized tailoring outweigh the benefits.

In a comparable elaborate undertaking, Professors Hazard and Rice were appointed special masters in the huge AT&T antitrust litigation.⁷³ For over three and a half years they supervised various aspects of this massive litigation initiated by the government to divest AT&T, a \$100 billion-a-year corporation, of at least some of its operating companies. The case management task was overwhelming: tens of millions of pages of documents, thousands of privilege requests, and more than two hundred depositions.⁷⁴

Initially, their mandate was “to adjudicate claims of privilege,” in their words.⁷⁵ To reduce the number of documents for which privilege might be claimed, the judge allowed the producing party to mark a document “Protected,” so as to confine the contents to the litigation.⁷⁶ For documents for which this protection was insufficient, the masters developed a series of guidelines purporting to set forth existing law and under which privilege claims would be resolved. This clarification had a self-censoring effect on the parties, who were reluctant to jeopardize their standing with the masters with frivolous claims of privilege.⁷⁷ A further requirement put a burden of written factual support on the party claiming privilege. In addition, the parties had to file indexes every few weeks, summarizing the documents for which a privilege claim was anticipated. A revised index, often containing many fewer claims of privilege, was due several weeks after production. Consequently, parties were much more likely to claim privilege only when they had a solid basis for doing so.

Using this streamlined procedure, Hazard and Rice were able to rule on over 4,000 claims referring to over 3,500 documents in roughly

⁷³ See Hazard & Rice, *supra* note 59, at 384. Hazard and Rice were appointed as special masters in May of 1978, three and a half years after the case was filed.

⁷⁴ See *id.* at 382.

⁷⁵ *Id.* at 384.

⁷⁶ Judge Greene, who replaced Judge Waddy early on in the litigation, issued the protective orders. See *id.* at 398.

⁷⁷ See *id.* at 397-405 (describing in detail this system for assessing claims of privilege); see also Rice, *Judicial Management of Complex Litigation: Further Comments on the Use of Informal Management Techniques and on Procedures for the Resolution of Privilege Claims*, in *MANAGING COMPLEX LITIGATION*, *supra* note 17, at 296-98 (defending the process used to assess privilege claims in the AT&T litigation).

a year.⁷⁸ Robert McLean, one of the counsel involved, properly points out two main reservations to the privilege procedures devised by Hazard and Rice: it may not be necessary to "reinvent the wheel concerning the law of privilege" in every mass litigation,⁷⁹ and such an elaborate procedure may be gratuitous in a case where there is less resting on the outcome of the privilege claim, whether it is mass litigation or a more typical case.⁸⁰

Because their responsibility increased to include primary pre-trial management responsibility formerly vested with a magistrate, Hazard and Rice quickly discovered the serious weaknesses in ordinary discovery rules when applied to extraordinary litigation. For one thing, the timetable under the rules is simply too drawn out in a case like AT&T where years of discovery is virtually inevitable even under the best of circumstances. In an effort to expedite the discovery process, the masters required the parties to file a copy of all requested discovery with them. They were to receive any objection by the other side within ten days. A hearing would take place within seven days. The masters would tell the parties what issues to brief. The masters then typically had a decision within three days of the submission of briefs. Thus, from start to finish, a discovery dispute began, ran its course, and ended within about thirty days.

This unusual pace is not contemplated by the existing discovery rules, but illustrates one of the clearest advantages a special master offers. Similar time advantages also accrued by having the masters attend depositions which promised to be particularly contentious. On other depositions, the masters were available for phone consultations and often prevented drawn-out disputes.⁸¹

Hazard and Rice attempted to limit the open-ended pleadings which are virtually useless in complex litigation like AT&T. They required the parties periodically to file Statements of Contentions and Proof, which mapped out both factual assertions and the evidence to be used at trial to support them.⁸²

In general, the masters set the tone and timetable for the litigation, and helped the parties define issues. They met frequently and informally with the parties, both in an effort to keep the momentum going

⁷⁸ See Hazard & Rice, *supra* note 59, at 404.

⁷⁹ McLean, *Pretrial Management in Complex Litigation: The Use of Special Masters in United States v. AT&T*, in *MANAGING COMPLEX LITIGATION*, *supra* note 17, at 284.

⁸⁰ See *id.* at 286.

⁸¹ See Hazard & Rice, *supra* note 59, at 391; McLean, *supra* note 79, at 276-77.

⁸² The procedure of using Statements of Contention and Proof is described in Hazard & Rice, *supra* note 59, at 405-10, and in McLean, *supra* note 79, at 286-88.

as well as to make decisions expeditiously.⁸³ They were not oblivious to the potential unfairness to the parties, however, and were careful to encourage the parties to seek formal hearings if they so desired.⁸⁴ The masters believed that the "threat" of either party resorting to a formal hearing increased the effectiveness of the informal procedure.⁸⁵ Counsel in the case, while realizing the value of operating by consensus, were less sanguine than the masters: "This *ex parte* contact by the parties with the special masters, however, while never actually abused by either side, had clear potential for abuse and left each side with a vague anxiety that something of consequence might be going on behind its back."⁸⁶ For similar reasons, counsel worried about the *ex parte* communications and *in camera* reports to the judge by the special masters, and were concerned that their position might not be represented exactly as they would have wished.⁸⁷ While all of the cases (the final tally was 112) settled within less than two and a half years, the institutional questions still linger. As McGovern himself candidly notes, "[I]f the managerial horse is indeed out of the barn, we need a theory for managing the horsepower."⁸⁸

The Agent Orange litigation was another important "special master" case—indeed, a number of special masters ultimately were used in the case, doing everything from general discovery to settlement.⁸⁹ If a case ever cried out for exceptional treatment, *Agent Orange* was it. The proportions of the case were staggering: 600 consolidated

⁸³ See McLean, *supra* note 79, at 286.

⁸⁴ See Hazard & Rice, *supra* note 59, at 395. According to Hazard and Rice, parties agreed to resolve "about 80 to 85 percent of the factual contentions" informally. *Id.* at 413. Somewhat ironically, the negotiation process lasted several months longer than the trial. (The case settled in the eleventh month of the trial, but had been widely expected to end in another month.)

⁸⁵ See *id.* at 394-95.

⁸⁶ McLean, *supra* note 79, at 278.

⁸⁷ See *id.*

⁸⁸ McGovern, *supra* note 59, at 491. Another, and ill-advised, delegation to special masters Hazard and Rice was the initial adjudication of evidentiary issues under Federal Rule of Evidence 803(8)(c), the so-called Business Records exception to the hearsay rule. The parties appealed "most of the special masters' hundreds of rulings on contested evidentiary questions." McLean, *supra* note 79, at 282. As Professor Rice himself observes about special masters, "when their authority is extended beyond those matters to trial-dominated issues and to legal questions of an outcome-determinative nature, the delegation will probably not be justified because the decisions of the special masters often amount to little more than costly advisory opinion." Rice, *supra* note 77, at 296.

⁸⁹ No fewer than eight special masters were utilized in *Agent Orange*. The latest function to be assumed by a special master was announced by Judge Weinstein in *In re Agent Orange Product Liability Litigation*, 689 F. Supp. 1250, 1257 (E.D.N.Y. 1988) (appointing a special master to hear "Appeals from denials of Payment Program benefits").

actions, over 15,000 named individuals, representing another 2.4 million veterans and family members.⁹⁰ The action took up a docket sheet 425 pages long, and the veterans were asking for between four and forty billion dollars in damages against the chemical companies.⁹¹ The chemical companies in turn sought to join the United States as a third party defendant, hoping either to get indemnity from the United States or to urge their own immunity via a "government contract" defense.⁹² Judge George Pratt, the original district judge in the case, appointed Sol Schreiber as special master to act as the court's agent in supervising all discovery, assisting in any settlement negotiations, and preparing the pre-trial order that would govern the Phase I trial on the issue of the government contract defense.⁹³ Professor Peter Schuck, in his book *Agent Orange on Trial*, explains some of the advantages of the special master in this litigation for the parties:

[F]or the parties, he offered a means to obtain swift decisions on discovery and related issues from someone with detailed knowledge of the case that was unavailable to a busy, generalist judge. Although the parties could always appeal the special master's decisions to the judge, they knew that frequent appeals would arouse resentment and probably be fruitless. The special master could insulate the court from messy, time-consuming details, distancing it from the lawyers' incessant posturings and wrangling. The master also constituted a new tactical resource with which the court could hope to manipulate the parties toward agreement.⁹⁴

Not only were there structural advantages in the use of a special master to supervise discovery in *Agent Orange*, but Sol Schreiber had unique capabilities. As a former federal magistrate, Schreiber had extensive judicial experience in fashioning practical and imaginative solutions to discovery problems. For example, Schreiber persuaded the government to provide him with a security clearance to examine government documents that might prove relevant; once Schreiber had narrowed the pool, the government lawyers then could assert their state-secret privilege, which requires an affidavit signed by the govern-

⁹⁰ See P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 4 (1986). The veterans came mainly from the United States, but they also came from New Zealand and Australia. See *id.* at 4-5.

⁹¹ See *id.* at 5.

⁹² See *id.* at 60-61.

⁹³ See *id.* at 82-85, 92-98 (describing Schreiber's significant role).

⁹⁴ *Id.* at 82-83. Judge Pratt confirmed all but one of Schreiber's decisions. That one was modified. See *id.* at 83.

ment department head. By relieving Cabinet officers from personally reviewing thousands of documents, this customized procedure was an invaluable aid to a potential discovery nightmare.⁹⁵

Schreiber also proposed a Solomonic solution early in the litigation which would have moved the case forward and given something to each of the parties. He suggested that the defendants agree to certification of the plaintiff class under Rule 23(b)(3) and payment of any notice that was ordered in return for plaintiffs' agreement to allow the defendants to pursue, unopposed, the government contract defense in a bench trial. Although the parties came close to entering a stipulation to this effect, they ultimately did not agree on Schreiber's compromise.⁹⁶ If they had accepted it, questions might have been raised as to whether this avenue of resolution—having parties abandon procedural protections to which they have a right—is appropriate. Perhaps a case with these dimensions is necessarily *sui generis*, but the impact of these suggested detours around clear procedural precedent is worth pondering. It could well be that a case like *Agent Orange* mandates these kinds of extraordinary and innovative procedures. But if such a case is judicially manageable at all, more formalized rules should be in place to govern it. And if adjudication is really not feasible, alternatives will never be developed in an atmosphere where ad hoc proceduralism reigns and outcome, not process, is the only consideration.

