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Colloquy on Complex Litigation

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Colloquy
on
Complex Litigation

It has been ten years since Benjamin Kaplan, past reporter to the Advisory Committee on Federal Civil Rules, suggested that "the drive toward a unitary procedure be abated" and that "special procedures be set up that are better accommodated to the intrinsic qualities of problems presented."¹

Professor Kaplan's suggestions are representative of a movement in the profession toward specialized treatment of complex cases—a movement whose impact is considerable, as evidenced by the Manual for Complex and Multidistrict Litigation. Nonetheless, identifying the "intrinsic qualities of problems presented" and fashioning procedures to respond to these problems are tasks that remain with us.

In an effort to address these tasks, four distinguished scholars—one judge and three lawyers—met at J. Reuben Clark Law School. They discussed problems presented by complex litigation. They examined causes of the problems and explored solutions. What follows is an edited transcript of their discussion.

Participants:

Alvin B. Rubin, Judge, United States Court of
Appeals for the Fifth Circuit.

Francis R. Kirkham; Pillsbury, Madison & Sutro. A.B., 1930,
LL.B., 1931, George Washington University.

Weyman I. Lundquist; Heller, Ehrman, White & McAuliffe.
A.B., 1952, Dartmouth College; LL.B., 1955,
Harvard University.

1. Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Court Procedure*, 69 MICH. L. REV. 821, 845 (1971).

Jerrold E. Salzman; Freeman, Rothe, Freeman & Salzman.
 A.B., 1962, University of Michigan;
 J.D., 1965, Harvard University.

Kirkham: In order for us to establish a common foundation, I think that the first question we ought to examine is, What is a complex case?

Salzman: A complex case is most often defined by the inertia of the parties and the court.

Lundquist: That would be my first observation. One cannot identify a complex case by its subject matter or by the court that it is in. We have talked in Washington about identifying a complex case, either by instinct or by use of Justice Department statistics. We have been able to adduce no guidelines that reveal what a complex case is, except for a notion that lawyers involved in antitrust think antitrust cases are complicated—a self-fulfilling prophecy.

Rubin: I think we have two overlapping concepts. First, the complex case: cases that have complicated subject matter. Rule 10b-5 cases with issues of scienter and reliance, patent cases with numerous defenses and claims, and certain antitrust cases are complex by virtue of the subject matter. They are just hard to understand. Second, the protracted case. The subject matter may not be particularly complicated, but the case involves a lot of parties, or the amount at stake is very large, and the case goes on a long time. Sometimes the two overlap, resulting in a complex, protracted case. I don't find it very useful to distinguish the complex case from the protracted case. Viewing them as a single class—the difficult case—is a simpler concept.

Kirkham: I agree with Judge Rubin. There are complex cases, and these cases require special treatment. They should be designated as complex and treated as complex from the outset.

Salzman: I agree that to avoid problems, certain cases should get special treatment. However, I am not certain that such treatment is required by the nature of the case. For example, the most complicated cases

that we see in our office are roof collapse cases. They present engineering problems, architectural problems, and use problems. There are many parties—steel manufacturers, the fabricator, the contractor, the subcontractor, etc. This list assumes that no one was killed or injured when the roof collapsed. We do, however, have to face all issues arising out of the interruption of an ongoing business. These cases are very complex. However, the bar that handles them, for historical or other reasons, doesn't act like the antitrust bar. The cases get treated in an expeditious manner—both by the lawyers and the parties. I have found that although the roof collapse case is much more complicated than the average antitrust case, the roof collapse case proceeds through discovery stages expeditiously.

Lundquist: I agree that there are cases with complex subject matter. However, there are also lawyers who enjoy a certain mystique by making a case complex; they like to speak the language of their case. The patent bar does this. A federal district court judge in San Francisco recently complained to me about a complex patent case. The judge was outraged because neither he nor the jury could understand the case. The expert attorneys and the expert witnesses were speaking only to each other and ignoring everyone else.

Rubin: Is there any reason to treat differently the case that is complicated because it is difficult to understand from the case that is protracted because the lawyers or parties are very difficult to deal with?

Salzman: I think so; I think that one ought to allow complicated cases to proceed without interference, but the potentially protracted case should be controlled from the outset and should be subject to discovery restrictions.

Rubin: How would you distinguish the case that ought to be controlled from the case that should be permitted to go its own way? Who would identify the case? How would they identify it? How would the case be treated differently from the complicated

case?

- Salzman:** Experience has taught all of us some answers. Large antitrust cases with class action aspects (price-fixing cases), regardless of their inherent simplicity, often become cumbersome. In such a case, it is in the defendant's interest to protract the litigation, either to wear down the plaintiff or to get the benefit of holding expensive money for as long as possible prior to settlement. Most defendants think they will eventually settle the case, and because they don't expect to lose anything from delay, they protract. In large class action antitrust cases we can predict that undue delay will occur.
- Lundquist:** I think Jerry is correct. Very often, a case is designedly made complex because it is in the interest of one party or the other to make it so. To achieve wear-down exposure, bring a lot of people in. If the attorney wants to assert that the case is beyond the grasp of jurors, he goes in every direction to make the case inordinately complex. The other side seeks to keep it simple. Ours is an adversary system; we respect and understand these processes. Over the years, depending on the interest I have had for a client, I have gone in one direction or the other.
- Kirkham:** I think that we are describing a situation that was. I think that everyone is completely fed up with the big case and its excessive discovery and expense. The plaintiff bar and the defense bar are beginning to recognize that both sides are responsible to see that simple cases do not become complex and that complex cases do not become more complex.
- Rubin:** There is something implicit in our discussion that I would like to make explicit to see if we all agree. Are we not saying that the lawyers, through experience, know whether a case requires special treatment, and that such a case cannot be identified from reading the complaint?
- Salzman:** Certain categories of cases are likely to be protracted—antitrust cases, certain types of 10b-5 actions, and so forth. Beyond that, the lawyer will frequently recognize an interest in the opponent to

- protract.
- Rubin: What you are saying then is that the plaintiff or the defendant will recognize, from their interaction, that the case will become a protracted case.
- Lundquist: I think that is right. I cannot resist saying that we have a mechanism in the Federal Rules of Civil Procedure that deals with this problem. The new procedures in rule 26(f) place the responsibility on the lawyers to determine how the case should be handled and to resolve difficulties. If the attorneys cannot resolve the differences, one or both of them can call for a judicial conference and obtain judicial management. The hope is that 26(f) will enable the lawyers to manage the case without judicial involvement; but, if they cannot do it, 26(f) permits early intervention in the protracted case.
- Salzman: I think that 26(f) will work unless both parties have an interest in protracting the litigation. There has to be one side that needs action and feels that the protraction of litigation will injure his client in order for the device to work.
- Kirkham: I agree. Tom Barr² said this not long ago when he was reviewing his IBM cases: One person cannot keep a case from being complex but any two can. If you have one lawyer and a judge, or two lawyers, who want the issues framed and the case reduced to size and brought to trial, it can be done. With respect to the complicated case, I don't think that anyone has a right to file a lawsuit and then just kick it along forever until it is an untriable case. The judge has to have some responsibility for the case; lawyers can work together, but there ought to be a report as the case goes along to enable the judge to know whether the case is being handled properly.
- Rubin: The discussion indicates that good judicial management resolves some of the problems presented by protracted litigation, and that rule 26(f) provides a mechanism to obtain such management. As I understand it, there are two situations

2. Thomas D. Barr; Cravath, Swaine & Moore, New York, New York.

in which 26(f) would not be triggered: the multidistrict case and the case in which both sides have an interest in delay. In those situations in which there is a public interest in obtaining judicial management, but neither party sees a need to trigger 26(f), what do we do to identify the case and subject it to judicial management?

Lundquist: I would want to think a while about what those cases might be. It is the lawyer's responsibility to handle his client's interests. If both lawyers determine that judicial intervention is not desirable, the case will probably proceed better without judicial intervention than it would with such intervention over the objections of both sides. At the same time, I realize that there are cases that are put on the back burner and allowed to drift along, to the detriment of the client's interests. Many of these are not complex cases, so I don't view them as the result of lawyer-designed protraction. I think that the ordinary mechanism of status conferences, in which the judge says, "Where are you?" "Where are you going?" "I want to get this case off my calendar within a certain period of time," is adequate to overcome most of the problems.

Rubin: Are you saying that, if all the parties agree that the case ought to be a donnybrook and ought to be fought the way World War I was fought, with tremendous sacrifices of men and materials, with bargages that continue for ten years, then the case should be permitted to go that way?

Lundquist: No. We have procedures by which the judge comes in every six months and asks, "Where are you?" If he sees that the case is out of hand he can certainly get into the picture.

Rubin: One thing that I strongly feel is that once the case gets out of hand, the judge cannot restore order. I've tried. The cases that I did not succeed in managing as a trial judge escaped control when I let the case get too big. It's almost impossible to get the genie back into the bottle. I don't think you can rely on the notion, "Well the case has gone two years and has gotten out of hand; judge, come in

- and save it.”
- Lundquist:** That may be, but on the other hand, I have seen judges come in and activate cases too quickly, making a morass of cases that the lawyers would have handled well. I think there is no complete answer; it may become a question of the judge’s confidence in the attorneys and the attorneys’ confidence in the judge. There is a chemistry that I don’t think the rules can define or provide.
- Rubin:** The existence of any system, however, depends on more than a visceral, intuitive judgment that this is the right kind of judge who can do something, and this is the wrong kind of judge who can’t do anything. If we are to propose any systemic kind of help, then we have to have some device that recognizes what kind of case it is that needs help, what kind of help can be given, who should help, and how that person is selected.
- Salzman:** The original question regarding judicial management without the request of either party assumes that there is some public interest in disposing of a case promptly or efficiently, even though the lawyers on both sides seem to be content with the progress they are making. I am afraid that I cannot identify that interest. I can identify an interest in not having an overcrowded docket, but I think that we are taking care of that.
- Rubin:** I don’t see any public interest in an uncrowded docket. But don’t you think that there is a public interest in litigation that is not unduly expensive?
- Salzman:** If we make it apparent that when one party feels the court’s intervention is necessary for efficient, expeditious litigation, that party can invoke judicial intervention, then we have met that interest.
- Kirkham:** I don’t like to be a Cassandra, but if more is not done to reduce the expense of litigation, the legal profession will be destroyed. If the courts of this country cannot handle litigation at a reasonable expense, then some substitute mechanism for dispute settling will be needed. Judge Rifkind³ said that if

3. Simon H. Rifkind; Paul, Weiss, Rifkind, Wharton & Garrison, New York, New

he had a friend who had a claim for anything less than \$50,000, he would advise him to forget it rather than file suit in federal court.

Salzman: We often tell people to forget lawsuits because it will cost too much. There can be a legitimate interest in proceeding slowly, however, even though this raises costs. For example, in a class action antitrust case the class attorneys may have some interest in going slowly—it is difficult for them to organize, and they are overburdened by the talent and effort that the defense attorneys can put into the case. The defense is interested in going slowly because the money is in their pocket, and the interest rate is very high. The defendants may be earning four times as much in interest as they are paying their attorneys. Therefore, although the eventual disposition of the case is clear to both parties from the outset—settlement—both parties are content to go slowly.

Rubin: I still think that there may be a public interest in judicial management of the case even when it is in the interest of both sides not to act precipitately with respect to discovery and trial. I think that the public interest exists because, as assumed in your hypothetical, we have a class action. Notice has gone out to a lot of people who won't be hearing anything about the case, and they will be concerned: "What is happening in my case? I've got a right to know this; I'm a member of the class. I haven't heard anything for six months or a year." Another thing that happens in these cases is that, although the attorneys are satisfied with the progress, at a later stage of the case the public becomes aware of the action and views the case as being typical of the judicial process. Suppose the case took four years to conclude and ended up being settled. Nothing much is visible on the public record in terms of judicial proceedings despite the tremendous discovery and negotiation efforts. Suddenly, there is a request for \$750,000 in attorney fees. The

public doesn't understand. For these reasons I think there is a public interest in having such a case under management even if the management consists of getting everyone together and finding out that attorney X, who represents the plaintiff class, is conscientious and is going forth as well as the case permits, and attorney Y, who represents the defendants, is not unduly dilatory. Thus, even in the case that doesn't require active management by the court in the sense of compulsory grooves, there is an interest in early identification of the case and some kind of judicial proceeding that will let the lawyers know that they have an obligation other than what they perceive to be the interest of their client.

