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# PROCEDURAL SOLUTIONS TO THE ATTORNEY'S FEE PROBLEM IN COMPLEX LITIGATION

Christopher P. Lu\*

## I. INTRODUCTION

Justice William Brennan once observed that disputes about attorneys' fees are "one of the least socially productive types of litigation imaginable."<sup>1</sup> Socially productive or not, attorneys' fees are a major problem in complex litigation<sup>2</sup> today because of both the time and resources needed to determine appropriate fees and the public perception that fees are excessive. While the attorneys' fee problem is not unique to complex suits, the problem is magnified because: 1) complex suits are often more protracted than ordinary suits and necessarily require more lawyers; 2) many fee shifting statutes can be triggered in complex suits;<sup>3</sup> and 3) class action

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1. *Hensley v. Eckerhart*, 461 U.S. 424, 442 (1983) (Brennan, J., dissenting); see also *In re Capital Underwriters, Inc. Sec. Litig.*, 519 F. Supp. 92, 101 (N.D. Cal. 1981), *aff'd in part and vacated in part*, 705 F.2d 466 (9th Cir. 1983) ("a lawsuit is a fruit tree planted in a lawyer's garden") (citations omitted); Christopher T. Lutz, *Planning Fees Fights*, LITIG., at 44 (Fall 1986), ("Litigating about the costs and expenses incurred by plaintiffs' counsel is one of the duller things a human being can do."). Attorney's fee litigation in civil rights suits has been described as a "nest of Chinese boxes."

The outside box is the litigation of the civil rights issue itself. Within it is the litigation over the fees incurred in the litigation over the merits — ordinarily a lesser litigation, as our metaphor implies. . . . Within the initial fee litigation will be another litigation — usually a smaller one . . . — over the attorneys' fee incurred by the plaintiff in the initial fee litigation. And so on without necessary end.

*Muscara v. Quinn*, 680 F.2d 42, 44 (7th Cir. 1982).

2. While there is no generally accepted definition of complex litigation, this paper will follow the American Law Institute's interpretation and use the term to encompass "multiparty, multiform" litigation. THE AMERICAN LAW INSTITUTE PRELIMINARY STUDY OF COMPLEX LITIGATION 4 (1987) (footnote omitted). Such complex suits include: class or derivative actions, mass tort suits, antitrust violations, and civil rights actions.

3. While there are at least 75 federal statutes related to fee shifting, several statutes especially relevant to complex litigation are: antitrust claims, 15 U.S.C. § 26 (1991); civil rights, 42 U.S.C. § 1988 (1991); Title VII, 42 U.S.C. § 2000e-5(k) (1991); consumer claims, 15 U.S.C. §§ 2301-2312 (1991); copyright, 17 U.S.C. § 505 (1991); patent, 35 U.S.C. § 285 (1991). Attorneys can also recover fees incurred in creating a common fund, which is generally the case in class action suits, particularly shareholder derivative suits. RICHARD L. MARCUS & EDWARD

suits, with their resulting common funds,<sup>4</sup> form a large portion of complex litigation.<sup>5</sup> This paper will propose several procedural mechanisms to make the determination of attorneys' fee more just and efficient and examine the extent to which judges have adopted these mechanisms.

There is no question that complex litigation, particularly large class action suits, is a major burden on the judicial system.<sup>6</sup> According to a 1988 Harris survey, more than half of the federal judges, corporate counsel, and public interest lawyers surveyed felt that the cost of civil litigation is a "major problem" in this country.<sup>7</sup> Whatever problems exist in civil litigation are only intensified

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F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 692-97 (1985); see also Symposium, *Attorney Fee Shifting*, 47 *LAW & CONTEMP. PROBS.* 1 (1984); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *DUKE L.J.* 651.

4. [After a case is settled] then beg[ins] the process which all too often consumes a disproportionate share of the court's time, the application for attorneys' fee. It is at this point in these and other common fund cases that the court is abandoned by the adversary system and left to the plaintiff's unilateral application and the judge's own good conscience. Rarely do the settling defendants, who have created the pool of money from which the attorneys' fee are awarded, offer any counterpoint; rarely do members of the class come forward with any response or opposition to the fees sought. There are no amici curiae who volunteer their advice.

For its guidance during this solitary inquiry, the court is confronted with [only] a mountain of computerized billing records. . . .

*In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989).