Schreiber did not remain as the special master in the *Agent Orange* litigation. Following Judge Pratt's appointment to the Second Circuit, the case was transferred to Judge Weinstein, perhaps the most experimental proceduralist of all district judges.⁹⁷ Judge Weinstein appointed Magistrate Shira Scheindlin to perform the discovery coordination functions that previously had been performed by Schreiber.⁹⁸ But Judge Weinstein's substitution of a magistrate for a master did not imply skepticism about the use of outside judicial adjuncts. In addition to Magistrate Scheindlin, Judge Weinstein introduced three special masters into the case, two of whom were to act explicitly as settlement masters to help the parties reach a settlement.⁹⁹

One does not have to accept Professor Fiss' absolutist notions

⁹⁵ See *id.* at 93.

⁹⁶ See *id.* at 96-98. Apparently, Monsanto and Diamond Shamrock, as the two "dirtiest" manufacturers, were reluctant to agree because they feared they would lose on the government contract defense, whether before a judge or a jury. See *id.* at 96.

⁹⁷ See *id.* at 111-12.

⁹⁸ See *id.* at 122. Schuck suggests that part of Judge Weinstein's motivation may have included the somewhat symbolic gesture of involving someone who was on the payroll of the United States government. See *id.*

⁹⁹ See *id.* at 144-47.

“against settlement”¹⁰⁰ to be suspicious of the settlement style adopted in *Agent Orange*. The dominant motive to “settle” this case by both the judge and the masters may have impaired the integrity of the process. Some of the objections to the *Agent Orange* settlement, such as judicial over-reaching and over-commitment and procedural unfairness, can be directed at both the judge and the masters.¹⁰¹ But the use of a special master exacerbates many of the problems, particularly where information is communicated to the parties indirectly by the masters. Although one special master model of settlement could “purify” the process by insulating the parties from the judge who makes preliminary rulings and ultimately tries the case,¹⁰² the master’s most effective settlement weapon is likely to be contact with and leverage through the judge.

The expense of a special master in these very exceptional kinds of litigations also must be considered.¹⁰³ The addition of a special master, who usually charges a normal hourly fee,¹⁰⁴ can be staggering.¹⁰⁵ In many cases, the costs are divided between both parties, although in *Agent Orange* it was defendants who paid the entire bill.¹⁰⁶ To the

¹⁰⁰ See generally Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1095 (1984) (“I do not believe that settlement as a generic practice . . . should be institutionalized. . . . Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and a judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.”).

¹⁰¹ See Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 359 (1986).

¹⁰² In England, the use of “masters at law” to settle cases serves this precise purpose. See Silberman, *supra* note 53, at 1106-07.

¹⁰³ Commentary on special master fees has been sparse. See generally Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141, 142 (1985) (noting that the question of fees for special masters has been overlooked).

¹⁰⁴ Ordinarily, masters will charge their hourly fees unless some other arrangement has been made, and courts will generally appoint them at that rate. *But see* Reed v. Cleveland Bd. of Educ., 607 F.2d 737 (6th Cir. 1979) (holding that the hourly rate the special master charged was excessive); *see also* Louisiana v. Mississippi, 466 U.S. 921, 921 (1984) (Burger, C.J., dissenting in part) (“I do not suggest that Special Masters should serve without compensation, as for example, Senior Federal Judges have done for a number of years in such cases, but I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this.”).

¹⁰⁵ The fees for the three special masters in *Agent Orange* were said to “total[] hundreds of thousands of dollars.” Schuck, *supra* note 101, at 348. More recent estimates suggest that special master Ken Feinberg and his firm alone received more than three million dollars in fees and expenses from the litigation. See Labaton, *Five Years After Settlement, Agent Orange War Lives On*, N.Y. Times, May 8, 1989, at D1, col. 1.

¹⁰⁶ Neither does there appear to be any obstacle to imposing special master costs on only one of the private parties, particularly if it is that party who has necessitated the need for a special master. *See* Brazil, *Complex Cases*, *supra* note 59, at 404; *see also* Brock v. Ing, 827 F.2d 1426, 1428 (10th Cir. 1987) (expense of master should be borne by the “wrongdoer”). In cases involving the government, the United States has taken the position that sovereign immunity prevents the imposition of special master

extent that utilization of special masters shortens pre-trial time, there may be a net effect of reducing parties' litigation costs,¹⁰⁷ if it is not offset by the additional expense of paying the special master. There also remains the danger that special masters encourage more elaborate procedures and, in the end, lengthen pre-trial time. As references to special masters become more prevalent in less unusual cases, the expense factor bears closer examination.

AT&T, the Ohio asbestos litigation, and *Agent Orange* may be cases in which no formalistic rules of any kind would suffice and, therefore, the individualized and customized treatment undertaken by special masters was the only practical alternative. Although the Administrative Office does not have precise statistics on cases where special masters are appointed,¹⁰⁸ a Westlaw search reveals that they are being used in a substantial number of cases other than the mega-litigation described above.¹⁰⁹ Because extensive discovery and substantial pre-trial motion practice is no longer unusual in much federal litigation, it is not surprising that judges are attracted to the option of using special masters to ease the pre-trial burden. Some judges have seen the use of special masters in environmental litigation, for example, to be appropriate—to supervise and conduct pre-trial discovery, to oversee and encourage stipulations of facts between the parties, to hear and make recommendations on dispositive matters such as summary judgment, and even to prepare reports on liability and ultimate remedies. Two courts of appeals have reviewed such uses of special masters in CERCLA actions, where the United States has sought to recover cleanup costs against a large number of defendants. Both courts found the district courts' delegations to special masters too broad and inconsistent with Rule 53(b), but differed in the way they thought special masters could properly be used. In *United States v. Conservation Chemical Co.*,¹¹⁰ a special master was given authority "to order and preside over pre-trial hearings . . . to supervise and issue recommendations regarding pre-trial matters, and . . . to hold hearings and issue recommendations on the claims for inclusion in any injunctive relief order and apportionment of costs."¹¹¹ The district judge denied a motion to vacate the reference, ruling that a number of "exceptional conditions" were

fees against it, but without success. *See Trout v. Ball*, 705 F. Supp. 705 (D.D.C. 1989).

¹⁰⁷ Chief Judge Kaufman argued that the expeditious pre-trial by the special master would result in a reduced net expense for the parties. *See Kaufman, supra* note 15, at 468.

¹⁰⁸ Telephone call to Office of Court Administration.

¹⁰⁹ *See* data base on file with author.

¹¹⁰ 106 F.R.D. 210 (W.D. Mo. 1985).

¹¹¹ *Id.* at 216.

present: voluminous technical and scientific data relevant to the liability issue, extensive discovery complicated by the absence of accurate documentation because certain business records had been destroyed, and the need for prompt resolution of this environmental endangerment. Several of the defendants sought mandamus, and in *In re Armco, Inc.*, the court concluded that reference to the master for trial was inappropriate but upheld the power of the master to conduct pre-trial discovery and to make recommendations with respect to dispositive motions, such as summary judgment.¹¹² The court also held that the master, after a determination of liability by the court itself, could conduct hearings and make recommendations with respect to damages and other relief.

In a similar case in the Sixth Circuit, however, the Court of Appeals in *In re United States* reversed a district judge's reference to the special master, under which she had authority to supervise the case and to "submit recommendations on all motions filed in the action after ordering sufficient briefing and an oral hearing, if necessary."¹¹³ Notwithstanding the district court's articulation of the exceptional conditions warranting the reference (calendar congestion, complexity of issues, lengthy trial, extraordinary pre-trial management in a case with more than 250 parties, and public interest in speedy disposition of the matter), the Court of Appeals found that only the reference of non-dispositive pre-trial matters was justified.¹¹⁴ Emphasizing that under Rule 53(e)(2) the district court must review the special master's recommendations and reject any findings of fact that are clearly erroneous, the Sixth Circuit observed that there was little time saved by use of a special master to hear pre-trial motions which would have to be briefed and argued twice: once before the judge and once before the master. And to the extent that the judge's burden was eased because the scope of review is limited by the clearly erroneous standard, the Court of Appeals still found the reference objectionable in that the master, and not the court, would decide the case. The Court of Appeals gave less attention to the portion of the order referring supervision of discovery and "non-dispositive" pre-trial motions to the master, possibly because the government had earlier acquiesced in a limited reference of certain discovery motions and did not press in its mandamus petition the court's requirement that the government pay half of the special master's fees.¹¹⁵ In seeming to approve the more limited role in discovery for the

¹¹² 770 F.2d 103, 105 (8th Cir. 1985).

¹¹³ *In re United States*, 816 F.2d 1083, 1085 (6th Cir. 1987).

¹¹⁴ *See id.* at 1088-89.

¹¹⁵ The government's present position is that absent its consent, sovereign immunity precludes the imposition of such costs by the court.

special master, the Court of Appeals noted that the large number of parties involved in the case could justify a reference of such non-dispositive discovery matters.

The Sixth Circuit is presumably correct in its view that special masters can be extremely useful in this narrower discovery role, but institutional concerns remain. My colleague Professor (now Dean) John Sexton was appointed as a special master in the Love Canal litigation, another CERCLA environmental case.¹¹⁶ There, plaintiffs—the United States, New York State, and UDC Love Canal—brought an action against several chemical companies, most notably Hooker Chemicals (now Occidental Chemical Corp. (OCC)), that dumped millions of pounds of chemicals into the Love Canal trench.

Judge Curtin's decision to appoint a special master was apparently prompted by the extensive document discovery requested by OCC and the state's claim of "deliberative privilege" for many of the requested documents. Interestingly, the option of referring those matters to a magistrate for *in camera* review was rejected on the grounds of the heavy caseload in the district which presumably was also occupying magistrate time. Whether any of the parties actually objected to the use of a special master is unclear, but they did participate in the selection of the master by nominating a pool of potential candidates from which Sexton was ultimately selected.¹¹⁷

As a matter of principle, the lack of formal procedures for selection of a special master is troubling. Indeed, in many of the earlier special master cases, such as *La Buy v. Howes Leather Co.*,¹¹⁸ the courts intimated that practitioners who served in the role often contributed to the delay in processing the case. The modern-day special masters, however, have more often than not been either prominent experienced practitioners with particular pre-trial expertise and the ability to make nearly full-time commitments, or prestigious academics with impeccable credentials and time flexibility. (A quick survey of the special masters in the cases noted here suggests that there is also a highly regarded crew of academic "proceduralists" who have contributed not only to the processing of the individual case, but also to conceptual thinking about pre-trial management and innovative practices for complex litigation.) Notwithstanding the high level of energy and competence of these individuals, they are selected from a narrow circle and

¹¹⁶ See *United States v. Occidental Chem. Corp.*, 606 F. Supp. 1470 (W.D.N.Y. 1985).