Lundquist: You state a valid public interest. But I think that there is another public interest in judicial management. In the context of protracted litigation, the lawyers arguably are working in a conflict of interest situation. The plaintiff lawyer who prolongs a case is justifying a fee for himself. At the same time, the defense lawyer is being paid on an hourly basis. I think that one of the leading conflict of interest situations of our day arises in the context of the hourly charge and the possibility of making a case protracted. Lawyers should be very sensitive to this. The conflict is such that it behooves the judiciary, in the public's interest, to be concerned. As to how to handle the case, I think it perfectly respectable for a judge to say, "I am going to have this case off my docket in two years and you ought to plan accordingly." Let the lawyers work within that. As long as the time frame established by the judge is reasonable, this type of intervention is proper. Of course, if something unforeseen comes up, one would expect the judge to be reasonable.

Kirkham: Perhaps we should change our focus and discuss the next question on the outline: What can be done before a complaint is filed to avoid delay and expense?

One factor is the extent of precomplaint investigation done by the plaintiff. In general, there are

two situations with regard to precomplaint work. One is government-initiated litigation; the other is private litigation. There is no excuse for the government to bring an action without knowing what the issues are. In government actions, discovery should be very specific and controlled because the government has ample opportunity to obtain evidence before the case is filed. Before filing a case, the government should know what it will do. Such was not the case in the *AT&T* case,⁴ the *IBM* case,⁵ the *Cereal* litigation,⁶ or the *FTC-Exxon* case.⁷ In the *Exxon* case the government filed a thirteen-volume, 1400-page demand subpoena. The administrative law judge remonstrated and said, "Go back and rethink it. If you can't file a discovery motion that looks toward a case that is triable, then you better look again." The judge was correct; there's no excuse for such conduct.

Now in the private case, because the private litigant does not have the right to go into the books of the potential defendant, the plaintiff has more of a problem, and discovery after the filing of a case is legitimately broader than it is in the government-initiated case. However, one of the biggest problems we have in complex cases is that a plaintiff can file a case under Rule 8 of the Federal Rules of Civil Procedure that doesn't state any issue at all. Class action cases are the worst manifestation of this problem. The minute there is any rumor of a government investigation, lawyers jump in all over the country creating a most ridiculous situation. The *Sugar cases* are a good example. More than one hundred lawsuits with millions upon millions of sugar users as class members were filed all over the country against practically every sugar

4. *United States v. American Tel. & Tel. Co.*, No. 74-1698 (D.D.C. filed Nov. 20, 1978).

5. *United States v. International Business Mach. Corp.*, No. 69-200 (S.D.N.Y. filed Jan. 17, 1969).

6. *Kellogg Co. v. Federal Trade Comm'n*, No. 8883 (filed Apr. 26, 1972; dismissed Sept. 10, 1981).

7. *Exxon v. Federal Trade Comm'n*, No. 8934 (filed July 18, 1973).

company in the nation, charging a nationwide conspiracy extending over half a century. When the indictment finally came down in New York, it charged four companies with a specific price-fixing arrangement arising from a single incident. In the meantime, every issue in the world had been thrown at the industry.

Salzman: Our office has withdrawn from the class action antitrust practice for reasons you mentioned. We found that lawyers were spending forty percent of their time jockeying for position and very little of their time working on preparation of the case.

The problem of issue identification is real but arises from inherent difficulties. A plaintiff's attorney, approached by a client, will make a preliminary investigation by appealing to a distributor or a person who was formerly in the industry. If the attorney is given compelling information, he is put in a bind. He has a duty at some point to file the case and stop the statute of limitations. How much pre-filing investigation can be done without compromising the damage claim?

Rubin: And I think there are other cases. Let's take the typical class action racial discrimination case. It's very hard to find out until after discovery, which is not available before filing, whether there really was racial discrimination. All the data are in the hands of your opponent. The plaintiffs give a plausible account of racial discrimination by their employer. These accounts make a credible class action, but the lawyer has no way to tell what the hiring policy was because no one will talk to him. Doesn't the plaintiffs' lawyer have a duty to file his suit and at least find out?

Kirkham: But in that case he will have specific issues, he will have plaintiffs, and he will be able to state something other than "These defendants have violated the law."

Lundquist: Perhaps not. I know of one discrimination case in which the complaint was a notice-pleading complaint that alleged discrimination and even went on to suggest the particulars. The defendant said, "We

absolutely haven't so discriminated and we'll prove it to you." In the course of discovery the defendants gave the plaintiffs computer records of employee hiring. The documents showed that the defendants had not discriminated in the way alleged but had discriminated in another way. Except for notice pleading the discrimination would have never come to the fore. I certainly favor notice pleading, but I think that problems may arise after the case gets started on the notice pleading because the interest of one party or the other may be to make discovery explosive, to make it complicated, or to go far beyond the noticed claim, rather than to focus in on it. I feel very strongly that, after the case gets started and after a reasonable amount of discovery, the lawyers should start to focus on the issues to ready the case for trial.

Rubin: Is there not another factor that causes protracted litigation? That is, don't people who handle major issues in litigation have a sort of malpractice syndrome, not directly in terms of malpractice, but rather an anxiety that unless they turn over every stone, they will not be doing their professional duty. It's not a matter of self-aggrandizement; they're not trying to run up the clock; they really are concerned that they must turn over every stone.

Lundquist: I don't entirely agree that it doesn't tend to be running the clock; but to refer back to what we have said, in some cases we use that justification to avoid making judgments. When you are looking for worms in a field and you know that they're found only among stones where there's moisture, looking in the dry area is not good judgment; you must remember that what you're out to do is not to turn over every stone in the field, but to find worms. We can eliminate some of the problem by insisting that lawyers focus on the issues. We are not teaching our young lawyers to be trial lawyers. We're teaching them—and you hear this more and more—always to overprepare. I think Judge Pat

Higginbotham⁸ has said that overpreparedness can be as much of if not more of a problem than underpreparedness, because lawyers coming into a courtroom don't know how to bring a case to trial.

Salzman: This problem exists in many of the cases in which we are involved. In part, the problem arises from client demands in a situation where there is much at stake. That client says, "Damn the torpedos, full speed ahead. Who knows, something might come up." In many cases, we have said to the client, "Don't do it; it's going to be counterproductive," or "It will give you one-tenth of one percent return on your money." The clients have told us to go ahead. What has happened throughout the profession is that the example of New York law firms operating in this fashion has spread to the hinterlands. The next thing you know you're down in Atlanta, and somebody in Atlanta is trying to prove that he is as good as the people in New York. All of the business is moving down there anyway, and the clients are used to the "no stone unturned" principle. In this way it becomes a practice in litigation departments of major firms to operate on the leave-no-stone-unturned principle. The habit extends right down to the behavior at trial.

Kirkham: Sometimes the defense cannot afford to leave any stone unturned, especially in light of notice pleading. In the Little Mother Hubbard case,⁹ for example, the government brought suit to divest the oil industry of its vertical holdings. When the government brings that kind of a case, the stakes are so high you can't afford to miss anything. In that case, for instance, we had a study made of every independent oil refiner that went out of business on the west coast between 1917 and 1930. At the outset there were dozens and dozens, even scores of little refineries; all one had to do was put up a tank, boil the oil, take the gasoline off the top, and throw the

8. Patrick F. Higginbotham, United States District Judge for the Northern District of Texas.

9. *United States v. Standard Oil Co.*, No. 11584-C (S.D. Cal.).

rest away. As things got more efficient, of course, those refineries went out of existence. The government alleged that it was the result of a conspiracy, that we had thrown all these people out of business. So we made a survey to discover the reasons why every one of those refiners went out of business. And that was only one aspect of the refining issue. The government would never confine the case and tell us what the suit was all about.

Salzman: Another problem arises when the government uses the court to accomplish structural change that ought to come through legislation. There has been a tendency in the Justice Department to use the judicial system for sweeping changes rather than to correct conduct recognized to be in violation of the law. I don't think the judicial system is designed for that, although it's had incredible success in certain social areas.

Lundquist: I wonder if you're not going to get into the courts one way or the other. Assume that to further a social policy a law is passed that prohibits companies from employing more than *X* people or having more than *X* billion dollars in assets. That legislation is going to be in litigation immediately, and you're going to be back in the courts looking for answers.

Salzman: Let's discuss that. A bill of this type is pending right now. Representative Neal Smith, of the House Agricultural Committee, has proposed legislation to restrict the size of packing houses and to limit the way they feed cattle.¹⁰ The Justice Department reacted adversely, asserting that the legislation would be anticompetitive. If the law is enacted, there is likely to be litigation. But the litigation will be of a different scope than litigation charging, for example, that the packing houses had a shared monopoly. When we deal with statutes, we focus on narrow standards for overturning overly restrictive legislation.

10. Small Business Preservation and Protection Act, H.R. 7197, 96th Cong., 2d Sess., 126 CONG. REC. 3073 (1980).

Rubin: That is true. When a statute is challenged, the judge assumes a role that he more readily comprehends and for which he is better trained; the judge determines whether the statute is constitutional—whether it violates due process or equal protection or has some other defect.

Lundquist: But when the legislation makes reference to social aims, and the court is left to “flesh-out” the details, such as in the environmental area, the court again becomes the arena for sweeping change. Furthermore, in my judgment, the courts have not done a bad job.

I would like to address the statement made that notice pleading is a cause of some problems in complex cases. My view is that notice pleading remains a good thing. What happens after the notice pleading is what becomes critical. It is a question of which way you look through the telescope: Do you look through the wide end so the case is perceived broadly, or do you focus in to reduce the case to triable issues? Something I have advocated—and I think Justice Powell thought of this when he wrote his dissent with Justices Rehnquist and Stewart regarding the recent federal rules change¹¹—is that, after the case gets started in the pleadings, discovery be limited to the claims or defenses at issue in the case. That’s the way I would like to see the problem addressed.

Rubin: How would you get the attorney to focus in on the issues?

Salzman: I would force him to take a jury trial. The judge should say, “I want you to start preparing your little fact booklet for the jury.”

Lundquist: I couldn’t agree more. I think that this touches upon an integral cause of complex litigation problems. If we look at those who are described as litigators in this country, we will find very few trial lawyers. The truth of the matter is that most big firms try very few jury cases each year.

Rubin: I agree with you. I ask people who say they’re in

11. Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980).

the litigation section of X, Y & Z how many cases they have tried in the last three years. It's not uncommon to find that the average will be five or six per year.

Lundquist: That would be unusually high. I would guess that if you were to poll litigation partners in major firms around the country you would find that a number of them have never tried a jury case. You would find a number of them who have not tried a jury case in ten years. This is part of the problem I previously alluded to in which the interests of the lawyers lie in making a case complex and in making it remunerative.

Rubin: I think I generally agree that in some cases the judge ought to say, "This case is going to be set for trial to a jury six months hence and you must be ready."

Salzman: The judge must do more. The judge must also circumscribe the initial wave of discovery for both sides. I believe that it is essential to promulgate pattern interrogatories, discovery requests, and documents requests.

Lundquist: Another thing the judge must do is to set limits on trial length. I think lawyers become used to time limits when they are set. You can go to the Supreme Court and be given a half hour on the most important case in the world and say that's fine, because you're used to it. But if somebody says to you that you're going to have to try a case to a jury in a certain period of time, it gets a different visceral reaction. I think that this kind of management can make litigation much more effective.

Rubin: I agree basically, perhaps entirely, with your suggestion, but I have two questions about approaching the matter from that standpoint. Suppose one or, indeed, both parties say to the judge, "But judge, this is not that kind of case; you have it wrong. This is just a tremendous case and I need time; I need more than six months." How does the judge avoid becoming tyrannical? How does he identify whether the protests are genuine?

Salzman: I think I can give you a start on the answer.