5. Even when there are no novel issues involved, courts have awarded attorneys' fees in cases of "massive multi-district litigation . . . with myriad attendant subsidiary issues." *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.* (Lindy II), 540 F.2d 102, 114 (3d Cir. 1976). "The Lindy litigation represented the largest number of cases of any matter that has ever come before the Judicial Panel on Multidistrict Litigation." Barbara W. Thompson, Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 *DEL. J. CORP. LAW* 671, 686 n.99 (1984).

6. At their peak in 1976, federal class actions represented only 2.7% of all civil suits filed and 4.3% of all civil suits pending in the federal courts. As of 1984, class actions were only .9% of all pending suits. Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 *TEX. L. REV.* 385, 386 n.8 (1987). These statistics, however, may be deceiving given the time-consuming nature of complex suits involving multiple litigants and issues. See Carroll Seron, *The Professional Project of Parajudges: The Case of U.S. Magistrates*, 22 *LAW & SOC'Y REV.* 557, 564 (1988) ("[T]here is little doubt that a major increase in the 'mega' cases and their impact on the courts' operation has occurred.").

7. *REPORT OF A TASK FORCE, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* 6 (1989) [hereinafter *BROOKINGS REPORT*]. At the suggestion of Senator Joseph Biden (D.-Del.), a group of lawyers, judges and professors worked under the auspices of the Brookings Institution and the Rand Corporation's Institute for Civil Justice to develop recommendations for reforming the civil litigation process. *Id.* at vii. The group commissioned Louis Harris and Associates to survey 1,000 federal judges and litigators on their opinions. *Id.* at 6. The study's recommendations have formed the basis of the Civil Justice Reform Act of 1990.

when the number of parties, forums, or issues increases. In the wake of the *Exxon Valdez* oil spill, for example, eighty-four law firms filed ninety suits on behalf of 7,000 claimants.<sup>8</sup> And the six-year-old Dalkon Shield litigation has produced 200,000 claims nationwide.<sup>9</sup> Not surprisingly the costs of waging these battles is staggering. One need not look far to find outrageous examples of attorneys' fees. The plaintiffs' attorneys in the *Agent Orange* suit received more than \$13 million in fees and expenses; the defendants' attorneys received between \$75 million and \$100 million from seven chemical companies.<sup>10</sup> *Agent Orange*, though one of the most famous complex cases, was not the largest award of attorneys' fees. In the *Fine Paper* litigation, lawyers claimed \$21 million or forty percent of the \$50 million class award, despite the fact that many of the legal tasks were duplicated or triplicated.<sup>11</sup> Even more astounding was the fact that there were more attorneys than parties involved in *Fine Paper*, and at least one-third of the firms did not intervene until after the defendant had settled the case.<sup>12</sup> In one instance, plaintiffs' attorneys billed 1475 hours for preparing and taking one third-party deposition, which the court observed was "the equivalent of three attorneys each spending two and one-half months doing nothing else except preparing for and taking this deposition."<sup>13</sup> The *Corrugated Container Antitrust* litigation<sup>14</sup> eventually led to attorneys' fees of more than \$40 million out of a \$550 million settlement.<sup>15</sup>

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8. Loren Berger, *Cleaning Up After Exxon*, LEGAL TIMES, Mar. 5, 1990, at 1, 14.

9. Howard Mintz, *Trust Fund at \$2.4 Billion: Dalkon Shield Injury Claims Start Anew in Court*, LEGAL TIMES, July 30, 1990, at 6.

10. Stephen Labaton, *Five Years After Settlement, Agent Orange War Lives On*, N.Y. TIMES, May 8, 1989, at D1, D2. As of mid-1989, five years after the case had settled, the total settlement had reached \$250 million, but only \$3 million had been paid to the veterans and their families. *Id.* at D1. A comparable fee award was approved by a special master in an employment discrimination suit against AT&T Technologies. Rorie Sherman, *Million-Dollar Fees Approved in AT&T Suit*, NAT'L L.J., Nov. 11, 1991, at 2. Lawyers in the case will receive \$9.9 million in fees out of a fund of \$66-\$175 million. *Id.*

11. *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 75-77 (E.D. Pa. 1983), *aff'd in part and rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

12. *Id.* at 68, 74.

13. *Id.* at 173 (footnote omitted).

14. *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411 (5th Cir. 1985).