¹¹⁷ See Correspondence in Love Canal case (on file at *University of Pennsylvania Law Review*).

¹¹⁸ 352 U.S. 249 (1957).

have no institutional imprimatur to function as decision makers.¹¹⁹ Certainly when parties have not agreed to either the special master reference in general or to the person in particular, such "judicial" substitution in a case seems objectionable, particularly where the parties must bear the expenses. Consent by the parties alleviates some of these concerns, but there is always a danger that such consent might be less than voluntary because of judicial pressure to accept appointment of a special master. Indeed, even where true consent is obtained, the case shaping and the law articulation process set in motion becomes the province of a set of private judges. I have no quarrel with those litigants who are willing to pay a price for private judging and are prepared to opt out of the public system of courts (through resort to arbitration, or to some other private ADR mechanism).¹²⁰ However, the special master system continues to be a peculiar hybrid; for even where parties are willing to pay for a special master, they return (at taxpayer expense, of course) to the judge to seek review of the master's rulings.¹²¹ To the extent that no review is requested or when review becomes *pro forma*, adjudication of some important issues has then been inappropriately abdicated to the special master, and there is always the danger that the judge does not engage in the intellectual process of decision making once a special master has made her report.

Sexton's role in the Love Canal case highlights some of my misgivings. One issue which emerged in the discovery phase of the litigation was whether state officials were entitled to invoke "deliberative privilege," which protects state officials from revealing views communicated

¹¹⁹ Compare the procedures for selecting magistrates, which are set forth in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *THE SELECTION AND APPOINTMENT OF UNITED STATES MAGISTRATES* (1987) and now include the use of merit selection panels. Magistrates also have the advantage of familiarity with many of the discovery issues that arise in litigation. The academics may be one step removed, and private litigators who function in a particular case may have potential conflicts of interest given their own discovery practices.

¹²⁰ If the parties choose arbitration, however, the decision of the arbitrator is generally not subject to judicial challenge, except for bias or misconduct on the part of the arbitrator. Where parties are diverted to alternative dispute procedures within the court system, which they may use free of charge, questions of efficiency and cost have also been raised. See Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 390-91 (1986).

¹²¹ Under Federal Rule 53(e)(2), the master's finding of facts are subject to review on a clearly erroneous standard and issues of law are fully reviewable. Of course, the parties may stipulate to making findings of fact by the master "final" and not subject to review. See FED. R. CIV. P. 53(e)(4). However, such stipulation must be clear. Cf. *Turner v. Orr*, 722 F.2d 661 (11th Cir. 1984) (unclear whether "special master" appointed pursuant to consent agreement was essentially an arbitrator, who could make binding decisions, or a Rule 53 special master), *cert. denied*, 478 U.S. 1020 (1986).

within government circles. During depositions, another claim of privilege by state officials emerged—a “mental process” privilege, which protects officers from revealing their unexpressed thoughts or opinions about official policy. Although Professor Sexton had guidance from Judge Curtin on the earlier deliberative privilege, the question of the “mental process” privilege was close to one of first impression. Dean Sexton authored an innovative and path-breaking ruling on this issue, later affirmed by Judge Curtin.¹²² Although not “merits” issues, these kinds of issues may have precedential effect in other cases.

Another tentative hypothesis I have put forward relates to the potential hydraulic quality of discovery when a special master is brought in. Judicial adjuncts, of course, were instituted precisely to handle the overflow of discovery, but their presence in the system does not necessarily encourage self-restraint. In the Love Canal litigation, for example, the appointment of the special master seems to have generated additional document production and additional privilege claims. Whether this is the result of the normal discovery flow over time or whether the state was more reluctant to put Judge Curtin to so large a task of document review than to burden Dean Sexton who provided a full-time pair of eyes reviewing the documents is, of course, only speculation.

Another set of relatively common cases that are likely to generate increased use of special masters are cases under the Freedom of Information Act. In a recent appellate case in the District of Columbia Circuit, the panel majority denied the government’s petition for a writ of mandamus to direct the district judge to revoke appointment of a special master. In that case, *In re United States Department of Defense*,¹²³ the Washington Post sought production of classified Defense Department documents relating to the Government’s efforts in 1980 to rescue the Iranian hostages. When Judge Oberdorfer, the district judge, indicated his intention to appoint a special master, the government objected and proposed that it assemble a random sampling of the 2,000 documents, which could then be examined by the judge *in camera*—a procedure used in several other FOIA cases. However, Judge Oberdorfer rejected this approach and instead appointed as special master a Washington attorney who was a former intelligence counsel at the Department of Justice and held top-secret security clearance. It was contemplated that the special master would develop a *representative* sampling of documents for which privilege was claimed, would summarize for

¹²² See *United States v. Hooker Chems. & Plastics*, 123 F.R.D. 3 (W.D.N.Y. 1988). The special master’s rulings are included as an appendix. See *Hooker Chem.*, 123 F.R.D. at 12-61.

¹²³ 848 F.2d 232 (D.C. Cir. 1988).

the judge the arguments relating to the exemptions, but would make no recommendation. The government argued that the exceptional condition requirement for appointment of a special master had not been met and that alternative procedures for resolving the privilege claim were available. In rejecting the petition for mandamus, the court held that the writ of mandamus should not be used to "second-guess trial judges in situations where they have not exceeded their 'prescribed jurisdiction.'" ¹²⁴

Not only does this case endorse the use of special masters in what may be a large category of cases, but it also highlights the difficulty of challenging such appointments, which are interlocutory orders and not appealable, except by the difficult mandamus route. In a strong dissent, Judge Starr insisted that no showing of an exceptional condition had been made, particularly when other avenues suggested by the Government for review of the documents had not been explored. ¹²⁵ Noting that use of a special master would undoubtedly "make life easier," Judge Starr cautioned that Article III judges must be charged with resolving sensitive FOIA disputes and that the majority's failure to demand particularized reasons in this case for the appointment of a special master made it impossible to distinguish this case from any other multi-document, national security one. ¹²⁶ As he admonished, "[t]he yellow light is flashing." ¹²⁷

As the above examples indicate, the most prevalent use of special masters has been in the area of pre-trial discovery. I have indicated ways in which I believe that delegations of even "judicial management" tasks come with some institutional cost because they cannot be totally divorced from decision making itself. But in addition, once a judge delegates discovery matters to the special master, the special master may be asked to rule on other dispositive motions. ¹²⁸ For example, in *Societe Liz v. Charles of the Ritz Group*, ¹²⁹ after a master was appointed to handle discovery motions, ¹³⁰ both the parties and the judge agreed to

¹²⁴ *Id.* at 238 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). Judge Wald, the author of the majority opinion, commented more extensively on the case and the role of special masters in Wald, "Some Exceptional Condition"—*The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b)*, 62 ST. JOHN'S L. REV. 405 (1988).

¹²⁵ See *Department of Defense*, 848 F.2d at 240-41 (Starr, J., dissenting).

¹²⁶ See *id.* at 241 (Starr, J., dissenting).

¹²⁷ *Id.* at 243 (Starr, J., dissenting).

¹²⁸ Professor Brazil observes that the forces of gravity in litigation tend to increase a master's role as time goes on, and prior involvement becomes the rationale for continued and expanded authority. See Brazil, *Complex Cases*, *supra* note 59, at 396 n.6.

¹²⁹ 118 F.R.D. 2 (D.D.C. 1987).

¹³⁰ See *id.* at 3.

have the master rule on a set of dispositive motions involving the validity of choice-of-forum clauses, the jurisdictional reach of the antitrust laws, and important issues of antitrust and conspiracy laws.¹³¹ Even if the master's one hundred plus page opinion is the equal of (or even surpasses) a "district judge opinion," institutional accountability is missing. The district judge, who need only subject the report to a "clearly erroneous" standard of review,¹³² may have achieved a substantial saving of time, but it is then the special master and not the judge who becomes the "decision maker." If the needs of the judicial system mandate delegation of this order of judicial business to judicial adjuncts, magistrates are the more appropriate alternate decision makers. They are full-time judicial officials, selected according to prescribed procedures, and designated by Congress to assume these tasks. The law articulation function does not belong in the hands of either the private bar on a part-time basis or the academics, for both of whom there are potential conflicts of interest.

A reported Seventh Circuit decision, *Jack Walters & Sons Corp. v. Morton Building*,¹³³ provides another illustrative example of reflexive and overbroad delegation. Confronted with the unfortunate but now commonplace lengthy motion for summary judgment, accompanied by several thousand pages of materials, the district judge referred the proceedings to a special master who prepared a report which was eventually adopted by the judge apparently without independent analysis.¹³⁴ In affirming the judgment of the district court on appeal, Judge Posner took the opportunity to observe that the district court had gone beyond its proper bounds in delegating the matter to a special master. Since the Rule 53(b) issue was not raised on appeal, the court was unprepared to prolong the proceedings by vacating the reference on its own initiative, but it did warn that the use of special masters in antitrust and other complex litigation should be conducted with greater sensitivity to the problem of excessive delegation of judicial power.¹³⁵

¹³¹ See Special Master's Amended Recommendation re: Dispositive Motions, *Societe Liz*, 118 F.R.D. 2 (D.D.C. 1987).

¹³² Federal Rule 53(e)(2) states that the court shall accept the master's findings of fact unless clearly erroneous. After a hearing the court may "adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." FED. R. CIV. P. 53(e)(2). The "clearly erroneous" factual review standard makes little sense on dispositive motions and seems inconsistent with the standard of review for magistrates on similar rulings.

¹³³ 737 F.2d 698 (7th Cir.), cert. denied, 469 U.S. 1018 (1984).

¹³⁴ The special master's report was "indistinguishable in form from a judicial opinion; and the district judge approved that opinion rather than write his own." *Id.* at 712.

¹³⁵ See *id.* at 713; see also *Apex Fountain Sales v. Kleinfeld*, 818 F.2d 1089, 1096-97 (3d Cir. 1987) (reference of contempt motion to special master was improper).

Without proper statistics it is difficult to know just how serious is the problem of excessive delegations.¹³⁶ Case law is not revealing since a reference order is not immediately appealable even when objected to, and in some instances consent of the parties may be obtained through a certain veiled coercion. It is interesting to note that in 1986, the Justice Department for the first time announced an express policy regarding special masters with a directive to consent to a special master in only a narrow class of cases.¹³⁷

My point is not that special masters cannot be helpful in particular cases, but that there has developed an almost Pavlovian response to the complicated case—delegation to a special master. A rethinking of traditional rulemaking philosophy, which has been marked by informal management techniques, excessive delegation, broad discretion and trans-substantive application, seems to me a welcome alternative.