Perhaps the judge should become a bit tyrannical and say, "This is the first wave. You come back to me in three months after you have actually looked at these documents and tell me what else you need, why you need it, and what you're going to do. Be prepared to explain to me why you have to put on more than *X* witnesses from each defendant." Let the lawyers come back after the documents have been produced, after the interrogatories have been answered.

Kirkham: I agree with these proposals with respect to certain types of cases. Maybe we need to remember that there are cases which really are huge such as the *IBM* case and *AT&T* case. In those cases, unless you are bifurcating the case, the limits are not fair because you don't have a case that can be prepared in six months.

Salzman: The *Western Sugar* case¹² could have been ready for trial in a much shorter time had it been in the interest of the parties. There were eight or ten key dispositions, and the rest was wasted effort.

Rubin: I think Jerry is suggesting something that I heard best summed up by Judge Hubert Will,¹³ a great trial judge. He said that in those situations the judge should be reasonably arbitrary but not unreasonably arbitrary.

One last question relating to the propriety of focusing in from the pleadings: If notice pleading is permitted the case cannot be limited to the issues until the issues are known; there must be some discovery, must there not, between the filing of the pleadings and the definition of the issues?

Lundquist: It is a question of refining the definition of issues. I think that in the broader sense an issue is present when there is a complaint and an answer, or a complaint and the various responsive pleadings. Those pleadings have then framed certain issues. A classic abuse of notice pleading occurred in some cases in-

12. *In re Sugar Antitrust Litigation*, [1977] 1 TRADE CAS. (CCH) ¶ 61,373 (MDL No. 201, N.D. Cal. filed May 21, 1976).

13. Hubert L. Will, United States District Judge for the Northern District of Illinois (senior status).

volving the National Football League. Once the issues were framed it was insisted that discovery be permitted of every one of the NFL teams on things which were not germane to the law suit but which were customary discovery items around the rest of the country. Now, that is where I think the judge should start to focus in on the law suit and not allow the attorneys to pursue discovery into everything that is merely of conceivable relevance. The problem is partially caused by judges. Judges have too often said, "Well that's discovery and I'm not going to get into that," and have not really paid the attention that they should. What I would call for probably is a little more judicial intervention to keep discovery from exploding.

Rubin: Before the others comment, let me ask one more question. How do we give the judge incentive to spend some of his time—perhaps an appreciable amount of time—getting into the case, finding out what the issues are, and limiting discovery?

Lundquist: A partial incentive is that if judges get into the case early and efficiently, they will actually save themselves time. Judges who are close to the cases tend to be the most efficient and to dispose of more cases. Rarely will a judge who does not involve himself in the discovery processes be an efficient mover or trier of cases. Rather, the converse is true. Perhaps many judges wonder whether time is better used by getting into the discovery fray or by leaving it to the magistrates. I would like to see these judges become involved in discovery. That is what the lawyers want. Lawyers want judges in the picture, and such involvement is more efficient for judges in the long run.

Rubin: How do you feel about it, Jerry?

Salzman: I believe we need ten or fifteen specially designated judges located in centers where complex cases are filed. Complex cases could be assigned to those judges. Their dockets would be limited to fifteen or twenty complex cases. That would require the judges to do three trials a year in addition to managing the other cases. I think this would be the

cheapest way to do it, because judges are probably the least expensive part of the judicial system. They don't get paid a lot of money; neither do their clerks. In addition, such a system would be the most certain way to encourage legitimate settlement negotiations because the parties could not avoid speedy trials. Appointing special judges would also partially alleviate the burden on other judges in those same districts, which usually have unbearable criminal dockets. Almost all major urban centers have tremendous criminal dockets to deal with, and these complex cases don't often come up in rural locations. Therefore, we need to create special judgeships. Whether these judges would handle only complex cases during their tenure is problematic. I believe it would be best to rotate judges into the special status for three, four, or five years, and then bring them back to ordinary status.

Lundquist: That may be ideal, but I don't think it is realistic. There isn't any likelihood that the Congress, the people, or the judges will accept it. We really need to focus more on what we can do with the existing system and judges to solve the problem.

Rubin: What about a system that is somewhere between the random selection of judges and the designation or appointment of special judges: authorizing the chief judge of the various major districts or the chief judges of the courts of appeals to select judges to whom these matters would be referred based on their presumed competence and experience.

Lundquist: I would want to think a little more about it. I have a kind of halfway solution of my own: allowing each attorney to peremptorily challenge one federal judge per case. This at least gives the lawyer a little latitude within a given district. I would like to see that as a first step.

However, the notion of assigning cases to particular judges does exist in multidistrict litigation. The case is assigned to a particular judge by the panel, and generally speaking this works well. However, a little forum shopping occurs because at-

torneys file cases in districts where they know judges are better equipped to handle them.

Rubin: I understand, Jerry, that your experience with the panel has been one of delay regarding the designation of judges.

Salzman: No, the panel generally acts quickly, and there are several judges around the country to whom they assign these cases. But I want to create a situation in which these judges can be relieved of some portion of their ordinary dockets so that everybody knows that these judges are actually going to try three complex cases each year. Let's take some very good judges in Chicago—Judge Marshall¹⁴ or Judge Will, for example. They can't give trial dates for big cases because it means setting aside a great deal of time. The defendants invariably threaten a six-month trial, and two months is a fairly reasonable estimate. The threat of setting a date for a trial is not realistic because both sides know that if they can give the judge an excuse he must accept it.

Rubin: There is an alternative that depends again on judicial administration. The Judge Marshalls and the Judge Wills could be relieved of the more routine cases. Could we not use existing mechanisms to handle both routine and complex cases rather than create a special mechanism to handle complex cases?

Salzman: In any event, I think we need additional judgeships and special courts. The statistics from the Administrative Office show that the district court judges in urban centers have an overwhelming caseload.

Kirkham: This gets back to a very fundamental problem—work volume and income. It's disgraceful what we pay our judges, and yet we still expect to get good men. We need more judges, and we need to compensate them better.

Lundquist: There is no question about that. I thought that what you were going to suggest with your center, Jerry, was more teaching, with the judges who are

14. Prentice H. Marshall, United States District Judge for the Northern District of Illinois.

doing the best job sharing their information with others. I think such an educative process could be very helpful. It is my perception that some judges have the personality, instinct, and knowledge to run a better calendar, try more cases and move more cases along. Other judges don't. The former ought to instruct the latter. Some judges don't like to try cases; they prefer to become managers and settlers. Indeed, there are some interesting statistics regarding the number of cases actually tried in certain districts. They show that some federal district judges like to try cases and, in fact, do so. Others, seemingly, don't like trying cases at all.

Rubin: Well, part of it is the judge's vision of himself—in current terminology, his self-image. What does a judge think judging consists of? If a judge's concept of judging is to be on a bench in a black robe saying, "I sustain" or "I overrule that objection," it is very hard to get him to move into effective pretrial discovery. If a judge, like Judge Marshall and Judge Will, believes that the role of the judge is to assist in the administration of justice, then he is apt to act differently. You have to help the judge reshape his image of judging.

Lundquist: Having sat on a committee of lawyers and judges that has worked on these types of problems for four years now, I think the solution finds partial root in education. Everyone needs to understand that lawyers like strong judicial control and early intervention. They also want the issues shaped to facilitate the trying of complex cases. Judges have the power to take control and probably had it before the rules changes. It's a question of getting the judges to use that power and to understand that lawyers want them to use it. I think that a lot of the changes we see are not so much changes in powers the judges have, but in the sense of direction judges take.

Rubin: Judicial intervention occurs at a conference that is triggered either by the court *sua sponte* or by the request of one or both parties. The mechanism by which the judge takes control is the rule 20(f) status conference. The judge should either find out if

the parties know what the issues are or determine how much discovery is needed to reveal those issues.

Lundquist: I should point out that we also tossed a little extra leverage for the judges into rule 37(g). We said that if the party or his attorney won't in good faith participate in framing the issues, then the judge may charge attorney's fees against that party. So both the stick and the carrot are there. Hopefully it will start something going.

Salzman: Judicial control seems to vary with the number of parties and attorneys involved. A conference with the judge, three lawyers on one side and two lawyers on the other side, ordinarily results in some reasonable resolution. The parties identify the individuals whose depositions are to be taken, agree on a schedule, and so forth. But if there are fifteen defendants and each has three lawyers at the conference, the conference takes on a different tone. It doesn't focus on the issue of what discovery is going to be taken, but instead focuses on the procedural steps that will identify what discovery is subsequently going to be taken and how the parties are going to object to the discovery. This conference sets the stage for disagreement, and the case can go six or seven months before the first discovery ruling, and then another three months will pass before production.

Rubin: How would you like to see that changed?

Salzman: I think we need pattern discovery tools on the model of jury instructions. Illinois has them in all personal injury cases. As soon as the complaint is filed, the court promulgates explicit interrogatories and document requests that the parties are required to respond to. There could be a very nice, limited set of court-promulgated discovery devices about which no one can argue and to which no one will object.

Kirkham: Exactly what would those be when the plaintiff just makes some broad, general statement that the defendant conspired to violate the antitrust laws?

Salzman: I really don't understand all this talk about the

problems of notice pleading. I've never had any such problem with the practice we have: we are fairly restricted. Even the *Western Sugar* case was fairly restricted in terms of the allegations. But if a defendant were genuinely confused, the court could legitimately ask the plaintiff, "Can't you tell me anything other than that?" If the plaintiff were unable to, the court could say, "You've got your choice: you can ask interrogatories relating to price-fixing or you can ask interrogatories relating to other violations, but I'm not going to give you 500 interrogatories. Here are the six or seven you can choose from."

Lundquist: This is directly germane to what we proposed in the latest rule change, but the Supreme Court did not adopt it. The Advisory Committee to the Rules Committee to the Supreme Court is entertaining the notion of imposing a threshold limit of thirty interrogatories; to file more than that you would have to go to the court and explain why.

Salzman: That rule is in force in some districts, but it is subject to avoidance. Attorneys avoid the limitation by substituting instructions for questions. But that is not the issue. Even if a party is limited to thirty questions, there is no guarantee of any prompt response. Ordinarily, six months elapse before the usual objections are resolved and another three months before the answers are filed. In the process of fighting about discovery, everything is compromised. Invariably, a second wave of discovery is needed to cure the compromises. Rather than a limitation on requests and interrogatories, we need pattern document requests and interrogatories. I would even suggest compulsory 30(b)(6) depositions of certain corporate officers and defendants to identify categories of documents and modes of doing business. Of course, these forms would be modified as experience dictates.

In the *Corrugated Carton* case¹⁵ we filed five

15. *In re Corrugated Container Antitrust Litigation*, MDL No. 310 (S.D. Tex. filed Jan. 25, 1980).

interrogatories: Who were the employees who did business with the plaintiffs? Who saw the grand jury transcripts? How were they dispersed? Where are they now? What did you sell the plaintiffs? The objections to those have taken six months to resolve. I limited myself to five because I thought I'd get an answer in a week.

- Lundquist:** I'm uncomfortable when we start to talk about the multidistrict panel cases and complex cases at the same time. I almost regard those as different animals. Complex cases merit different treatment because they present special problems. As I listen to us, I start to smile to myself and say, "Maybe the best thing to do is to give up panels and not have any multidistrict cases." No one likes the manual any more; it's going to be redone and many agree that it has created far more problems than it has solved.
- Rubin:** I have just been appointed to the Committee for the Manual on Complex Litigation, so I'd welcome any suggestions.
- Kirkham:** Hasn't the Committee asked Professor Miller¹⁶ to prepare a revision?
- Rubin:** He's been employed as a consultant. I don't know whether any specific directions have yet been given to him. They may have been.
- Salzman:** What about having an appendix that lists appropriate interrogatories or appropriate first sets of interrogatories or documents?
- Kirkham:** The manual already includes a first "wave" of interrogatories. These were taken from specific cases and they worked just fine in those cases. Applied to some other case, however, they may be monstrous.
- Rubin:** There is another problem with the Committee's proposal on limiting interrogatories: many lawyers tell me, "Okay, I'll ask only twenty interrogatories, but I'll take twenty more depositions. You're simply forcing me to find out some of the information I

16. Arthur R. Miller, Professor of Law, Harvard University Law School, Cambridge, Massachusetts.

would otherwise elicit by interrogatories through depositions—the more expensive way.”