One other specific use of special masters deserves comment here—the appointment of a master for settlement purposes.¹³⁸ Functionally, of course, the role is often subtly played by the master who is technically appointed to oversee discovery. Some judges, however, have separated out the settlement task more definitively in their reference orders. For example, in the *Agent Orange* case, although Judge Weinstein substituted a magistrate for the special master on discovery matters, he then appointed three lawyers as separate “settlement masters.”¹³⁹ Judge Aspen in Chicago has appointed special masters as “mediators” in both “complex and routine” cases.¹⁴⁰ Notwithstanding the success (and increasing prevalence) of some of these efforts, it should be noted that use of such judicial adjuncts technically should meet, under the present rules, the exceptional condition requirement for the appointment of a master under Rule 53(b).¹⁴¹ There is, of course, nothing to stop parties from voluntarily choosing an outside party to help settle their dispute, but it is not clear that consent to the formal appointment of a special master suspends the requirement of Rule 53(b). Quite apart from the restrictions of Rule 53(b), it might be argued that Federal Rule 16 is authority for the court to experiment with

¹³⁶ The Office of Court Administration does not keep statistics on appointments of special masters.

¹³⁷ See Department of Justice, Office of the Attorney-General, Department Policy Regarding Special Masters (Mar. 13, 1986).

¹³⁸ For a discussion of settlement devices, see D. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 58-67 (1986).

¹³⁹ See P. SCHUCK, *supra* note 90, at 143-67.

¹⁴⁰ See Aspen, Use of Special Masters for Intensive Mediation (and/or Arbitration) (unpublished) (on file at *University of Pennsylvania Law Review*).

¹⁴¹ *But see* Brazil, *Referring Discovery Tasks*, *supra* note 17, at 306 (arguing that Rule 53 does not cover pre-trial special masters at all).

extrajudicial settlement techniques in the name of pre-trial management. Rule 16(c)(7) directs consideration of "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute" at the pre-trial conference, but there is no evidence that Rule 16 represents an invitation for increased delegation to special masters whom the parties must pay.¹⁴² Of course, to the extent that experience demonstrates that third party mediation and settlement functions done under court auspices are effective, statutory or rule changes can be made. The policy issue is thus the one to be addressed.

The private master as a settlement facilitator might seem, in some respect, the least intrusive or objectionable role of the ones we have examined. But unless the master comes armed with the coercive power of the judge (and possibly with disclosures as to the judge's views on some of the issues in the case, as there was in *Agent Orange*), it is unclear that the intervention of an outside party will have any real impact on settlement. To the extent cases ultimately do settle, there is little evidence that third party intervention is in fact the catalyst for settlement. Indeed, additional expense and time of the special master may add overall to the parties' litigation costs. Moreover, if the master is effective because of leverage that comes from behind the scenes contact between the master and judge, serious questions of ethics and policy are presented. Of course, where the parties consent to a master for settlement, some of these objections are less pronounced, but the danger is that the "consent" is not always so voluntarily forthcoming.

Along with the danger of involuntary consent, I have alluded to potential conflicts of interest that may arise from using special masters who serve only for a particular case. Not only is there the traditional kind of conflict that may arise because the master may have represented or opposed parties and lawyers who come before him, but also more subtle conflicts in approaches to particular issues and views of the merits may infect decision-making by those who by definition wear dual hats. The more traditional conflict came before the Court of Appeals for the District of Columbia in *Jenkins v. Sterlacci*,¹⁴³ where the special master was contemporaneously the lawyer-adversary of a law firm

¹⁴² Cf. *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987) (mandatory summary jury trial not authorized by local rules, although parties could clearly consent). But see *McKay v. Ashland Oil Co.*, 120 F.R.D. 43, 47-49 (E.D. Ky. 1988) (disagreeing with *Strandell*); *Arabian-Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988) (same). Moreover, the Advisory Committee was quite clear that the thrust of Rule 16 was for judges to manage their cases. See FED. R. CIV. P. 16 advisory committee notes.

¹⁴³ 849 F.2d 627 (D.C. Cir.), *petition for reh'g denied per curiam*, 856 F.2d 274 (D.C. Cir. 1988).

also representing one of the litigants in the proceeding before the special master. The Court of Appeals found that the ABA Code of Judicial Conduct was by its terms applicable to any officer performing judicial functions, including a special master.¹⁴⁴ It also reasoned that the "clear error" standard that insulates the special master's findings makes the special master "functionally indistinguishable"¹⁴⁵ from a trial judge, and thus the special master must be held to the same standards applicable to the conduct of judges. Although ultimately holding that the law firm had waived any objection based on the appearance of bias in the particular case, the District of Columbia Circuit went on to acknowledge the potential conflicts facing special masters:

who may wear different hats depending upon the professional function they are performing from one day to the next. In one matter they may be required to observe the impartial decorum of a decisionmaker, while in another they may be called upon to assume the perspective, and the partiality, of an advocate. This duality of roles places a burden on the special master with an active law practice, but its discharge does not require that once he has accepted an assignment as a special master, an attorney places his life as an advocate in a state of suspended animation. . . . Instead, it is sufficient and necessary, that an individual who accepts an appointment as a special master scrupulously avoid any un-

¹⁴⁴ Unlike 28 U.S.C. § 455(a) (1982), which sets a standard for disqualification only for "any justice, judge or magistrate," the ABA Code of Judicial Conduct for United States Judges explicitly provides that a special master and anyone else performing judicial functions "is a judge for the purpose of this Code." See *Jenkins*, 849 F.2d at 630.

¹⁴⁵ *Jenkins*, 849 F.2d at 631. *Jenkins* squarely rejected the First Circuit's reasoning in *Morgan v. Kerrigan*, 530 F.2d 401, 426 (1st Cir.), cert. denied, 426 U.S. 935 (1976), that special masters did not have to be held to the same strict standard of impartiality as judges since they are "subject to the control of the court and since there is a need to hire individuals with expertise in particular subject matters." See *Jenkins*, 849 F.2d at 630 n.1. In a recent case, the court ordered reference to a special master vacated since the master was a paralegal in the law firm representing one of the parties and in fact had served as a witness in favor of that party at the trial. See *Petroleos Mexicanos v. Crawford Enters.*, 826 F.2d 392, 402 (5th Cir. 1987). Even though the tasks referred to the master consisted largely of mechanically filing and indexing documents, the court reiterated its view that even this type of:

[a] special master 'should have no interest in or relationship to the parties * * * and [should be] fit to perform the duties incumbent on one sitting in the place of the court.' A special master has the duties and obligations of a judicial officer. Having served as a witness for one side of the case, the appointee was accordingly disqualified.

Id. at 402 (quoting *Lister v. Commissioners Ct. of Navarro County*, 566 F.2d 490, 493 (5th Cir. 1978)).

dertaking, as an advocate or otherwise, that would tend or appear to compromise his impartiality as a decisionmaker.¹⁴⁶

B. Remedial Special Masters

To complete the picture of judicial adjuncts in federal court litigation, I want to sketch briefly the now common use of the "remedial" special master.¹⁴⁷

The modern "remedial" special master, who functions largely but not exclusively in "public litigation,"¹⁴⁸ bears only a slight resemblance to his earlier predecessor.¹⁴⁹ The earlier special masters, even if known by another name, were regularly requested by judges to assess damages,¹⁵⁰ or to distribute a trust corpus, or to perform other similarly non-substantive roles. The modern "remedial" special master likewise continues the tradition of involvement at the remedial phase after liability has been determined but the scope of the adjuncts' powers is much broader.¹⁵¹

¹⁴⁶ *Jenkins*, 849 F.2d at 632.

¹⁴⁷ Post-disposition matters were often within the special master's role, and the Clark Papers show that the advisory committee intended that the long tradition in equity of using special masters to perform tasks after a court had determined liability were to be included in the Federal Rules. Both Rule 53 and Rule 70, which provides for the appointment of a person to effect compliance with a judgment, are sources for the appointment of remedial masters. See Levine, *supra* note 21, at 757-59.

¹⁴⁸ The term "public law litigation" is amplified in Chayes, *supra* note 10. For more recent developments, see Chayes, *Foreward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982).

¹⁴⁹ See Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543, 543 (1979); Eisenberg & Yeazell, *supra* note 60, at 466-67; Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 639 (1982); Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1272-76 (1983); Jennings, *The Chancellor's Foot Begins to Kick: Judicial Remedies in Public Law Cases and the Need for Procedural Reforms*, 83 DICK. L. REV. 217, 236 (1979); Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419, 422 (1979); Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399, 407-12 (1981); Weinberg, *supra* note 60, at 367; Special Project, *supra* note 60, at 805-09; Note, *Force and Will: An Exploration of the Use of Special Masters to Implement Judicial Decrees*, 52 U. COLO. L. REV. 105, 107-08 (1980).

¹⁵⁰ See, e.g., *Ex parte Peterson*, 253 U.S. 300, 317 (1920) (holding that the appointment of an auditor in a law case is permissible); *Kimberly v. Arms*, 129 U.S. 512, 516-17 (1889) (master to review documents and render a preliminary accounting).

¹⁵¹ Even apart from public institutional litigation, remedial masters' tasks have expanded. See, e.g., *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1147 (D.N.J. 1979) (special masters appointed to compute backpay will be required to handle discovery disputes and engage in fact-finding), *aff'd*, 647 F.2d 388 (1981). But more likely, masters assume their broadest remedial charge in prison and other institutional litigation. See, e.g., *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (special master appointed in connection with prison reform litigation), *cert. denied*, 460 U.S. 1042 (1983). See

There are, with subtle variations, several different functions a master may play in the post-trial phase of litigation.¹⁵² In one situation, the judge appoints the special master even before the decree has been drawn up and uses the master in an investigative and fact-finding role to aid in shaping the decree. In other situations, the decree (or often the consent judgment) has been formulated by the court, but additional activity is necessary to implement it. For that reason, judicial decrees ordering the remedying of conditions violative of an individual's constitutional rights also will include appointment of a special master.¹⁵³ Often connected to the administrative function is an oversight and monitoring function to assure that those responsible for complying with the decree are doing so in good faith.¹⁵⁴ To this end, special masters are often vested with authority to take certain action or make certain orders to achieve compliance.

There is substantial evidence to indicate that violations of constitutional rights, when asserted against institutional defendants, can be remedied only when effective follow-up takes place,¹⁵⁵ usually by the special master. In this sense, special masters preserve rather than threaten judicial integrity. Moreover, masters often have particular expertise which enables them to bring a realistic and practical approach

generally Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739 (1980) (discussing role of special masters); Dobray, *The Role of Masters in Court-Ordered Institutional Reform*, 34 BAYLOR L. REV. 581 (1982) (discussing the authority and responsibility of special masters); Horowitz, *supra* note 149, at 1297-1302 (describing the broad powers of special masters in enforcing and supervising judicial decrees).

¹⁵² See Brakel, *supra* note 149, at 544-46; Horowitz, *supra* note 149, at 1298-1302; Weinberg, *supra* note 60, at 370.

¹⁵³ See, e.g., *Gary W. v. State of La. Dep't of Health and Human Resources*, 861 F.2d 1366, 1366 (5th Cir. 1988) (master at remedial phase to monitor compliance with order correcting violations of constitutional magnitude in state's treatment of mentally retarded children placed in non-resident institutions); *EEOC v. Local 638*, 700 F. Supp. 739, 739 (S.D.N.Y. 1988) (hearing and report on plaintiff's motion for holding defendants in contempt of prior court order ordering anti-discrimination measures).

¹⁵⁴ Cases challenging the sufficiency of institutional treatment often require the appointment of special masters at the compliance phase. See, e.g., *Lewis v. Woods*, 848 F.2d 649 (5th Cir. 1988).

¹⁵⁵ In an unpublished paper, *Special Masters in Prison Litigation: Who? What? Why?* (1985), my New York University colleague, Professor Jim Jacobs, argues that the vindication of constitutional rights for prisoners would be virtually impossible without the expertise of special masters, many of whom have worked in the complex world of prison bureaucracy. Leading prison reform cases that have required special master intervention include *Ruiz*, 679 F.2d at 1116, and *Powell v. Ward*, 487 F. Supp. 917, 935 (S.D.N.Y. 1980), modified in part on other grounds, 643 F.2d 924 (2d Cir.), cert. denied, 454 U.S. 832 (1981); see also M. HARRIS & D. SPILLER, *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 254, 260 (1977). For a discussion of masters in school desegregation cases, see Aronow, *supra* note 151.

to their shaping, monitoring, and/or compliance functions.¹⁵⁶

Nonetheless, there are reasons to be less than completely sanguine about the role of special masters in the remedial phase of institutional litigation.¹⁵⁷ Overbroad delegations of authority to judicial adjuncts often accompany appointments of special masters. The concern is both a general one about the propriety of the judicial role, particularly in relation to other branches of government and interference with state institutions,¹⁵⁸ and the distinct worry that private adjuncts are inappropriate actors in this regard.¹⁵⁹ Recent guidelines of the United States Department of Justice, for example, state that it is inappropriate for a court to use a master to extend its own power, noting that "enhancement of judicial power will usually be at the expense of a coordinate branch of government."¹⁶⁰ Professor Owen Fiss, not a natural ally of the Meese Justice Department, makes the quite distinct point that appointment of special masters deflects responsibility from the judge. Fiss suggests alternatives, such as using expert witnesses or involving amici to advise the judge, to "avoid the bureaucratic pathologies inherent in the fragmentation and delegation of decisional power"¹⁶¹ Unlike the Justice Department, of course, Fiss does not object to the judicial role at all, but to the fact that a species of "subjudge" is now making primary decisions.

The expense of a special master—which often includes an entire administrative bureaucracy¹⁶²—is yet another consideration. In the

¹⁵⁶ Vincent Nathan, a law professor whose expertise is criminal law, was the master in several prison cases. See *Jones v. Wittenberg*, 440 F. Supp. 60, 65 (N.D. Ohio 1977); *Taylor v. Perini*, 413 F. Supp. 189, 198 (N.D. Ohio 1976). Professor Curtis Berger's expertise in housing was one reason for his appointment as special master in the Coney Island school desegregation case, in which Judge Weinstein was seeking to impose broad remedial relief likely to affect housing patterns. See *Hart v. Community School Bd.*, 383 F. Supp. 699, 767 (E.D.N.Y.), *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

¹⁵⁷ See Brakel, *supra* note 149, at 569; Horowitz, *supra* note 149, at 1303-07; Jennings, *supra* note 149, at 235-36; Note, *supra* note 149, at 115-22.

¹⁵⁸ See *Halderman v. Pennhurst State School*, 451 U.S. 1, 55 (1981); Brakel, *supra* note 149, at 543.

¹⁵⁹ See Fiss, *The Bureaucratization of the Judiciary* (Mar. 16, 1983) (unpublished paper) (on file with the *University of Pennsylvania Law Review*), noting that special masters are "appointed with increasing frequency in litigation seeking the structural reform of large scale organizations I am devoted to such litigation and view it as critical to the proper discharge of the judicial function. . . . but it also seems to me that there is a risk that subjudges will be created by the judge as a way of avoiding unpleasant tasks and deflecting responsibility." *Id.* at 27.

¹⁶⁰ Department of Justice, *supra* note 137.

¹⁶¹ Fiss, *supra* note 159, at 28.

¹⁶² See, e.g., *Pugh v. Locke*, 406 F. Supp. 318, 331 (M.D. Ala. 1976) (committee appointed to monitor the implementation of health, education, and safety standards for Alabama prisons), *cert. denied sub nom. Neuan v. Alabama*, 438 U.S. 915; see also

large institutional cases, special master expenses may run into hundreds of thousands of dollars for many years.¹⁶³ Moreover, compliance with the decree itself may require large outlays of public funds, and institutional defendants may point to fiscal concerns and budget limitations as relevant in deciding how any decree should be effectuated.¹⁶⁴ The sensitive interplay between the courts and the institutional actors thus argues against overbroad delegations of authority to judicial adjuncts. It is true, of course, that the question of the propriety of using judicial adjuncts in the remedial phase of litigation has often become confused with the overriding issue in public cases of this genre—whether disputes of this nature are susceptible to judicial resolution and judicial enforcement at all.¹⁶⁵ The appointment of a special master, because it makes possible the extension of the judicial role, then becomes the focus of the attack.

More carefully drawn references which use judicial adjuncts in those situations where appointment is necessary to achieve compliance with and implementation of the decree and which limit the discretion and authority of the master are one possible solution to the problem. Certainly when acting pursuant to a narrowly drawn reference and with proper and diligent supervision by the court, remedial masters can operate effectively as the judge's eyes and ears outside the courtroom.

There are several recent examples where broad delegations of authority to special masters have provoked strong reactions. In *Hart v.*

Halderman v. Pennhurst State School, 526 F. Supp. 423, 424 (E.D.Pa. 1981) (discussing expense of the offices of special master and hearing master).

¹⁶³ Monthly bills in the Pennhurst litigation amounted to around \$70,000.00. See *Halderman*, 526 F. Supp. at 424. For an excellent overview of the expenses associated with special masters, see Levine, *supra* note 103. Levine notes the controversy in California that arose when Senior District Judge Weigel appointed his very young and inexperienced law clerk as the special master in a complex prison case. See *id.* at 142 n.6, 198 n.300; see also *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984), *aff'd in part and rev'd in part*, 801 F.2d 1080 (9th Cir. 1986), *cert denied*, 481 U.S. 1069 (1987).

¹⁶⁴ It is clear that a judge has authority to implement equitable relief, notwithstanding that public funds must be used to pay the cost. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 268 (1977), in which the Supreme Court affirmed a court order requiring Michigan to spend general state education funds to compensate previously inadequate education for black school children in Detroit. In *Robinson v. Cahill*, 62 N.J. 473, 496-505, 303 A.2d 273, 285-89 (1973), the court invoked the state constitution to mandate equal educational opportunities throughout the state, and after years of bitter feuding, forced the state legislature to enact a state income tax since it was the only way to raise the revenue to implement the decision. Perhaps because of the potentially significant impact on the state legislative budget, Jennings proposes revising the Federal Rules to require that the chief executive officer and the chief fiscal officer of a state be notified when a remedy "may require substantial expenditures of public funds." Jennings, *supra* note 149, at 238.

¹⁶⁵ See Special Project, *supra* note 60, at 805-09.

Community School Board,¹⁶⁶ Judge Weinstein found school authorities liable for segregated conditions in the schools and also placed partial responsibility on housing authorities. After the defendants—and other third parties¹⁶⁷—had submitted plans for preparing a remedy, Judge Weinstein determined that he needed additional information and expertise in formulating a decree. He then appointed Professor Curtis Berger as a special master to explore options that he might consider in choosing a remedy. As Professor Berger himself pointed out, as special master he was not directed to prepare findings of fact and conclusions of law, but rather to conduct a roving investigation, visiting the schools, meeting with community groups, assessing the needs for low-income housing, and then submitting a report which had no legal status.¹⁶⁸ Perhaps Judge Weinstein thought that this somewhat open course for the special master would help bring about cooperation and settlement, and that the special master might eventually play a mediative role in the conflict. In the end, however, the unchartered course and lack of judicial guidance of the special master may explain why much of his report was not instrumental in the ultimate decree that was rendered.¹⁶⁹

In *Hart*, the master had been brought in to help shape the remedy to be issued by the court. The more usual place of the special master is at the “implementation” stage or the monitoring-compliance stage. Here too, however, there are dangers that too much discretion is left in the hands of the special master. For example, in *Taylor v. Perini*,¹⁷⁰ the special master was empowered to act for the Court with the “authority to state to the defendant . . . the actions required to be taken by them . . . to effectuate full compliance with the Court’s order”¹⁷¹ An order such as this amounts to almost complete judicial abdication.

Although there is little judicial authority as to the precise limits of a special master’s authority, it is clear that the breadth of the order may be relevant in determining whether judicial oversight and monitor-

¹⁶⁶ 383 F. Supp. 699, 756-57 (E.D.N.Y. 1974).

¹⁶⁷ Judge Weinstein involved many others—the Metropolitan Transit Authority, city, state, and federal housing officials, and the New York City police department—none of whom were defendants in the case. See *id.* at 758-60.

¹⁶⁸ See Berger, *Away from the Courthouse and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 711 & n.10 (1978).

¹⁶⁹ See *id.* at 733-38.

¹⁷⁰ 413 F. Supp. 189 (N.D. Ohio 1976).