Salzman: That ignores what is plainly stated: it is a threshold limitation. The other side can agree to interrogatories beyond the threshold. If it is a choice between interrogatories or depositions, I think the other lawyer would agree to additional interrogatories to avoid going through twenty depositions. If he won't, you just say to the court, “In this kind of case we need more.” Such a rule has operated in Massachusetts since time began. It's the rule in the state courts in Chicago. Eighteen federal district courts have some variation of the rule. The Committee has proposed the rule because the bar has reported more abuse in the filing of excessive interrogatories than anything else. It's not designed to shut out any segment of the bar or to prohibit interrogatories when they are the most efficient approach.

Kirkham: I don't think an arbitrary limit of ten or twenty interrogatories is necessarily the answer. One of the interrogatories propounded to the Standard Oil Company was, “If you have destroyed any paper during the year X relating to the production, transportation, refining, or sale of oil or petroleum products, then state who wrote the document, to whom it was sent, what the substance of it was, when it was destroyed, and why.” In my objection to that interrogatory, I took a picture of the pile of documents that is taken each night from the Standard Oil Building. It filled a truck. Thousands and tens of thousands of documents were destroyed every day, and this interrogatory called for a description. A limitation doesn't resolve that problem.

Salzman: If you need an interrogatory like that, a pattern interrogatory would say, “Describe all documents destroyed otherwise than in the ordinary course of business,” or “Somehow categorize the documents.” It can be done. If you get a few smart people spending a little time, they can come up with pattern interrogatories and pattern document requests that are as useful as pattern jury instructions, if the

judges are educated to use them and take that kind of control. Numerical limitations are not helpful because they just lead to disputes about the objections. Pattern interrogatories eliminate this problem. They are proposed and discussed, and after discussion the judge says, "These are the interrogatories and no objections will be heard. Get your answers in."

Kirkham: But you would have a court session of twenty days just to go through a set of interrogatories.

Salzman: That's if lawyers propose them. But I'm talking about starting with an appendix of pattern interrogatories.

Lundquist: I recall a federal district judge who threw out a sheaf of eighty pages of interrogatories without reading them. He said it was preposterous to file eighty pages of subquestions. The courts have come to the point where they say, "That's intolerable, we just won't even start to read them." We need to move toward what Jerry is suggesting.

Rubin: Let's go back to the problem alluded to by Jerry. At some stage you will have specific interrogatories devised by counsel. Inevitably, objections will be raised. The process of hearing the objections and disposing of them is unduly lengthy and intolerably expensive. What is the answer to that? What is a possible solution?

Salzman: One thing that is not the answer is the magistrate system. In the *Western Sugar* case, for example, the defendants propounded gigantic sets of interrogatories about matters that really could never have been issues in the case. There were interminable meetings and attempts to negotiate. Neither side wanted to negotiate, but they had to hold the meetings for the sake of form. When the parties sought a ruling by the court, the judge threw up his hands and said, "Wait a second. I'll never be able to deal with this case if I have to listen to you fellows all day and all night." Therefore, he assigned it to a magistrate. Then, the following occurred: a briefing schedule before the magistrate, arguments before the magistrate, an opinion by the magistrate,

- a motion to the magistrate for reconsideration of the opinion, rebriefing, opinion confirmed, appeal to the court, the court stating, "On the grounds available to me to overturn a magistrate's ruling, I probably can't reverse, but I'll look at it any way," and on and on. You end up with nothing of any value to anybody, except the benefit the defendant derives from causing the plaintiff to expend energy.
- Rubin: What do we do about it? I hear this all the time and I see it sometimes. What can be done?
- Salzman: Let's start with a pattern situation. The judge propounds the interrogatories and document requests to each side as a suggestion. He's done it, there's no objection to it, and the answers must be forthcoming. At some point a party should be entitled to come before the judge and show why particular further document requests or particular further interrogatories are needed. It should be a procedure without the delays that are presently inherent in the federal rules dealing with answers to interrogatories. A person who has thirty days to answer or object always waits thirty days to object. Then he stalls the meeting for another thirty days, and negotiation goes on for another thirty days on top of that. You're already at three months. An extended briefing schedule is *de rigueur* because a large number of parties must coordinate. This causes inordinate delay.
- Kirkham: Jerry, you're talking about dealing with a monster that should not have been conceived in the first place. If the set of interrogatories is reasonably small, you ordinarily don't have that delay.
- Salzman: I disagree. Our questions were, "Please identify who saw the grand jury transcripts" and "Do they still have them?" Six and a half months later we don't have a ruling.
- Lundquist: There is a difficulty with your solution, Jerry. How does the judge get familiar enough with the case to decide what the issues are and which pattern devices to use?
- Salzman: I'm not familiar with cases in which the issues are so undefined. When does this happen?

- Kirkham: Take any class action antitrust case—any one.
- Salzman: The class action antitrust case breaks into two natural parts: The issue of whether there is an appropriate class (and there are certain kinds of discovery necessary for that), and the other issues. Most of the class action antitrust cases have been price-fixing cases. The kinds of questions that ought to be asked in those cases are not complicated.
- Lundquist: That is when you need a neutral person because the defendant in that case can think of thousands of questions which would indicate that it's not a class or that there are all kinds of subclasses, and the plaintiff is obviously trying to focus on questions that will give it all the ingredients of making a rule 23 class.
- Salzman: Anybody who has ever tried to make use of an interrogatory answer knows that those thousands of questions are best asked by deposing the individuals from the various companies. In these cases, there are judges who say, "Wait a second. Instead of asking these interrogatories, which result in answers that are totally useless for a jury and which really don't get any information you don't already know, write up a narrative statement, one sentence at a time, and the opposing party will either admit it or deny it." In the alternative, the opponents can write up a narrative statement about their company.
- Lundquist: If we are talking about the usefulness of interrogatories, I think we all pretty much agree that they aren't really useful. That is why I'm not troubled with limitations or patterns. I do not think interrogatories are useful, either as discovery tools or at trial.
- Rubin: It certainly has been implicit throughout our discussion that we are talking about multitiered procedures for discovery. The relatively simple diversity automobile accident case or the Jones Act case goes on one track, which may employ magistrates for discovery and which may be routine, and the case that is complex or protracted goes on an-

other track. I understand all of you to agree that, in the latter case, the judge himself, rather than a magistrate or some other official, ought to be giving personal attention to discovery control, starting with the interrogatories.

Judge Greene¹⁷ has been using a novel device in the *AT&T* case. The parties have claimed privilege on literally thousands, perhaps hundreds of thousands, of documents. To expedite the tremendously time-consuming job of ruling on the claims, Judge Greene has appointed two law professors as special masters to superintend discovery. In the case that gets beyond the time that the judge can personally give, is that a useful device or is it a device to use once in a century?

- Kirkham: On an issue of that kind it is a useful device.
- Lundquist: In special instances it's probably appropriate. The use of law school professors makes me think about the evidence professor who once said to his class, "That's what the evidence cases say anyway. Whether the trial courts follow those rules, I have no idea; I've never been to a trial." I have a little concern in that respect.
- Rubin: Judge Greene just handed down a ruling in which he defined what privilege would consist of in the *AT&T* case.¹⁸ The opinion gave guidelines: This document is privileged, this is not; this is how you identify the claimed privilege—you must attach an affidavit concerning why it's privileged, and so forth. Would it be helpful in complex cases, and indeed in all cases, if the judge had an individual document about discovery generally: "This is my discovery policy. I admit this, I exclude that. I sustain this kind of objection."
- Salzman: The lawyers at our office often try to get judges to do it in the course of pretrial conferences. They say, "By the way, your honor, we understand so and so is going to be raising these kinds of objections," hoping the judge can give some indication.

17. Harold H. Greene, United States District Judge for the District of Columbia.

18. *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1980).

Some judges say, "You know I don't give advisory opinions." Others give indications, but they don't make any difference because they aren't binding, and people continue to raise objections. It's in their strategic interest to do so, and you wind up with the same donnybrook. What I thought would have been interesting for Judge Greene to do in that circumstance would be to say, "I want you to categorize the types of privileged documents you have and give me five examples of each. I will give you some rulings on those documents. Then I will ask you to go back and look at the other documents. You draw your own conclusions based on my rulings. I will take any documents for which you continue to claim privilege and look at them again, but this time there will be some penalty attached for a wrongful claim of privilege in light of my prior ruling."

Lundquist: Thereafter the judge should say, "I'm going to strip issues, I'm going to add issues, I'm going to do things that really make the case start to take shape."

Salzman: Judges must also penalize either attorneys or clients for recalcitrant behavior during discovery cases.

Kirkham: I agree with that.

Rubin: Is good faith a defense? When we consider penalizing attorneys or clients, the answer almost invariably is that the attorney had a good faith belief that the objection was well founded.

Lundquist: A defense of good faith must be questioned. The attorney is trained to reason from fact and precedent and should be held to his judgment. The idea that Jerry suggests is intriguing. The judge says, "I'll rule on X documents out of a hundred thousand to give you an idea of how discovery should proceed."

I think sophisticated services like statistical sampling could be useful to a court. One percent of the vote can be evaluated to determine who will win a political election. Likewise, the statistical evaluation of documents and rulings could be very

helpful in giving meaning to how a court will rule on relevance, privilege, or other issues in a case. For example, if somebody asks to look at one half million documents in a price-fixing case and the other side replies that the request is absolutely unreasonable, that it would take *X* number of paralegals *X* hundred hours, the court, or the parties by agreement, could appoint an auditor to go out and pull a statistical sampling of the half million documents requested. The parties could then come back to the court and say, "Based on the sample I think that it would be worth pursuing more in this area," or, "I am satisfied that we can establish this." More sophisticated procedures could help a court make discovery rulings and determine what was needed in enormous cases in which hundreds of thousands of documents must be examined for statistical or accounting information.

Rubin: I think we are approaching a national bar, particularly in complex cases. It's highly desirable that there not be forum shopping to facilitate discovery or to find the best judge or jury, and that lawyers have some guidelines by which to shape their conduct and advise their clients. Therefore, judges ought not to fashion ad hoc rules. That would not guarantee that every judge will rule precisely alike in every borderline situation. But if you build a repertoire of rulings, you will find some tendency toward uniformity. The judicial process by nature tends toward uniformity. If the judge is presented with some objections to interrogatories of a kind he never has considered before or with a suggestion by counsel Lundquist that he appoint a special master to make a sampling of documents, the first thing he does is see what some other court has done.

Lundquist: I think what both you and Jerry said is salutary. When you get down to the nitty gritty, one of the problems with discovery is that there are too few precedents to go by: you don't have rulings, partly because judges have stayed out of that process and haven't given enough decisions to guide people.

Rubin: Weyman, how would you feel—and I ask you specifically because of your role on the ABA Special Committee on Discovery Abuse—about a massive educational effort specifically directed at discovery that would include judges and perhaps even feature judges? We would hold a nationwide series of seminars on improving discovery methods and strongly encourage state and federal judges, particularly judges in courts of general jurisdiction, and litigating members of the bar to attend.

Lundquist: It's an exciting idea, one that I would recommend. I have heard trial judges comment on how much they have picked up from such an interchange, and I think it would be progressive and helpful. One, it would give more of a national cast to rulings, particularly in federal courts, where I think it's more important. And two, it would provide an interchange of experience from which all participants benefit. There remains a parochialism among lawyers, and perhaps more so, among the judges between circuits and even districts. Such an interchange could break that down.

Rubin: To a large degree federal judges are already educated in this manner: newly appointed judges attend a seminar for one week or more, and more experienced judges attend periodic seminars. There are also seminars for state judges. But judges act against their own background as lawyers, and they remain members of the legal profession. I think we need some common education that is directed on a much broader scale to lawyers and judges together, so that they conceptualize the problems alike and reach a consensus about a method that does not leave the bar, or large numbers of the bar, feeling that, if a judge tries to adopt a management technique, he's being tyrannical or arbitrary or fighting the customary methods of the bar.

Salzman: This type of exchange is going on to some extent among those judges who have multidistrict cases. I know they discuss the issues on an informal basis because a judge will tell you, "I was just talking to

Judge Pointer¹⁹ and this is what he did under these circumstances, and it sounds pretty good to me," or "I just talked to Judge Will and I don't care what Judge Will did, that is not what's going to be done down here."

Rubin: The multidistrict panel has periodic meetings, I believe every six months. They have two basically different emphases. One is to talk about specific cases, not in terms of how they are to be decided, but where they are and what the progress is. The other is to discuss generally techniques for handling multidistrict cases.

Lundquist: In these panel meetings do the judges sit down and discuss what lawyers have thought about how they handled the cases? It seems to me that if judges want to establish how effective they are with multidistrict cases, how quickly they can move them along, or how innovative they can be, a little hindsight evaluation of what the lawyers who were before them thought while they were going through these exciting experiences would be informative.

Rubin: I think every business needs consumer surveys. Judges need consumer surveys too. The problem with doing precisely what you talk about is that generally lawyers fear they will come before a judge again; so they want to be complimentary in some degree, even if they think he was horrible.

We are trying something right now that will be of interest to you. I am chairman of a subcommittee to the Committee of Court Administration that has been charged with looking into possible alternatives to jury trials in complex protracted cases. The Federal Judicial Center is undertaking a series of interviews. We have selected twenty protracted cases—cases that took a considerable amount of time to try. Trained interviewers will personally interview the judges in each of these twenty cases. We have a schedule for the interviewer to follow outlining all things that should be touched on. This

19. Sam C. Pointer, United States District Judge for the Northern District of Alabama.

is not a question and answer check off sort of thing. It's conducted on a personal basis, but, to be sure the interview is thorough, the schedule calls for a variety of inquiries into discovery, the handling of jury charges, and other matters. Separately, we are interviewing two lawyers in each case. If the case involved two parties, there will be one plaintiff's lawyer and one defendant's lawyer. If the case involved more than two parties, then we will select counsel with diverse interests. The judges and lawyers will be anonymous, and the cases will not be identified. We hope to get from these forty lawyer interviews at least a sampling of lawyer reaction to different judges and different techniques. There is no reason why it should not be done on a broader scale. I think it needs safeguards because of the fear that if I say something bad about Judge Rubin and come before Judge Rubin again, he's going to retaliate.

Lundquist: That is a natural concern, although I think lawyers are at least somewhat willing to run that risk.

Perhaps we should see if we've reached some consensus. I think that education is at least a partial solution to protracted discovery. Primarily, education comes in the way Judge Rubin has suggested. However, there is nothing more instructive than a direct sanction. When someone gets hit with a fine or has an issue stripped, that spreads nationwide very quickly.

Rubin: I think we have agreed that difficult cases, whether they be complex or merely protracted, require different discovery procedures than nondifficult cases. The first thing they require is personal attention from the judge in some systematic way. The court's involvement must be meaningful, not merely perfunctory. This might take a variety of forms: experimentation with standard interrogatories, standard lists of witnesses who would be deposed in particular kinds of cases, and so on. These would be prepared not by the judge alone in chambers or in an ivory tower, but with the assistance of lawyers experienced in this kind of litigation. Acting on those

premises, judges and lawyers ought to be educated in how to use discovery devices prudently and expeditiously.

- Lundquist: I certainly don't want to endorse the notion of pattern interrogatories in any general sense, but I would agree that in some areas certain types of pattern interrogatories would be helpful. However, I don't think interrogatories are a high level discovery tool, and I don't think Jerry does.
- Salzman: No, I put them very low, which is why I think pattern interrogatories are appropriate. I think there should be very few of them for either side, but I do think that if they are well defined we would not have to fight about them for months.
- Rubin: Before we leave interrogatories, let me ask one question that I have my own answer to, but I would be interested in knowing what the rest of you think. Lawyers who represent indigent clients or who frequently do pro bono work assert that the interrogatory is invaluable because it is the most inexpensive way to get into the lawsuit quickly. Therefore, when they have indigent or pro bono cases that are fairly complicated, they contend that they need to ask numerous interrogatories.
- Lundquist: I have no problem with that. If that's their best tool, the defense lawyer ought to agree to a waiver of any numerical limitation, and if he is unreasonable in not agreeing to it, the judge ought to give the public lawyer the costs involved in filing a motion to get beyond the threshold. It is simply a question of making sure that the interrogatories are the best tool and that they are intelligent interrogatories. If they are the best tool, people should not be precluded from using them.
- Kirkham: One very important point, I think, is that discovery should be directed to issues that have been defined. You have to have a lawsuit. The big problem I see in the form interrogatories of the present Complex Litigation Manual is that they were drafted for relatively narrow cases. If you take those same interrogatories and apply them to a case that has very broad issues, they immediately become arbitrary.

- Rubin: I am perhaps midway between you and Jerry on that. Jerry does not, I think, see lack of issue definition as a very common problem. I see it occurring, but not quite as frequently as you do. I think what we are envisioning in the suggestions is that, if the issues are not clear in a case from the outset, all discovery preliminarily must be directed to defining issues. At some stage the court has to say to the parties or the parties have to say to the court, "These are the issues; from now on the trial concerns these issues."
- Salzman: If a party must rely upon interrogatories as his principal discovery device, he is in trouble. If he thinks he is going to prove his case from interrogatories, he's dreaming. But in such a case it is no burden to require that the opposite side respond to the interrogatories since they are not going to be hit with duplicative depositions.
- Kirkham: Let me just say one thing here: I don't know whether I stand alone in this, but I think one of the real problems with complex litigation in our courts is that certain cases should not be in the courts. The idea should be emphasized that courts are constituted to try cases and controversies. Jerry says that there are not many cases in which discovery is not addressed to the issues, and that's right, but there are some cases in which there are no issues, for example, cases that allege general conspiracy on the part of an industry-wide group of people. I think the court should either use Rule 11 of the Federal Rules of Civil Procedure to force the lawyer to indicate what he wants the court to try or simply dismiss the case. I am not quite sure how to handle a case in which a person says he is entitled to discovery in order to know what the issues are. It seems to me that one must start out with some issue or the case is not triable.
- Lundquist: Isn't the issue within what you just said? Didn't you define it? The issue is whether there was a conspiracy to do something or other, and if the plaintiff says that that is the issue then the interrogatories should ask, "Did you hold meetings on such

and such a date?"

- Kirkham:** Perhaps, but I'm not certain it is that simple. Another problem in complex litigation is the rule 23(b)(3) class action. There is no way for a court to try an antitrust price-fixing case in which there are unlimited numbers of plaintiffs, all nonparties brought in through a 23(b)(3) class action, and in which the question to be determined is the amount of damages suffered by the various plaintiffs. Courts have tried to cope by using fluid recovery, which, in my view, is an unconstitutional device. At the very outset you have a case that is never going to be tried—it will be settled. The leaders of the bar, such as our friend Kohn,²⁰ say that the way to ensure that cases like that are manageable is to certify the classes, thereby forcing the parties to settle.
- Salzman:** I don't agree with you. Our office has tried two 23(b)(3) class actions on the plaintiffs' side and several on the defendants' side. For example, our office handled the *Cast-Iron Pipe* case²¹ before Judge Pointer. Although there were 750 to 800 class members, the judge tried the case for twelve trial class members—three picked by the defendants, three by the plaintiff, and six by the court. We tried it right through damages—the whole thing.
- Kirkham:** You are stating the proposition that the only way you can make those cases triable is to adopt an "opt in" provision instead of an "opt out" provision. Until that is done you are not going to have triable cases.
- Salzman:** No. The case was tried on the basis of a selected number of class members, and we didn't really need to know anything about the other class members while we were trying the case.
- Kirkham:** How do you apply the damages to the others? And how many class members did you have?
- Salzman:** The purchasers were chosen as class representatives by their geographical location. We constructed a price-line in each of the areas and had a method of

20. Harold E. Kohn; Kohn, Savett, Marion & Graf, Philadelphia, Pennsylvania.

21. *In re Cast Iron Pipe Antitrust Litigation*, No. 71-516 (N.D. Ala.).

comparing a purchase price at a given point to the constructed price-line. Then, the jury was asked to determine the competitive price in the area at the appropriate time and compare it to the price paid to arrive at the damage figure. Let's take the *Corrugated Carton* case, which is a gigantic, unbelievable class action. The defendants had information relating to the plaintiffs' purchases in their files. From this information the jury found an absolute minimum amount of damage a class member could have suffered. This became the basis for a specific damage award.

- Kirkham: How did the jury arrive at the minimum?
- Salzman: The same way anybody arrives at those figures—experts get up and jabber and the jury makes its decision.
- Kirkham: Have they proved the damage situation with respect to each plaintiff? How many plaintiffs were involved?
- Salzman: There are probably 200,000 class members. But it doesn't matter what the number is because they can each be identified from the defendants' records, and the amount of purchases can also be determined from those records.
- Kirkham: If you prove damages by sample, you haven't proved the damages of any individual persons.
- Lundquist: Although I have not tried any class actions on the plaintiff's side to conclusion, I have been involved in a number of cases, one with over 40,000 plaintiffs and one right now with over 4,000 plaintiffs. We are looking at some nationwide cases involving probably 50,000 people with individual claims. What happens, be they class actions or major product liability cases, is that you start to develop guidelines. You go through the same exercises after you try a few of them. It starts to settle down; you get answers. I don't see the manageability of large class actions as being much of a problem. When we were defending class actions ten years ago, we said these things were untriable, they couldn't be handled as classes, they were unmanageable, nobody was typical. I think that position has faded a little bit.

- Kirkham: What has happened is that people have just buckled under, taking samples, using fluid recovery, and applying it across the board.
- Rubin: I have to disagree with you, Francis. Even in the fluid recovery cases the problem can be resolved once intelligence is brought to bear on it, if there are paradigm or model cases. That is what lawyers have always done, even outside the class action context. They didn't try every automobile accident case in which someone had a whiplash. A certain model of whiplash cases developed and then most settled. If you have a class action embracing 50,000 plaintiffs, you don't try 50,000 cases; you try ten or fifty, enough to develop a model, then most settle. Perhaps you have a few strays when the parties can't agree that they fit a model; so you have to do something with them.
- Lundquist: The British have built so much precedent into their damage awards that it has been recently suggested that the judges ought to freshen up their precedential thinking by trying a few simple jury cases.
- Kirkham: I think this problem could be dismissed much too quickly because in large antitrust cases and large class actions, the cases are not tried. Even if a test case is brought, the verdict in the test case is res judicata against a defendant, but the plaintiff must still prove his damages. When you aggregate the liability and damage issues together, not all issues are tried. We simply aggregate enormous sums. These cases should not be brought to court: there should not be a class action of this type.
- Rubin: Congress determines whether that class action is tried or not tried, in the sense of being brought to court. All we can do in this discussion is say, "Assuming Congress has decided that this is a matter of litigation, how is it handled?"
- Kirkham: I disagree because some judges will certify classes in cases of that kind and other judges will not.
- Lundquist: You can always ask the appellate judge whether the judge who certified the class was right in the first instance.
- Kirkham: Should we not address, then, the question of what

type of cases should be in the courts?

Lundquist: I don't see how we, as practitioners, offer solutions to such inquiries. I haven't thought a lot about whether substantively one type of case should or should not be in the courts. Certainly the notion that some kinds of cases should not be brought into courts eliminates problems. However, we may be building a different process—something I'm very much against.

Rubin: Let's move to a different topic. We have said that the judge has his own problems. Speaking in a vein that some of my colleagues will not approve of, I say it is up to the judge to solve those problems; they are not insoluble in our present system. As some of you have pointed out, these complex cases seldom arise in one- or two-judge districts. They arise in metropolitan districts, and there are very few metropolitan districts that are seriously understaffed. I don't mean judges are sitting idle; there is plenty of work, but the districts are not seriously undermanned the way they were ten years ago. The problem, then, is not too few judges. I think that a greater initiative and incentive to resolve these problems can be found and that, when found, the problem will become soluble.