¹⁷¹ *Id.* at 193; see also *Jones v. Wittenberg*, 73 F.R.D. 82, 85-86 (N.D. Ohio 1976) (master had power to hold hearings, have unlimited access to the files and the prison facility, have confidential interviews with any and all personnel and inmates, attend otherwise private internal meetings, and request show cause contempt orders from the judge).

ing of a decree is appropriate. In one recent decision, *National Organization for the Reform of Marijuana Laws v. Mullen*,¹⁷² the Ninth Circuit upheld an order of reference for a special master to monitor compliance of a preliminary injunction against the government's marijuana-destroying patrol (whose acronym is CAMP) and stressed the limited powers given to the special master. In *NORML*, a prior preliminary injunction had ordered CAMP not to conduct warrantless searches, not to detain people illegally, and not to violate FAA safety regulations in its patrol planes. When the plaintiff class moved for contempt, the court denied the motion but amended the injunction to require certain specific prophylactic measures to be taken by defendants and announced the appointment of a special master under Rule 53 to monitor compliance.¹⁷³

In approving the special master reference (and imposing the costs thereof on the defendants, including the United States),¹⁷⁴ the court approved the use of a master to act both as monitor and as hearing officer. Critical to the court was the fact that the parties were afforded the opportunity to submit written objections to the master's reports and findings, thus emphasizing the continuing role of the district court. In addition, the court pointed out that the special master could not " 'purport to direct any CAMP activities or agents, or issue orders,' "¹⁷⁵ and thereby did not control or administer functions of any government defendant.

But a much broader grant of authority to special masters—albeit in a federal suit against state officials and institutions—provoked express comment and criticism by the Supreme Court of the United States in *Pennhurst State School and Hospital v. Halderman*.¹⁷⁶ Having found violations of state and federal law by the state-operated mental health residential facility, the district court ordered (among other things) that suitable community living arrangements be provided for all Pennhurst residents and that individual treatment plans be developed for each Pennhurst resident.¹⁷⁷ The court also ordered a special master to supervise the implementation of this order.¹⁷⁸ When the case eventu-

¹⁷² 828 F.2d 536, 542-45 (9th Cir. 1987) [hereinafter *NORML*].

¹⁷³ See *id.* at 542-43.

¹⁷⁴ The United States took the position, consistent with guidelines issued by the Department of Justice, that sovereign immunity precluded the imposition of the special master's costs. The court rejected the argument. See *id.* at 545.

¹⁷⁵ *Id.* (quoting the district court's March 6 order of reference).

¹⁷⁶ 451 U.S. 1, 54-55 (1981).

¹⁷⁷ See *Pennhurst*, 446 F. Supp. 1295, 1326-29 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd in part*, 451 U.S. 1 (1981).

¹⁷⁸ See *Pennhurst*, 446 F. Supp. at 1326.

ally reached the Supreme Court, both the majority and the dissent addressed the question of remedy. Justice Rehnquist's majority opinion noted that in no case had the Court "required a State to take on such . . . burdensome obligations as providing 'appropriate' treatment in the 'least restrictive' environment,"¹⁷⁹ and Justice White's dissent more specifically criticized the special master appointment:

More properly, the court should have announced what it thought was necessary to comply with the Act and then permitted an appropriate period for the State to decide whether it preferred to give up federal funds and go its own route. If it did not, it should propose a plan for achieving compliance. . . . In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed.¹⁸⁰

Holding that federal law did not support the least restrictive alternative standard imposed by the lower courts, the Supreme Court in *Pennhurst* reversed and remanded the case for a determination of whether state law itself could support the plaintiffs' claims.¹⁸¹ On remand to the Third Circuit, a majority of the *en banc* panel held that Pennsylvania state law created a substantive right to habilitation in the least restrictive environment.¹⁸² But the remedy continued to be troublesome for several of the judges. Judge Aldisert, who concurred with the majority, wrote separately to "seriously question the propriety of the district court's appointment of a special master to supervise compliance with the original remedy." Unwilling to vacate the order after the expenditure of funds had already been made by the state, he expressed hope that the district court would immediately "disassemble the judicially-created administrative hierarchy of special and hearing masters."¹⁸³ Two of the dissenting judges, Judge Seitz and Judge Hunter, also disapproved of the special master appointment to supervise compliance.¹⁸⁴ Although they agreed that the special master would be useful in helping the court formulate a remedy, they argued that because plaintiffs failed to show that the state would defy any decree, the master's oversight responsibilities were improper, based on "[p]rinciples

¹⁷⁹ *Pennhurst*, 451 U.S. at 29.

¹⁸⁰ *Id.* at 54 (White, J., dissenting in part).

¹⁸¹ *See id.* at 24-25, 30-32.

¹⁸² 673 F.2d 647, 654-55 (3d Cir. 1982), *rev'd on other grounds and remanded*, 465 U.S. 89 (1984).

¹⁸³ *Id.* at 661-62 (Aldisert, J., concurring).

¹⁸⁴ *See id.* at 662 (Seitz, C.J., dissenting).

of federal-state comity.”¹⁸⁵ Judge Garth, in a separate dissent regarding relief, argued that the Supreme Court’s earlier admonitions against using masters to oversee compliance by state officials under a federal-state funding statute was *a fortiori* as to a master seeking to bring state officials into compliance with its own state laws.¹⁸⁶ The Supreme Court, ultimately finding that the eleventh amendment precluded the claims in *Pennhurst*, has had no further word on the propriety of a special master in this litigation. But the opinions spawned in *Pennhurst*¹⁸⁷ indicate an evident discomfort with the intrusion of judicial monitoring, particularly in the form of judicial adjuncts.

Undoubtedly, some special masters would prefer to proceed with unfettered discretion. Given the self-perpetuating quality of their use and the largely ruleless environment in which they proceed, however, important issues of policy and decision-making are subtly being transferred from the judge to judicial adjuncts. Without limiting the remedial powers of the federal courts, Rules 53 and 70 could be revised to ensure that references to judicial adjuncts are made only in limited circumstances and after a hearing that compliance has not been, or is unlikely to be, forthcoming. References should be drawn so that judges retain close supervisory powers while granting narrow mandates to their special masters to implement the judge’s decisions and policy choices. Structure and formality must replace the ad hoc individualized approach to special masters that has come to dominate the remedial phase of litigation.

C. Other Functions

The “traditional” functions of special masters have been alluded to earlier,¹⁸⁸ and Rule 53(b) continues to authorize the use of masters “in matters of account and of difficult computation of damages” without the necessity of meeting the “exceptional condition” requirement.¹⁸⁹

¹⁸⁵ *Id.* (Seitz, C.J., dissenting).

¹⁸⁶ *See id.* at 670 (Garth, J., concurring in part and dissenting as to relief).

¹⁸⁷ 465 U.S. 89, 121 (1984).

¹⁸⁸ For the reasons explained previously, neither pre-trial supervision nor supervision of remedial relief falls within the category of the special masters’ traditional role. *See supra* notes 18-23 and accompanying text. The Supreme Court confirmed the propriety of using special masters in federal court litigation well before the advent of the Federal Rules. *See, e.g., Ex parte Peterson*, 253 U.S. 300 (1920); *Kimberly v. Arms*, 129 U.S. 512 (1889).

¹⁸⁹ All references to a special master are subject to the “exceptional condition” requirement “save in matters of account and of difficult computation of damages.” FED. R. CIV. P. 53(b). The inclusion of “difficult computation of damages” as well as the addition of assessors to take such references was added in 1966 (the year of unification of admiralty procedure and civil procedure) and was intended to preserve the admiralty

When special masters are used for these purposes, the procedures of Rule 53(e) requiring a report and providing for review of the master's report subject to a "clearly erroneous" standard make eminent good sense. Broader references, such as the one in *La Buy*—to make findings of fact and conclusions of law on the basis of the evidence presented—are quite rare.¹⁹⁰ One recent attempt to appoint a special master in this way because the judge didn't understand "the jungle" of trademark law was sternly rebuked by the court of appeals.¹⁹¹ Masters in jury cases are similarly reserved for the specialized case, often involving complex damage issues.¹⁹²

Interestingly, it is not the traditional special master functions that are reflected in practice. Rather, most special master references are for pre-trial matters (both dispositive and non-dispositive), settlement, and

practice of referring difficult computations to assessors after an interlocutory judgment determining liability. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2601 nn.1 & 8 (1970). References to masters for accounting and damages computations are currently quite common, particularly in discrimination, attorneys' fees, and patent matters. See, e.g., *Rios v. Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168 (2d Cir. 1988) ("administrator" appointed to do damages accounting in Title VII backpay award); *Devex Corp. v. General Motors Corp.*, 857 F.2d 197 (3rd Cir. 1988) (accounting in patent case); *Hartwick College v. United States*, 801 F.2d 608 (2d Cir. 1986) (master to calculate attorneys' fees under Equal Access to Justice Act in tax case, as well as decide individual monetary claims). For an interesting variation on this theme, see *Hartness Int'l Inc. v. Simplimatic Eng'g Co.*, 819 F.2d 1100 (Fed. Cir. 1987), in which a special master appointed to calculate damages and lost profits in turn appointed an accounting firm.

¹⁹⁰ See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 253 (1957). A search of circuit and district court cases involving the use of special masters from 1985 through the present revealed very few cases with the type of broad reference disallowed in *La Buy*. Nevertheless, special masters received such broad delegations in a few cases. See *Wayzata Bank & Trust v. A & B Farms*, 855 F.2d 590 (8th Cir. 1988) (findings of fact and conclusions of law in fiduciary breach case); *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988) (entire case referred); *NLRB v. Southwire Co.*, 801 F.2d 1252 (11th Cir. 1986) (findings of fact and conclusions of law in civil contempt motion); *Apex Fountain Sales v. Kleinfeld*, 818 F.2d 1089, 1096-97 (3d Cir. 1987) (reference of contempt motion held improper); *Mobil Oil Corp. v. Altech Indus., Inc.*, 117 F.R.D. 650 (C.D. Cal. 1987) (presided over jury trial).

¹⁹¹ See *Madrigal Audio Labs. Inc. v. Cello, Ltd.*, 799 F.2d 814, 818 (2d Cir. 1986). District Judge Eginton had appointed a special master after telling the parties:

"I don't understand anything about the merits of any patent or trademark case. I'm not about to educate myself in that jungle. I appoint routinely Special Masters who know what this is all about. . . . I would have no confidence in my ability to do any justice in that thicket of patent and trademark, which I never understood when I was trying to practice law, and I wouldn't begin to understand it now."

Id.

¹⁹² See, e.g., *Cratoe, Inc. v. Intermark, Inc.*, 536 F.2d 862 (9th Cir.) (bankruptcy), *cert. denied*, 429 U.S. 896 (1976); *Burgess v. Williams*, 302 F.2d 91 (4th Cir. 1962) (bankruptcy); *Board of Educ. Yonkers City School Dist. v. CNA Ins. Co.*, 113 F.R.D. 654 (S.D.N.Y. 1987) (school desegregation).

broad remedial relief.¹⁹³ Indeed, it may be thought that these latter roles for special masters implicate the adjudicatory function much less than the more general references, and that perhaps the “exceptional condition” requirement should even be abandoned in these contexts. As I have indicated already, I do not believe such a course of action would be wise, although I do believe that as a practical matter, Rule 53(b)’s restrictions are often not observed for these references.

Other types of experimentation with judicial adjuncts, perhaps not always in the pure “special master” sense, are also occurring. Several courts—sometimes relying on the authority to appoint special masters and at other times resting on their inherent authority—have selected technical advisors to the court.¹⁹⁴ In many cases, of course, the court has exercised its power under Federal Rule of Evidence 706 to appoint expert witnesses and has acquired information in traditional evidentiary fashion.¹⁹⁵ On occasions when the expert is to act as an “advisor

¹⁹³ In the discovery context, see, e.g., *Trustees of the Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. 1538, 1557 (C.D. Cal. 1988) (discovery and pre-trial proceedings resulting in 50 orders over 18 months in ERISA case); *Corcoran Partners, Ltd. v. Dresser Indus., Inc.*, No. 84 C 4506 (N.D. Ill. June 3, 1988) (master to decide reconsideration motion about a judge’s prior opinion on jurisdiction and sanctions); *Celpaco, Inc. v. MD Papierfabriken*, 686 F. Supp. 983 (D. Conn. 1988) (master to oversee discovery in RICO case). In the remedial context, see, e.g., *Ridgeway v. Montana High School Ass’n*, 858 F.2d 579 (9th Cir. 1988) (master to oversee implementation of a settlement agreement); *Ramirez v. Rivera-Dueno*, 861 F.2d 328 (1st Cir. 1988) (monitor compliance with court order in class action on behalf of mentally retarded); *William v. Lane*, 851 F.2d 867 (7th Cir. 1988) (implement prison rights decree). Masters also have taken on roles as, *inter alia*, hearing contempt motions, see *Johnson v. Kay*, 860 F.2d 529 (2d Cir. 1988); determining members of class, see *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (W.D.N.C. 1988); helping administer a class action, see *Mycka v. Celotex*, Civ. No. 87-2633 (D.D.C. Apr. 28, 1989); and collecting information regarding class plaintiffs with a view toward recommending relief, see *Ayuda v. Meese*, 700 F.Supp. 49 (D.D.C. 1988), *mandamus denied*, *In re Thornburgh*, 869 F.2d 1503 (D.C. Cir. 1989). Other references include requests for reconsideration regarding filing of Chapter 11 bankruptcy claim, see *In re A.H. Robins Co.*, 869 F.2d 1092, 1095 (4th Cir. 1988); and an appointment to aid the court in determining foreign law, see *Henry v. S.S. Bermuda Star*, 863 F.2d 1225, 1227-28 (5th Cir. 1989).

¹⁹⁴ See, e.g., *Reilly v. United States*, 863 F.2d 149, 154-61 (1st Cir. 1988) (holding that the district court did not abuse its discretion in appointing a technical advisor to assist in calculating damages in a medical malpractice case).

¹⁹⁵ Under FED. R. EVID. 706(a), a court may, *sua sponte* or in response to a party’s motion, “enter an order to show cause why an expert witness should not be appointed, and may request the parties to submit nominations.” If the expert makes findings, the parties should be so advised. The witness’s deposition may be taken by any party, and the witness may be called to testify and be cross-examined at trial. See 3 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 706[02], at 706-21 (1988). But see *Reilly*, 863 F.2d at 155-56 (concluding that Rule 706(a) does not restrict judge’s power to appoint technical advisor); *CNA Ins. Co.*, 113 F.R.D. at 654-55 (*sua sponte* appointing special master concurrently under FED. R. CIV. P. 53 and FED. R. EVID. 706).

to the court," however, Rule 53, inherent authority, or both have been cited as the source of authority.¹⁹⁶ In *Reed v. Cleveland Board of Education*,¹⁹⁷ the court required the payment of fees to such a technical advisor (in this case appointed to *assist* the special master), but cautioned that a court should not, in the absence of agreement by all parties, avail itself of legal advice from one who was neither counsel in the case nor a witness under oath.¹⁹⁸

More recently, in *Reilly v. United States*,¹⁹⁹ an appellate court approved the appointment of a technical advisor to the court to assist in the calculation of damages. Although not resting on the authority of Rule 53, the court found that complex economic theories relied upon in regard to the damages issue justified the judge's use of a technical advisor to "advise and instruct [him] on the myriad and arcane aspects of economic science necessary to a just adjudication of the . . . case."²⁰⁰ In *Reilly*, the court of appeals did acknowledge that a variety of procedural safeguards—notice to the parties of the identity of the advisor, the requirement of a "job description" for the advisor, and an affidavit by the advisor attesting to his compliance with the designated tasks—should be adopted in the future.²⁰¹

The use of technical advisors or "experts," authority for which has occasionally been linked to Rule 53 master appointments, is another example of circumvention of formal rules. Here again, procedural requirements—such as those in Federal Rule of Evidence 706—may technically be inapplicable if the "advisor" does not testify.²⁰² But a

¹⁹⁶ See, e.g., *Reilly*, 863 F.2d at 154 n.4 (citing, *inter alia*, *Ex parte Peterson*, 253 U.S. 300, 312-13 (1920) and *Hart v. Community School Bd.*, 383 F. Supp. 699, 764 (E.D.N.Y. 1974)).

¹⁹⁷ 607 F.2d 737 (6th Cir. 1979).

¹⁹⁸ See *id.* at 745-48 (decrying the additional expense and ordering that in the future a rate of compensation should be set in advance so that the parties "are aware of the actual costs of the reference as they accrue," and noting that "to the extent that [the district judge] relied on advice received in chambers from a 'legal expert' there was a partial abdication of his role").

¹⁹⁹ 863 F.2d 149 (1st Cir. 1988).

²⁰⁰ *Id.* at 158 (quoting *Reilly v. United States*, 682 F. Supp. 150, 152 (D.R.I. 1988)). The district judge in *Reilly* further envisioned the economist/advisor as someone "in the nature of a law clerk" and someone with whom he could have "freewheeling discussion." *Reilly*, 682 F. Supp. at 152. The circuit court dismissed the suggestion that a "technical advisor" should be required to submit a written report. See *Reilly*, 863 F.2d at 160 n.8.

²⁰¹ See *Reilly*, 863 F.2d at 159-60.

²⁰² These protections include advising the parties of any findings, if any are made, and allowing the parties to depose, call to testify, and cross-examine the expert witness. Cf. *Gary W. v. State of La. Dep't of Health and Human Resources*, 861 F.2d 1366, 1366 (5th Cir. 1988) (party could not depose director of special monitoring unit who had prepared report detailing incidences of abuse and neglect, even though she was not acting in her capacity as special master when she wrote the report).

different danger arises; a core adjudication function takes place under the influence of an outside expert to whom counsel does not even have access. Academics and other "experts" may be valuable assets upon which courts may rely. But they should do so under clear rules—perhaps in particular kinds of cases—with formal procedural safeguards.

One last case epitomizes my general concern about abdication of the judicial function to outside actors. In *Mobil Oil Corp. v. Altech Industries, Inc.*, the court permitted a special master to preside over a jury trial with the consent of the parties.²⁰³ The court acknowledged its unprecedented path, but believed its actions to be proper. Interestingly, the case was one in which a special master had been appointed under Rule 53 originally to supervise discovery because of the particularly "contentious and cantankerous" behavior of the parties.²⁰⁴

Once again, an initial pre-trial delegation of discovery matters to a special master led to the use of a non-institutional actor in a central judicial role—here, the conduct of a jury trial. Although as a general matter private adjudication is to be applauded, the conduct of a jury trial by a private "judge" is inappropriate. Institutionally accountable judicial officers—whether they be judges or magistrates—have been given this role by the Constitution and by statute. The exercise of fed-

²⁰³ 117 F.R.D. 650 (C.D. Cal. 1987); for other examples of abdication of the judicial function, see *In re Newman*, 763 F.2d 407, 409 (Fed. Cir. 1985) (noting that a special master had been appointed to hear an entire patent case because of the "substantial and contradictory submissions of record and the complicated issues of scientific and technical fact"). In *In re Armco*, 770 F.2d 103, 105 (8th Cir. 1985), the court upheld the reference of a summary judgment motion to a special master, but maintained that the delegation of an entire trial was improper. In *Knop v. Johnson*, 667 F. Supp. 512, 519 (W.D. Mich. 1987), the court deemed plaintiff's motion for sanctions under FED. R. Civ. P. 11 "a close question" regarding defendant's request that a special master conduct the trial.

²⁰⁴ I have noted this self-perpetuating, or "hydraulic," quality to references in which the original reference to a special master is replaced by more, and often more expansive, tasks. See *supra* text accompanying notes 128-31; see also *Johnson v. Kay*, 860 F.2d 529, 535 (2d Cir. 1988) (master's initial role in settlement replaced by the role of hearing motions for civil contempt). The impact of this trend was not lost on the court in *Reed*, which sympathetically observed that

[t]hrough the breadth of the special master's assignment appears to have expanded as the case progressed, this is understandable. It was impossible to anticipate every problem which would be encountered in fashioning a remedy. We do not believe that the special master exceeded the bounds of his appointment or that the defendants were unaware of the expansion of his duties and responsibilities.

Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 743-44 (6th Cir. 1979); see also *Roberts v. Heim*, 670 F. Supp. 1466 (N.D. Cal. 1987) (in RICO case, special master who monitored discovery prior to class certification took on additional discovery supervision following class certification).

eral judicial power and control of the constitutional jury function should not be subject to the whims of the parties.²⁰⁵

IV. LESSONS FROM THE JUDICIAL ADJUNCT EXPERIENCE

This paper is not intended as a general critique of the utilization of judicial adjuncts or alternative dispute resolution mechanisms. At this time of reflecting on where the Federal Rules have taken us and where they should be going, there are important lessons to be learned from this case study of judicial adjuncts.

On the micro level, it is fair to say that the role of modern judicial adjuncts bears little relationship to the special masters envisioned by the 1938 Rules. The historical role of masters was to aid at trial by reporting facts and conclusions of law in a technical or complex case or to assist in the post-trial phase in the calculation of damages or accounts. The elaborate pre-trial presence that special masters now have and the broad-ranging powers they now bring to fashioning remedies in litigation have been brought about by the changing nature of modern litigation.