If a judge gets a complex case that he or she knows will take six months to try, the answer is not to say, "I can't try this because I have a lot of criminal trials." It is for the chief judge of that district to say, "We will reallocate your criminal cases and meet the Speedy Trial Act." Another alternative is to get visiting judges. Hitherto, one of the practices of the judicial profession has been to get the visiting judge to try the big case; but that's disastrous; the visiting judge should come in and handle the relatively routine cases to free the local judge for ninety days or six months. We need to educate judges about judicial administration. Perhaps we also need greater tolerance, both among the judiciary and the bar, for the transfer of cases to other judges when there are emergencies. As you all know, forum shopping is undesirable. Judge shop-

ping is undesirable. If a lawyer has a personal injury case of three days to try before judge X, or a criminal case set for trial before judge X, and judge X happens to be very sympathetic to civil plaintiffs and very kind to criminal defendants, the attorney does not want that case reassigned to someone else just so judge X can try an antitrust case. Therefore, the bar resists that device.

Lundquist: How do you feel about giving each attorney one peremptory challenge against a federal judge.

Rubin: I've discussed that idea with various people, and I have no personal objection to it. But I am told that in those jurisdictions that have tried it, it has not proven to be a very useful device.

Lundquist: We have it in our state courts in California, and I think it works well. Although it is seldom used, it is usually used for good and valid reasons.

Kirkham: I think the bar would really like a peremptory challenge to one judge. But it's very hard to answer the point that Judge McCree²² raised when I suggested this idea. He wondered what would have happened down south with a peremptory challenge to Judge Johnson.²³ And he makes a very good point. But he was describing a situation which should not exist in the federal judiciary, one which hopefully no longer exists now that certain passions and prejudices have been tempered down a little. I think one peremptory challenge to a judge is a fair thing. Incidentally, if a case is going to be tried by the judge rather than the jury, the question of a peremptory challenge becomes more important.

Salzman: The Court of Appeals for the Seventh Circuit has taken a slightly different tack with some of the senior judges. That circuit has said that if a case requires more than X number of trial hours, certain judges may not handle it. That has shifted the case load somewhat. There is also a specific rule in the Seventh Circuit that if, after an appeal on the sub-

22. Wade H. McCree, Professor of Law, University of Chicago Law School, Chicago, Illinois; Former Judge, United States Court of Appeals for the Sixth Circuit.

23. Frank M. Johnson, Jr., Judge, United States Court of Appeals for the Eleventh Circuit, Montgomery, Alabama.

stance, a case is remanded, it must be remanded to a different judge; it may not go to the same judge.

I would like to move to the question of jury trials in complex litigation. Our office has had experience with both cases tried by judges and cases tried by juries. In one recent case the parties waived the jury at the last moment and the case went to the judge. In that case, it worked. The judge took as active a hand in forcing the simplification of the issues as if there had been a jury, and the trial ended. But I've heard many reports of cases tried to the court in which the judge took the usual posture—he's the judge, he'll sort it out afterwards. That posture results in an overly long trial and a messy record. It invites disaster that is not likely to occur with a jury trial.

Kirkham: I think we have two points to focus on. One is the desirability of trying a complex case before a judge or a jury. That would include questions of expediting, questions which cut in favor of jury trials. A jury trial certainly can be quickly expedited and decided. The other point is, what are the constitutional limitations? As far as the second point is concerned, it is important to bear in mind that there are two kinds of complex cases. One is the complex case within our scope of discussion for which the seventh amendment mandates a jury trial. The other is the complex case for which the seventh amendment does not require a jury. In my opinion, there is a classification of the latter kind. The issues are sharply defined in the Ninth Circuit decision in the *United States Financial* case,²⁴ and in the Third Circuit decision in the *Japanese Electronic* case.²⁵ I think the *Japanese Electronic* decision is a little too narrow. It was decided on the grounds that it would be a denial of due process of law to submit the case to the jury, and that when there is a denial of due process because of a jury

24. *In re United States Financial Securities Litigation*, 609 F.2d 411 (9th Cir.), cert. denied, 446 U.S. 929 (1980).

25. *In re Japanese Elec. Prod. Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980).

trial, the seventh amendment does not mandate one.

Rubin: I think we should avoid discussing the seventh amendment limitations because that issue is up to the Supreme Court. Rather, our focus should be two-fold. First, despite a constitutional right to a jury trial, can litigants agree that certain cases should be tried to a judge rather than a jury? And how important is the judge's personality in obtaining such an agreement? Second, what should be done to improve nonjury trials?

Lundquist: I am reluctant to part totally with the seventh amendment issue because it seems to me that it is coming down the road, and scholarly input is going to be important with respect to what the Supreme Court ultimately decides. But moving on to your first point, I think if there is agreement on whether a case should be tried to a jury, that makes it easy. Your question of how to try nonjury cases is one about which we can talk. However, I wonder if that same discussion wouldn't apply to trying a complex case to a jury.

Rubin: An important factor in deciding whether you agree to a nonjury trial is the personality of the judge as viewed by the litigant.

Lundquist: That is true. There are some added risks in trial by a judge that don't exist in a jury trial. I just tried a case that was bifurcated—part to a jury and part to a judge. The judge ruled against us as a matter of law, and I think he was wrong about that, but he took the added precaution of not believing any of our witnesses who testified at trial. Thus, whether he was right or wrong about the law, he didn't have anything to worry about. He could not do the same thing with the part of the trial tried to the jury, and it came out very, very differently. That is a risk that goes with a judge's personality.

Salzman: My training is to insist upon a jury trial unless I have some good reason not to. Time-saving is not a good reason. Federal jury trials are usually over quickly. Even if jury trials took additional time, the time invested in post-trial proceedings in order to

secure a final judgment in nonjury trials tips the balance in favor of juries. When we try a case to a jury, we're probably getting transcripts daily. We are using the transcript for the purpose of cross-examination and final argument preparation. We are looking for material for an hour and a half presentation to the jury. However, in a bench trial, the lawyer reads the transcript to prepare post-trial briefs and to draft findings of fact and conclusions of law.

Lundquist: I think the lawyer's skills are used a little better when he's trying a case to a jury. Regardless of the subject matter, the lawyer must present the case—it must be intelligible; it must be direct; it must not be overly long. The case is generally better tried to a jury, both in terms of the lawyer's techniques and the use of demonstrative evidence, which explains things in the best fashion. I would give a higher mark to the lawyer's performance in the jury trial than I would in the judge trial.

Kirkham: Just taking one point, how would you use demonstrative evidence more effectively before a jury than before a judge?

Lundquist: Well, when I examine an expert witness, instead of just giving the judge something to follow, such as a chart, I would have it blown up and developed in a more complete manner, possibly even utilizing colors.

Kirkham: Why is that not a good device for a judge? He has a hard time too. That same chart could be blown up in red and blue colors and so on. With respect to understanding expert testimony, why shouldn't you help the judge out? And in a complex case, if you explain things equally well to a judge and a jury, isn't a nonjury trial preferable? Aren't you more likely to receive a just result from a judge?

Lundquist: No, I don't think so. I have faith in the jury.

Rubin: It has always amazed me that lawyers don't do what Francis suggests—make the case as clear to the judge as they do to the jury. Perhaps it stems from the assumption that the judge is smarter than the jury, an assumption which may not be war-

ranted. Perhaps lawyers assume the judge will feel demeaned if they treat him as if he knows nothing. I hear 140 cases a year on the court of appeals, and in only one or two of them will a lawyer present demonstrative evidence.

Lundquist: I do use demonstrative evidence before the appellate courts. However, there is another factor to consider in deciding whether to try a case to the judge or the jury. I have had judges say, "Enough! I don't want to have to hear more of this recording or look at more of this video. I have had enough, and the rest of it is going to be repetitive."

Kirkham: If you're giving the same stuff to a jury, you can be darn sure that they will say the same thing mentally long before the judge does orally.

Lundquist: I don't think that is always the case.

Kirkham: The jurors can always lean back and close their minds.

Lundquist: There is no question about that, but I think the judge will form his ideas more quickly and cut off the presentation sooner.

Rubin: Let me ask another question. The common folklore of the profession, perhaps not among trained litigators but certainly in law schools and among outsiders, and perhaps even among judges, is that jury trials take more time than bench trials. Correct or incorrect?

Salzman: I think jury trials take far less time when you consider the post-hearing work that is required by a bench trial.

Lundquist: Most judges want to see the jury fully occupied so they make rulings in advance, decide on exhibits in advance, and eliminate bench conferences. Indeed, the other day Bob Hanley²⁶ said that in the *MCI-ATT* case²⁷ they had but two bench conferences during the entire trial. It went very smoothly. Because a judge has this attitude, I think a jury trial may be more efficient than a bench trial.

26. Robert F. Hanley; Jenner & Block, Chicago, Illinois.

27. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 462 F. Supp. 1072 (N.D. Ill. 1978).

- Rubin: Well, lest you think I disagree with you, my own reaction is precisely the same. I have found that, if you take elapsed time, the time from when the bailiff or the deputy clerk calls court to order to the time a final decision is rendered, less time is consumed in a jury trial than there would be in a bench trial of the same case. Lawyers do not abbreviate much in a bench trial. In a jury trial the lawyer will say, "Well, I'll leave that question out because it will bore the jury." But if it is a nonjury trial, they don't worry about boring the judge.
- Lundquist: Another problem in a nonjury trial is that the judge will say, "I'll let that stuff in but if it's irrelevant, I won't consider it." There is a little more latitude in such matters during a bench trial than there is in a jury trial.
- Kirkham: But, this all applies only when the case can fairly be tried to a jury.
- Lundquist: When you say you can't try cases to juries, you are saying there are unintelligible laws.
- Kirkham: Oh, my goodness, how many cases are not tried to a jury? Maritime cases, admiralty cases, condemnation cases—there are twenty kinds of cases that aren't tried to juries.
- Rubin: Fifty percent of the trials in federal courts are not tried to juries.
- Lundquist: I am speaking in terms of fundamental rights, in terms of seventh amendment rights. I believe that in all those categories of cases arising at common law for which we've had a right to jury trial—and I admit there are some aberrational types of cases in which the right did not exist at common law, but for which the right exists now—we do and should have a right to jury trial. It's idle to say that what was the common law of that era is the common law of today. It has evolved. I can't accept the notion that cases are too complex, that one is denied due process because a case is too complex. One of the remarkable things in this is that you are obviously talking about factual complexity, and I don't see how the judge rises to the level where he is better able to deal with factual complexity. What you are

- really saying is that the judge has superior intelligence, and that he can learn more about a technical field than jurors can. I think that is a type of elitism which is not properly founded.
- Rubin: Do you think the notion is untrue or that it should not be acted on as true?
- Lundquist: I think it's untrue in one respect.
- Kirkham: I hear you, but I can't believe it.
- Rubin: Weyman, I really don't believe that under any of the methods we use to measure intelligence you can say that the judge, or even the average member of the bar, does not have a higher level of intelligence than the average juror and does not have a higher degree of skill in dealing with controverted facts, listening to testimony, and so forth. Now, there may be some very good policy reasons why we don't want to use people of a higher degree of intelligence, but that is a different concern.
- Lundquist: I'll accept that, but what I'm saying is that when a factual matter comes before a jury there are six or preferably twelve people who bring a composite of intelligence and experience to bear on the matter. That composite of intelligence and learning which comes from the jury—and I probably used the wrong words in confining it to "intelligence"—is totally desirable when dealing with complex issues.
- Rubin: Do you prefer as a policy matter, and perhaps as a constitutional matter, the pooled judgment of six typical people over that of one person who might have superior background, training, or intellect? That seems like a perfectly good value judgment.
- Kirkham: That is a good value judgment in those cases in which both groups have the capacity to understand and decide the issues on the merits.
- Salzman: I don't think you can safely assume that a judge has a greater capacity to make a fair decision than a jury does. I am convinced that in most cases the judge's background and experience cause him to be predisposed toward a particular view. If you are on the losing side to start with, you are not going to be able to convince him during the trial. There is a much better chance of convincing a jury of what is

right.

Rubin: How do you respond to the type of interview that I have seen published in the *New York Times* and the *Wall Street Journal*. They interview all the jurors who serve on a celebrated complex case, and every one of them says, "I didn't understand it. I wish I had not been chosen to decide it."

Lundquist: I tried two complicated cases to juries this year, one involving a lot of chemical processes, engineering testimony, building construction issues, and esoteric liability questions. Some products used to send rockets to the moon exploded. The jurors came out of a southern county and included some engineers, some FAA inspectors, a former police officer, and a good number of housewives. That jury was absolutely as competent to make a determination of the numerous factual issues on which they heard divergent expert testimony as the judge or any of the lawyers were.