The magistrates, too, were introduced through statutory changes and have replaced the traditional special masters in some respects. In certain types of litigation—post-conviction relief, social security cases, and Title VII litigation—cases are referred to magistrates for initial reports and recommendations. The magistrate is thus not entirely unlike the traditional master, but has been made a formal judicial officer with a formal judicial role.

²⁰⁵ I suspect that Judge Richard Posner would also disapprove this type of reference. In his comments to my paper, he indicates no discomfort with special master references but substantial difficulty with magistrates when they try cases with the consent of the parties. See Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216-17 (1989). I interpret Judge Posner's reaction to be a concern with the type of adjudicatory functions undertaken by judicial adjuncts. As I indicate in this paper, however, one danger resulting from special master references has been the tendency to delegate broader adjudication authority, including the hearing of dispositive motions and, more recently, the conducting of jury trials, albeit with the consent of the parties. Although as a constitutional matter under Article III, there may be little difference between consent to a trial by magistrate and consent to a trial by master, see Silberman, *supra* note 15, at 1350-53, as a matter of policy, there are significant concerns. Magistrates are full-time federal judicial officers with appropriate accountability. Masters are part-time adjuncts to whom we should be wary of entrusting judicial power. The danger of special relationships and special interests influencing decision-making is evident, and public confidence in our formal institutions is likely to be eroded. See Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592, 1593 (1981) (arguing that "that advantages of using reference as a full-blown substitute for federal or state court trials are outweighed by the institutional costs, if not negated entirely by the constitutional concerns").

As the descriptive portions of this paper reveal, special masters have been useful at the discovery stage in devising innovative procedures to streamline and expedite cases. Their expertise in particular substantive fields and their sophistication in management techniques has been invaluable, particularly in large complex cases. To some degree, the informality and flexibility of their approaches are the very essence of their success. Similarly, the use of masters in the remedial stages of litigation have made it possible to implement and effectuate judicial rulings that would not otherwise be possible.

At the same time, I have suggested potential institutional costs emanating from a reflexive tendency to rely heavily on judicial adjuncts. The pre-trial masters may, in some cases, merely aggrandize the pre-trial and discovery role. Not only is the use of a master expensive, but it also may delay the likelihood of focusing on the merits of the case. To the extent that the pre-trial master shapes the case or influences settlement, reliance is placed on a private individual without institutional commitment and with potential conflicts of interest. More serious objections lie in the direct assumption of the judicial role by the master: making rulings and authoring opinions on preliminary issues that may carry precedential weight.

It may be that some of my objections to special masters can be overcome with a revision of Rule 53. After all, the 1938 Rule envisioned very different functions for special masters than those undertaken today. Calibrating the exceptional condition requirement to the type of reference that is made might be appropriate if there is consensus that using special masters to undertake discovery is a good idea but permitting them to rule on dispositive motions is not.²⁰⁶ The role of consent of the parties—keeping in mind the possibility that there might not always be true consent—might also be a relevant factor in determining whether a special master is appropriate and on what matters.²⁰⁷ The standard of review should also be adjusted to reflect the kind of

²⁰⁶ For example, Magistrate Brazil proposed that special masters be precluded from hearing any potentially dispositive issues without the parties' consent. See Brazil, *Referring Discovery Tasks*, *supra* note 17, at 185. Alternatively, a revised rule on special masters might permit references for supervision of discovery and for rulings on non-dispositive discovery matters if neither a judge nor a magistrate is available to render pre-trial assistance or when the special expertise of the master would be desirable. Such a provision would dispense with the stricter "exceptional condition" requirement, but would indicate the preferability of referring issues to a magistrate and the necessity of demonstrating a need for the expertise of a special master before reference to a master will be granted.

²⁰⁷ For example, references of dispositive motions might be appropriate if the parties consent. The conduct of a trial or the supervision of a jury trial, however, might not be appropriate in light of the need for public confidence in adjudication.

motion practice that contemporary special masters undertake.²⁰⁸ The issue of appointment of a special master for settlement should be addressed directly, and rules regarding the master-judge relationship and communications between them should be put in place.²⁰⁹

Restraints must also be placed on the use of masters at the post-trial relief stage. Criteria should be developed for those circumstances in which masters are appropriate and standards should be articulated to assure that accountability and control remain with the district judge. The question of who will serve as a special master and the procedures for selection of a special master should also be implemented. In sum, a revision of Rule 53, which reflects the different functions of judicial adjuncts, is necessary to clarify precisely what situations and within precisely what parameters a special master should function.²¹⁰

On the macro level, our experience with judicial adjuncts signals a more basic failure in the general philosophy of federal rulemaking and procedural reform. The great virtues of the Federal Rules of Civil Procedure in 1938 were their generality and their application to all civil cases.²¹¹ The Rules, almost by way of a broad charter to district judges, adopted minimal pleading rules, introduced broader techniques for pre-trial discovery, and flexible provisions for multiparty litigation. As individual cases demanded more particularized responses, the trans-substantive approach of the Federal Rules was supplemented by the introduction of local rules and standing orders, broad exercises of discretion by judges, and increased manifestations of "judicial management." That the original Advisory Committee's goal had been a movement away from a common law system of procedure—so that procedure would not dominate the substantive law²¹²—is the Rules' ultimate irony.

Indeed, the trans-substantive premise of the Rules is being eroded in numerous indirect ways. The *Manual for Complex Litigation*²¹³ and the National Commission for the Review of Antitrust Laws and Proce-

²⁰⁸ De novo review, such as that afforded to reviews of magistrates' rulings on dispositive motions, would seem appropriate on references of dispositive matters.

²⁰⁹ Professor Brazil, who has offered his own guidelines for pre-trial use of special masters as an addition to Rule 16, suggests that communications about the merits of the action between the judge and master should be in writing. See Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, *supra* note 17, at 380.

²¹⁰ See Proposal of Magistrate Wayne Brazil, in *MANAGING COMPLEX LITIGATION*, *supra* note 17, at 384-88.

²¹¹ For a critique of trans-substantive rulemaking, see Burbank, *supra* note 1, at 1935-37; Subrin *supra* note 1, at 2048-51.

²¹² See Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 957-60 (1987).

²¹³ *MANUAL FOR COMPLEX LITIGATION (SECOND)* 283 (1985).

dures,²¹⁴ although not in formal rulemaking guise, adopt a set of particularized procedures and recommendations for certain large and complex cases. The recent ALI study of Complex Litigation similarly moves in the direction of making formal changes in the structure of this type of litigation.²¹⁵ But by and large the erosion of trans-substantive rules has come via ad hoc informal, customized procedures devised by judges and, often, their judicial adjuncts to cope with the difficulties posed by the modern caseload.

Why have the federal rulemakers remained beholden to the approach of a single set of rules for all cases? And why have they resisted more precise and formalistic responses to some of the recurring problems in modern litigation, such as abusive discovery²¹⁶ and complex class action litigation? It is true that in 1983, under the tenure of Judge Walter Mansfield and his reporter, Professor Arthur Miller, amendments to the Federal Rules provided for judicial impositions of sanctions for pleading, motion, and discovery abuses as well as an increasing emphasis on judicial management in Rule 16. But like the general approach of most contemporary judicial reform, the direction is toward institutional restructuring (that is, introduction of magistrates) and other organizational techniques (judicial management).

One answer to the question I pose is that institutional and organizational reform is always easier than specific and particularized rules.²¹⁷ Indeed, there are probably inherent limitations in trying to create formal systems of *a priori* rules for categories of cases. But that it is a difficult task does not mean it should not be tried.

I have suggested that it is partly due to our continuing delegation of process to judicial adjuncts that we have failed to make more comprehensive procedural reform. Rather than revisit procedures appropriate in elaborate documentary or multi-party cases, a delegation to a special master, who can devise a customized procedure for the case,

²¹⁴ THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, (1979).

²¹⁵ AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Tent. Draft No. 1 Apr. 14, 1989).

²¹⁶ Articles lamenting the over-development of discovery abound. See, e.g., SEGAL, SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS (Fed. Jud. Center 1978); Batista, *Sanctioning Attorneys for Discovery Abuse—the Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and Bar*, 57 ST. JOHN'S L. REV. 671 (1983); Katzenbach, *Modern Discovery: Remarks from the Defense Bar*, 57 ST. JOHN'S L. REV. 732 (1983); Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680 (1983).

²¹⁷ Cf. Seron, *The Limitations of Standardizing the Practices of Judges* (Mar. 1988), (unpublished paper) (on file with the *University of Pennsylvania Law Review*).

alleviates the immediate pressure on the judge's calendar. Rather than confront the policy issue of whether litigation like *Agent Orange* should have something other than a judicial forum, there are sighs of relief that the case was in the hands of Judge Weinstein whose innovations and management helped bring about settlement of the case. Thus, the use of judicial adjuncts has pushed formalized procedure into retreat.

Although I have no particular programmatic federal rules agenda to propose, a change in direction in rulemaking philosophy generally seems warranted. Among the possibilities are redirecting efforts to specific reform of the discovery and class action rules. In this respect the "special master" experience may have provided some accumulated wisdom for more generic application. Certain procedures—such as the statement of contentions and proofs used by several special masters, or inverted discovery formats where discovery objections are brought to the masters as a first resort—could be debated and evaluated by the rulemakers. Even more detailed management rules devised by special masters, such as limits on interrogatories and limiting depositions to one day unless otherwise approved, might be applied more comprehensively.

Even if matters such as these are inappropriate for general rulemaking, one could think about devising a format of rules for application in particular kinds of cases. One need not retreat to the system of common law writs and develop one comprehensive set of rules for anti-trust cases, another set for multi-tort cases, and another for environmental cases. But the rules could certainly be supplemented in particular areas, such as pleading and discovery, with specific rules for specific cases. Whether that supplemental system should be developed for application along particular substantive lines or whether such procedures should merely be designed as a separate track or tracks is debatable. One example of this "specialized" track comes from the English experience, which has a separate commercial court with its own procedures for one class of large cases. Other models are suggested by the *Manual for Complex Litigation*, the *Report on Antitrust* cases, the FJC study for asbestos cases,²¹⁸ and the experimental models of court-annexed arbitration.

I believe this overview of judicial adjuncts provides a powerful example of our need to move away from trans-substantive procedural rules. As others have already observed, devices such as special masters, judicial management, local rules, and standing orders have made trans-substantive rules a concept in name only. Institutionalizing in the form

²¹⁸ WILLGING, TRENDS IN ASBESTOS LITIGATION (Fed. Jud. Center 1987).

of formal rulemaking those procedures that have proved effective in much of our ad hoc case management environment will have distilled the best from that experience.