Kirkham: Your statement, "That jury was just as competent to decide those issues as the judge," is an opinion, and I wonder if it is true. I talked to a little Norwegian woman that sat on a jury up in Seattle. The case involved "split-pump" operations by service stations. That is a trade term describing the selling of two brands of gasoline at the same service station. She said, "But what I don't know, Mr. Kirkham, is how you can sell gasoline out of a split pump." This, after weeks of trial.

Lundquist: Those things do happen with juries in bad situations. But whenever you interview the jury in those situations, you find that the confusion is caused by lawyers. Take, for example, some recent litigation in Chicago. The litigation was complicated because it had to do with takeovers and anti-trust defenses. The case was dismissed after three or four weeks of trial. Someone talked to a juror who said, "I was listening for this anti-'rust' defense and I wondered what was 'rusting'." It is obvious who was at fault: the lawyers.

Rubin: The Federal Judicial Center is trying to develop some data in districts that have tried complex

cases. They will begin by taking a cross-section of potential jurors. Next, they will try to get a profile of each person, including his education, background, occupation, skills, occupational level, and so forth. They will then determine how the profile of the jury selected in the average noncomplex civil case compares to the average person in the jury wheel. Finally, they will see how the profile of the person selected as a juror in the complex case compares to the profile of the average juror in the wheel. Now, all of us have some suppositions about which jurors a lawyer will challenge peremptorily and why. We also have suppositions about which jurors a judge will excuse for cause and why. We have been told, for example, that many professional people do not serve on juries in complex cases because of the length of the trial. Their schedules would be too disrupted, so they are excused for cause. Maybe those same people are excused for cause in simple cases. Maybe they are challenged peremptorily. At any rate, if we are able to find out all this data, at least we will know whether we get the same kind of juries in complex cases as we get in simple cases, and whether either, or both of them is much like the cross section of the voting population from which most jury panels are drawn.

Lundquist: I would suggest another area of inquiry, although I think I know how it comes out. I would guess that if the lawyers who have tried a reasonable or substantial number of jury cases were polled, the results, on the side of both the plaintiff and the defendant, would show that these lawyers are almost uniformly of the view that no case is too complex to be tried to a jury. I find that the people who take the other point of view have not had a lot of jury experience.

Kirkham: What kind of cases have they tried, Weyman? Take the IBM cases, five of which were tried to a jury. Three resulted in hung juries, and the other two were decided by directed verdict before they went to the jury. No jury has come in with a verdict in an IBM case yet. Did you talk to those lawyers, and

did they say they preferred a jury trial?

Lundquist: I could tell you about a substantial number of lawyers who, after having tried a number of antitrust cases, have a great deal of faith in the jury. In Los Angeles, for example, are Joe Ball²⁸ and Max Blecher,²⁹ who are on opposite sides. They certainly have a lot of faith in juries. I could give you other examples from all parts of the country.

Kirkham: Aren't you really talking about cases that all of us would concede are triable before juries?

Lundquist: I raised a different question. I am asking whether the lawyers who try jury cases think all cases are triable to juries. And I think the answer is yes. Those who are opposed to it are lawyers who have tried very few jury cases. Indeed, if I had only tried one or two jury cases and had been hit for hundreds of millions of dollars, I would not like juries either.

Rubin: Weyman, what you say is correct. But I wonder if it is not like asking a surgeon about surgery. A member of my family had a lump on the breast, and before we had anything done I made some inquiry. The best doctor I talked to said, "If the growth is malignant, don't go to a surgeon unless you want surgery. Go to someone else if you want chemotherapy or some other type of treatment. Surgeons believe in surgery." Well, lawyers who have tried cases before juries believe in juries. Even if they have a bad result, they merely say, "The jury went wrong, but next time it'll do it right." So I don't know whether a general belief is necessarily objective.

Lundquist: The way you have posed the question makes it a little tough; whether you should have surgeons involved in the process of deciding whether to eliminate surgery totally or just in certain cases is more akin to my position.

Rubin: Are there other alternatives? Could we have a three-judge panel that involved either a judge and

28. Joseph A. Ball; Ball, Hunt, Hart, Brown & Baerwitz, Long Beach, California.

29. Maxwell M. Blecher; Blecher, Collins, & Hoecker, Los Angeles, California.

two special masters, or three judges? Would that be inferior or superior to a jury, or should that not be considered at all?

Salzman: I don't see how having three judges is any different from having one. You are still presenting the case to somebody who has a particular type of training and a fairly consistent background. Most judges are not too different from one another—they live in the same neighborhood, they come in on the same bus.

Kirkham: Jerry, now that we have recovered from the shock of the suggestion, let's put it in context. We are not talking about having three judges in cases that can be tried to juries; we are talking about using them in extraordinary cases like the *Japanese Electronic* case or the *United States Financial* case. Most reasonable people, I hope, would think that these cases are not triable to a jury. Why in that exceptional case shouldn't there be two or three judges? It wouldn't be a great burden on the judiciary because it would be the exception, the rare case.

Salzman: Tell me, which type of case is extraordinary? What things would make it necessary for a case to be tried before a panel of judges?

Kirkham: That is a judgment the courts would have to make. They are capable of making such decisions. I think a reasonable decision can be made as to whether a case can be understood by a jury of laymen. Once that has been established, as it has been in the Third Circuit, then why not use two or three judges instead?

Salzman: If a case is too complex for a jury to understand, the complexity arises out of technical and mechanical issues, issues the judge is no better equipped to understand than the jury is.

Kirkham: Not necessarily. The case can be very protracted; it can involve a multitude of issues. In those situations a judge can segment a case; he can have a recess in the middle.

Salzman: He can do that in front of a jury.

Kirkham: For six months to a year?

Salzman: He should be able to break the case down into issues that can be dealt with.

- Lundquist: I heard a very respected federal district judge ask the other day (and I don't know where he comes down on this issue): "What makes people think I can absorb 100,000 documents or the testimony of X number of experts on all kinds of factual issues." To let a case get that complex is to overload the talents of the most industrious and astute judge.
- Kirkham: A case that complex cannot be decided by the tribunals our civilization supplies.
- Salzman: The answer to that is contained in the practice followed by most good trial lawyers in the Northern District of Illinois. They say, "If I can't put this case on in three weeks, I am probably going to lose. If the defendants want to take six months, good luck."
- Kirkham: You cannot put on a case like the *United States Financial* case or the *Japanese Electronic* case in three weeks. There are just too many issues.
- Lundquist: That is a self-fulfilling prophecy. As long as you say it is too complex, that there are too many issues, one side wins because they obviously want the non-jury result and they will string the case out to get that result. On the other hand, if, as Judge Rubin suggested earlier, both sides are told that in two years the case is going to trial, they will focus in and decide what really is going to carry the day.
- Kirkham: You are not talking about reality. Examine the records in the *United States Financial* or *Japanese Electronic* cases. Read the opinions of the judges. See what those cases involved. Then decide whether it is possible to try those cases in three weeks, if the complexities are being overstated. You cannot just dispose of this problem by saying that no case is too complex. That is the approach the Ninth Circuit took. I think it is overly simplistic.
- Lundquist: I am familiar with some of the lawyers and judges in those cases. I have my views as to what they were doing and why.
- Rubin: Let me ask if we have some ideas about another aspect of complex cases. Assuming we have a jury trial, are there ways in which the trial process can be improved so as to increase jury understanding

and expedite the trial? Some suggestions have been made: (1) the judge should give a preliminary charge on the law at the start of the trial so the jurors will know what to look for; (2) the jury should be allowed to take notes; (3) the judge's charge should be given to the jury in writing, and they should be permitted to take it into the jury room.

Lundquist: Don't forget notebooks for the jury.

Kirkham: I agree with all of those suggestions. I also advocate allowing juries to ask questions during the trial, always through the court of course.

Lundquist: I would not go along with that.

Salzman: In the *Corrugated* case, Judge Singleton³⁰ had a booklet prepared, printed, and given to each juror. The booklet defined all the terms and identified the companies and participants. The jurors had their booklet with them at all times, and the plaintiffs reinforced that technique by the use of slides. Whenever somebody's name was mentioned, a paralegal projected a slide identifying the person, together with his employment history.

Rubin: The device that Jerry suggested can be very useful, not only with regard to technical terms, but with photographs, exhibits, the preliminary jury charge, or other instructions before the jury. It's relatively inexpensive to reproduce those documents.

There was some difference of opinion on whether the jury should be permitted to ask questions. Why don't we explore that?

Lundquist: The problem is that the lawyers have in mind what they want to do: each side is trying to educate. It is like when I give a lecture at Dartmouth. At times it is inappropriate to take questions. Often, one question throws everyone off, and indeed even in the open sessions, I find that many students come in and say, "That question was off the mark; it didn't interest the rest of us." I think it is better to go through with what the lawyer has to present and not to allow one concern to be overly elevated. Be-

30. John V. Singleton, Jr., Chief Judge for the Southern District of Texas.

sides, some people are afraid to ask questions. Further, if in the course of the trial the lawyer makes what is kind of a continuum of opening statement—that is, if when he comes to a different phase of the testimony the lawyer explains what is going to happen in that phase—many of those jurors' questions will be answered.

Kirkham: What do you think of questions by the jury, Judge Rubin?

Rubin: I have always asked jurors to be very careful about asking questions because the lawyers have a certain order of trial. I instruct the jurors that if they have some question they really think is important, they should write it out and hand it to the marshall. Therefore, I have had very few questions submitted during the course of trial. But I think opinion varies widely on this matter. Some judges and trial lawyers say, "Let the jury ask questions. If it's on their minds, we might as well know about it."

Kirkham: I analogize the situation to an appellate argument. Every lawyer likes to stand up and go through that remarkable discourse he has prepared. He resents a judge's interruption. But believe me, if he doesn't take that question and answer it, he is going to lose.

Rubin: The worst question that I ever heard propounded by a juror was one that was blurted out. One of our more celebrated trial attorneys, who thinks he has a certain amount of appeal to female jurors, was engaged in doing the thing for which he was celebrated. Right in the middle of some histrionic argument, one female juror said, "Why don't you sit down and shut up?"

Salzman: Arguing a case before a jury is not like an appellate argument because the lawyer does not always control his ability to answer the question. There may be witnesses who will testify to issues A, B, and C. The first witness may testify to A and C but not B, and B may be the issue of interest to the jury at that point.

Rubin: In cases involving separate issues, we do have a great problem with the jury trial. The Supreme Court has decided that you may sever issues in a

jury trial, but it has never held that you may submit a second issue to a different jury. Assuming that could be done, would it be a useful device to be able to sever issues in a jury trial and assemble a different jury for each issue rather than just go straight through the whole trial?

Salzman: It makes a certain amount of sense in some situations. For example, it could be used when the proof of damages would occupy more than thirty percent of the trial time. If the case takes three to five weeks to try, and if the proof of damages is going to take another three weeks, severance may prove useful. I have seen this proposed, but when it came close to trial, the attorneys would always say, "These issues cannot be separated because the facts that pertain to issue one go to issue two, and it is only going to take an extra fifteen percent of the time. We might as well have the jury decide both of them."

Rubin: Are there any other things we want to say about complex cases at the trial level? If not, we might try to answer some questions about whether complex cases offer any particular problems at the appellate stage.

Lundquist: One thing that strikes me about complex cases at the appellate level is the bar's acceptance of the firm limitations as to brief length and type of argument. I don't have any trouble accepting that. To me, the limitations generally make a lot of sense. And yet, I am surprised to see how lawyers can accept the appellate process as a compressed process when they assert that some aspects of trial are so difficult that they have to be handled in an open-ended time frame. Perhaps people are more accustomed to having rules at the appellate level than they are at the trial stage.

Rubin: Do you accept the proposition that there is an almost one hundred percent appeal rate on complex cases that go to final judgment?

Lundquist: I would accept the proposition that notices of appeals are filed in almost one hundred percent of the cases; I would not accept the proposition that

almost one hundred percent of those cases go through to an appellate determination.

Salzman: We have had a couple of small complex cases, that is, cases in which not many attorneys were involved even though the issues were complex and even though they were class actions on behalf of all holders of commodities contracts. And in those cases which the defendant won by a jury verdict and in which the judge had, I think, essentially given the plaintiffs their head, the plaintiffs were out of luck on an appeal. They were responsible for substantial costs and expenses, and they were willing to forego the appeal for forgiveness of those costs and expenses. Those cases never were appealed.

Lundquist: I see a lot of complex cases settled after determination at the trial stage. In other cases, there is a lot of maneuvering back and forth through the appellate process. But aren't some appellate cases now starting out with a kind of settlement conference?

Rubin: The Second Circuit has such a procedure. They use a commissioner, who is a lawyer of considerable experience.

Salzman: New York state courts also seem to follow such a procedure.

Kirkham: Before we finish, we ought to discuss incentives and disincentives to saving time. Then, we should try to sum up.

Salzman: One thing I would like to mention is the notion of prejudgment interest in order to discourage stalling by certain defendants. The interest should be calculated at a genuine rate. The only problem with that idea is that it presumes there is going to be a judgment. And it presumes that any settlement will take into account, in addition to actual damages, the amount of prejudgment interest that would have been earned if there had been a judgment at the time. But, I think it would be some incentive to avoid unnecessary protraction of cases.

Lundquist: Another observation which doesn't follow on that, but which I have heard a number of times, is that trial lawyers tend to approach discovery differently

than what I describe as "litigators," and as a consequence you tend to get lower costs when a trial lawyer is involved. Even in the personal injury defense bar some lawyers who represent insurance companies have not tried a case in years. I would classify such lawyers as litigators. Litigators go on a much more elaborate discovery route. I don't know that the results are different. But that approach is starting to emerge. Until now we have thought of the trial and litigation bars as one and the same. I have some question as to whether they are.

Rubin: Let me ask a different question. In large part I think we agree that a good deal can be done to alleviate problems of complex litigation by having a certain type of judge who has a certain type of interest and incentive and, I presume, a certain type of background and skill. Are we getting trial judges who are capable of carrying out this mission?

Lundquist: That is becoming a problem because of the income level of judges, at least where I have practiced—Boston, San Francisco, and Alaska. In the past, there have been many very fine judges at both the federal and the state court levels, but it is a problem now. We are in danger of losing those types of people.

Salzman: I see it a little differently in the Northern District of Illinois. Good people are becoming judges, really spectacular people. But I don't think those people view it as a lifetime career the way it was formerly viewed. I think it is seen as a five- or seven-year career stop that is going to enhance your value as an attorney when you are done. You make certain short-term financial sacrifices for which you are awarded certain long-term financial benefits.

Kirkham: You have answered the question in the negative then, haven't you? There is a threat to a competent federal judiciary.

Salzman: No. The question is, is it like the army, where the first four years are training and the next twenty years are productive? Are we getting enough years out of these people who serve only seven to nine years? My guess is that we are. Maybe it is not so

bad to have a rotation like that on the federal bench.

Rubin: I don't think the problem is exclusively a federal one because, as we all know, approximately ninety percent of all the cases tried in this country are tried in state courts.

Lundquist: But, I would disagree with Jerry. I would like to see the bench become the pinnacle that one could achieve professionally. It should not be a way stop to a greater economic career. If that is the motivation people have for becoming judges, we are in a little danger already. I don't feel judges should be the highest paid segment of the profession, but they certainly should be paid enough so that when that pay is added to the other emoluments and responsibilities that go with the job, it attracts good people to the pinnacle.

Rubin: Perhaps pay is not the sole criterion. There may be other things about the nature of the judicial role that tend, quite apart from direct compensation, to be attractive or unattractive to successful practitioners.

Kirkham: That is true, but they should not be penalized for letting that high quality of devotion direct their path.

Salzman: Think of the difference between the urban districts and the rural districts. In North Dakota \$54,000 is not an inconsiderable sum compared to what other practitioners in the area make, but in New York City you can't afford to ride the subway on that salary.

Kirkham: Don't overlook the fact that the per diem a judge receives when he goes to another area does not even pay his hotel room.

Lundquist: That has always been a problem. When the federal judiciary was well compensated, the North Dakota judges were extremely well compensated.

Rubin: Some of you gentlemen are being a little provincial about what lawyers in small towns are able to make now. When I say small towns I don't mean a town of 10,000, but communities of 300,000 and 400,000. I know by what people tell me what starting law-

yers and successful practitioners make in towns of that size.

Kirkham: If it is agreeable to the rest of you, perhaps we could each take a moment to sum up our views. I'll begin.

In summary, I would like to return to the point I made earlier. One of the real problems with our courts today is that we have cases in the courts that should not be there. As far as the complex case is concerned, there should not be a rule 23(b)(3) class action available with an opt-out provision. An opt-out provision creates untriable cases that are resolved only by settlement. Often these settlements are extorted and unfair. Our system simply does not furnish a forum for the just resolution of those cases. If you took rule 23(b)(3) cases out, or converted it to an opt-in rule, then a very large percentage of complex litigation problems would be eliminated.

A related problem is the filing of suits for which the attorney and the client have no real basis. Because they hear some rumor that the United States is investigating some company, they immediately jump in and file a lawsuit. It has been suggested here that perhaps a lawyer has an obligation to do that because the statute of limitations is running. I disagree. Courts are formed for the purpose of trying law suits; and if a person doesn't have a law suit, doesn't know what the issues are, and doesn't know how his client is hurt and by whom, then he ought not to file the suit. The lawyer ought not to file pleadings, untruthfully certify under rule 11 that they are filed in good faith, and then resort to discovery to try to find a cause of action.

I also very strongly believe that there are certain types of complex litigation that should not be tried by juries and cannot be tried by juries in accordance with due process of law. Beyond that I think the single most important thing we have said today is that to solve the problem of complex litigation, we need a strong judge who will immediately take charge of the case, frame the issues, and con-

fine discovery to the issues. The judge should set target dates and determine as soon as reasonably possible whether the trial will be to a jury. A good strong judge will make a real difference.

Lundquist: I guess I have summarized throughout, but I cannot say that I am really one hundred percent, or even much more than seventy-five percent, with Francis. However, let me say that I think the problems are probably more internal. Many lawyers abuse the system. This has come to bother courts, clients, and the public. I think lawyers have to look very hard at their responsibilities. Indeed, what the ABA Special Committee on Discovery Abuse is pushing for is to have lawyers certify at every step of the way that things are done in good faith. This is necessary because lawyers do practice in a conflict situation. Maurice Rosenberg³¹ and others have observed that discovery and the coincidence of big firms starting to charge hourly fees for everybody, including paralegals, have put an unnatural strain on the conflict position of lawyers. So I think the profession has to, and I think it is starting to, do some things in that respect. With that attention from the profession and with an involved judiciary, we have the ability to solve most of the problems in the next decade, not in a perfect way, but in enough of a way so that people continue to respect the system.

I don't like the idea of eliminating cases from our court systems. I think one of the geniuses of the American judicial system, both federal and state, is that it operates as sort of a social roller-bearing in which people are able to litigate their disputes. It has been an enormous outlet for people. Lawyers should not care about not being liked as long as the system is working. And I think it has worked in this country in an exemplary fashion. While it needs reform, that reform should be along the lines we have talked about: quick trials, strong judicial administration, and lawyers who exercise their judgment so

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that they are not conducting abusive, redundant discovery.

Salzman: I think the possibility of eliminating the problems of complex cases through self-policing is slight. We might make some headway with prejudgment interest. Also, some progress may be made by disciplining attorneys or their clients for inordinate delays, improper objections, and bad-faith stalling tactics. I agree that we have to look for an active hand from judges, but this does not mean that we need a lot of status reports and a lot of hearings. Such procedures do not encourage the winding up of a case, but often breed greater complexity. When lawyers know the judge is willing to listen, rather than supply direction, they can turn a slip-and-fall case into a complex one.

I do not agree that rule 23(b)(3) creates complex litigation. However, I do not believe in rule 23 cases anymore. Our firm would be happy to do them if we were the only firm involved, but we don't want to occupy our time with gigantic committees of plaintiffs. My personal experience is that the recent cases, many of which have been settled, are not blackmail cases. If anything, the total amount achieved in settlement is substantially less than the amounts that would have been achieved had many of the large class members filed and pursued their own litigation. The judicial costs would have been greater, there would have been many more cases filed, and the cases would have been more complicated.

With respect to rule 11 and its place in simplifying litigation, I am going to go along with Francis and say that I believe rule 11 could be enforced more sternly. A judge should say, "I am going to give you a month, but this motion is pending. If you don't have something by the end of the month, you are going out the window on a rule 11 motion." However, I don't believe there are that many law suits that would be subject to a rule 11 motion. Most law suits that are subject to rule 11 motions have been brought for political purposes by individ-

uals who had to protect certain types of interests for the groups of people they were representing.

Perhaps there are some complex cases that cannot be tried to a jury, but I have not seen them. Francis has mentioned some, and he sounds as if he is right, but such cases don't often come across my desk. I believe that the jury is very useful and that if a litigator thinks he has to try his case before a jury, he begins to think earlier about which witnesses he can actually use. Some think that forcing a lawyer to do this is not fair. I think however, that such choices are part of life in these United States, and it is not a bad system.

Rubin: Yesterday, I finished fourteen years on the bench, of which twelve were rather busy trial court years. I have seen a relatively small number of cases filed that a conscientious, honorable advocate would not file. I believe I have seen at least an equally small number of cases defended that an honorable, conscientious advocate would not defend, or at least not in the way the cases were defended. I don't believe that any major part of the problems faced by courts in this country is caused by lawyers instituting or defending litigation that should not be instituted or defended. We do have a problem in that area, however, and we are all aware of it. It is a problem with which the new ABA Commission on Professional Responsibility has dealt. Should the lawyer's duty to his client be the major or, indeed, the sole controlling rule of behavior, or does the advocate owe other duties to society? By and large we are very timorous about doing anything that supplants the paramount duty to the client. Therefore, I don't think we are likely, either as a self-policing matter or as a judicial matter, to do much about enforcing rule 11 sanctions through the dismissal of law suits or defenses.

It seems to me that in complex cases what we have is, to use exactly the same term, a complex problem. The problem is brought about by a host of causes, some of which are societal in nature: What does society look to the courts to decide?

Some are caused by the judge's role in litigation. Others are brought about by the development of what has accurately been called the "litigation industry." These problems are not capable of simple solution. We are not going to solve them by limiting the number of interrogatories or by several changes in the federal rules. The solution will be found by trying to deal with many of the things that contribute, by their interaction and by their dynamics, to the problem.

One thing I think we have all agreed on is that a complex case is a slightly different species of litigation than the typical case. It deserves a different track, a different kind of treatment. It requires a different kind of attitude by all of those concerned. We have a system in which, laudably, judges are chosen from the profession. They are familiar with the problems of the profession, but they also bring with them the limitations of the profession. They bring with them attitudes and perceptions that are typical of the profession. So part of the problem in dealing with the judge's perception of his role is dealing with the profession's perception of that role. This I think requires acceptance of the notion that the complex case requires special management: it must be tailor-made management; it has to employ some accepted devices that might be uniform, but each case has to be taken individually; and the lawyers have to accept and tolerate a degree of judicial intervention that perhaps would be unacceptable in other cases. This also requires that the bar take a different role in these cases. In addition to accepting judicial management, lawyers must have some understanding of the nature of the problem. They must understand that the escalation of litigation costs is a matter of public concern even if both parties are willing to expend unlimited amounts. Litigation cost is public business. It reflects on our system for controversy disposition. I think we need broad, massive professional reeducation. We need to reeducate judges and magistrates, both state and federal, and people actively engaged in litigation.

Finally, I think we need some incentive for quality performance in the judicial role. All of the measures now taken to evaluate judicial performance are objective and statistical: How fast do the cases come to trial? How many cases did the judge dispose of? and so forth. We have no method by which we can measure good judging and bad judging, or quality performance versus nonquality performance. Like everyone else in our society, judges respond to incentives. Those incentives must not be monetary, but I think we ought to give some professional attention to devising ways to measure quality and to encourage quality.