15. Norman J. Wiener, *Simple Lessons from a Complex Case*, LITIG., Spring 1986 at 14. The case involved 200,000 class members, 39 pretrial hearings, 205 pretrial orders, and 15 appeals. *Id.* Another massive case was *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy II)*, 540 F.2d 102 (3d Cir. 1976) (374 cases and over 10,000 claims filed). Thompson, *supra* note 5, at 686 n.99.

But whether or not fees are actually abused,<sup>16</sup> the system needs to be reformed if only to enhance the appearance of fairness to the class and lessen the burdens on an already strained judicial system.<sup>17</sup> One observer of the *Agent Orange* settlement commented: "The disparity between the costs of processing this case and the return to the plaintiffs is unusually stark. There is no question that the major beneficiaries in this case have been the litigators rather than their clients, a phenomenon by no means unique to this case."<sup>18</sup> Therefore, the difficulty is ensuring that attorneys do not automatically receive the fees they request, while preventing "a request for attorneys' fee [from] result[ing] in a second major litigation."<sup>19</sup>

Though some legal scholars have suggested that the answer lies primarily in changing the conduct of attorneys,<sup>20</sup> this paper is premised on the assumption that attorneys are unable, and indeed unwilling, to police themselves under the present complex litigation scheme.<sup>21</sup> Only greater innovation by the courts can be effective. But innovation can also mean more work for the courts, as evidenced by the demands of "managerial judging." Professor Mary

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16. In a survey conducted by the Federal Judicial Center, judges were far more likely than attorneys to agree with the statement: "Fee abuses are a serious problem in contemporary litigation." Arthur R. Miller, *Attorneys' Fee in Class Actions* 306 (Fed. Judicial Ctr. Annual Report 1980) [hereinafter FEDERAL JUDICIAL CENTER REPORT]. But the statistics are still striking: 63% of judges felt lawyers "often worked more hours than necessary" and 29% felt unnecessary work "sometimes" happened. *Id.* at 267. Seventy-three percent of plaintiff's counsel conceded unnecessary work "sometimes" occurred, while 17% felt such abuse happened "often." *Id.* at 268.

17. "The judges, it is said, have been converted into accountants and watchdogs, the courts are burdened with extensive litigation on fee issues, and the litigants are taxed with the time and money costs of waging such fee fights." *Id.* at 338.

18. Labaton, *supra* note 10, at D1 (quoting Professor Peter H. Schuck).

19. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

20. *See, e.g., Kane, supra* note 6, at 409 ("The solution must rest predominantly with class counsel: Courts cannot achieve change unless the attorneys recognize their special responsibilities and desire change."). While Professor Kane believes the answer lies in the class counsel, she also describes the inability of lawyers to coordinate and economize their preparation of complex suits and recognizes the need for greater judicial supervision. *Id.* at 402-09; *cf. Mary Kay Kane, The Lawyer as Litigator in the 1980s*, 14 N. Ky. L. Rev. 311 (1988) (indicating that the reluctance of lawyers to make civil litigation more affordable has forced courts to take the initiative to force change).

21. "[T]here is a consensus that some litigation costs are not demanded by the merits of the case, but rather are incurred as a direct outgrowth of the incentives that have been built into the private legal industry itself." BROOKINGS REPORT, *supra* note 7, at 35. For a discussion of how the entrepreneurial inclinations of class action lawyers are in conflict with the interests of their clients, see Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, LAW & CONTEMP. PROBS., Winter 1984, at 293.

Kay Kane noted: "Judges have been schooled to remain independent and aloof, and they are extremely busy, indeed, overworked. Thus, it may be unrealistic to expect the courts to welcome yet another responsibility to their already overcrowded schedules."<sup>22</sup> Any procedural reform, therefore, must necessarily rely on "nonjudicial" devices to avoid additional burdens on the court system. Yet until recently, judges have been reluctant to use such mechanisms. Most of the attention to reforming complex litigation has occurred in other areas; for example, attempting to make Rule 23 (class actions) more amenable to mass tort litigation.<sup>23</sup> In short, judges spend too much time worrying about what kinds of cases should be consolidated and how they should be settled, instead of focusing on what happens afterwards when lawyers try to collect their fees.<sup>24</sup>

This paper examines the feasibility and desirability of several reforms: appointing magistrates and special masters to oversee the fee process; naming guardians to protect class interests; encouraging judges to use pretrial conferences to set ground rules for attorneys' fees; appointing lead counsel or lead committees to organize the litigation; requiring attorneys to submit contemporaneous time records; and awarding interim fee awards.<sup>25</sup> In examining the relative advantages of these reforms, this paper surveys the state of attorneys' fees in complex litigation since the Federal Judicial Center and Third Circuit Reports.<sup>26</sup> As Judge Jack Weinstein's highly publicized handling of the *Agent Orange* case<sup>27</sup> demon-

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22. Kane, *supra* note 6, at 406.

23. Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988).

24. See Kane, *supra* note 6, at 403 ("The notion that the court must protect the interests of the absent class members should be constant throughout the litigation, not just for settlements.").

25. See MANUAL FOR COMPLEX LITIGATION § 21.54 (1985) ("Other special resources, such as referral to a private or governmental technical body, use of an advisory jury of experts in a non-jury case, or consultation with a confidential 'adviser' to the court, may be considered in complex litigation.") [hereinafter MANUAL]. An additional innovation which is not discussed is the use of computers. See Palmer Brown Madden, *Information Management in Complex Litigation*, LITIG., Spring 1978, at 12.

26. The Federal Judicial Center Report was published in 1980, and the Third Circuit Report in 1985. See *Court Awarded Attorney Fees*, 108 F.R.D. 237 (3d Cir. 1985) [hereinafter *Third Circuit Report*].

27. One of the catalysts of the "managerial judging" movement, Weinstein hired extra law clerks and paralegals, assigned a federal magistrate, appointed six special masters (four or five working simultaneously), and authorized the use of paid consultants. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 5 (2d ed. 1987).

strates, the resources for these procedural innovations are available in the federal system<sup>28</sup> where most complex litigation occurs.<sup>29</sup> Finally, this paper hypothesizes that any judicial expense is more than offset by overall savings of time and money.

Improving the procedures by which courts decide attorneys' fees will have many positive effects. First, by checking potential abuses by attorneys, the interests of the plaintiffs are better protected. This is particularly important in class action suits, where the attorneys are largely autonomous and unaccountable. One of the peculiar traits of the attorneys' fee issue is that it is the one time in the litigation process when the attorney is at clear odds with the client, since the amount the client, or class, ultimately receives will vary according to the size of the attorneys' fee award.<sup>30</sup> It is at this point that the adversarial system fails, since the faceless members of the class have little ability or knowledge with which to challenge the award. Consequently, only the court with its limited time and resources is left to safeguard the class's interests.

Second, greater predictability and order will be brought to the entire fee process. Not only are attorneys put on notice as to what procedural requirements they must follow, but they will be more certain of the amount of their final fee award. Additionally, one of the barriers to consolidation of multidistrict litigation is attorney uncertainty over the fee issue; these reforms could decrease this resistance.

Third, and most importantly, reforms can improve the image of a judicial system suffering from press accounts of seemingly incomprehensible fee awards. The perception that complex litigation ex-

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28. "Federal district judges who can draw upon masters, magistrates, law clerks, and other resources may make ready use of these tools. The greatest difficulty probably will be that these techniques also must be used by solitary rural state judges with large dockets and little support." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multi-state Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 67 (1986).

29. *But see* Mintz, *supra* note 9, at 6 (stating that most Dalkon Shield cases are presently in a unique settlement procedure, awaiting trial or arbitration if the offer of settlement is inadequate).

30. The resulting problem of attorneys' fee being considered in settlement negotiations was addressed by the Supreme Court in *Evans v. Jeff D.*, 475 U.S. 717 (1986), *reh'g denied*, 476 U.S. 1179 (1986), in which the Court allowed such negotiations; *see also* Kane, *supra* note 6, at 397 (stating that the number of cases combining a low settlement with high attorneys' fees is small). For a recent analysis of the relationship between attorney and client in the class action setting, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

ists solely for the attorneys and not for the clients is reinforced by the recent problems in the Johns-Manville asbestos trust fund.<sup>31</sup> It is estimated that legal fees have accounted for thirty to forty percent — or between \$218 million and \$374 million — of the money expended by the trust.<sup>32</sup> Partly as a result of the attorneys' fees, the trust ran out of money, forcing Judge Weinstein to restructure the fund and cap the attorneys' fees at twenty percent.<sup>33</sup>

Though many particularly skillful judges are, and will continue to be, successful in controlling the fees process without these reforms,<sup>34</sup> even these exceptional judges will find such procedural mechanisms useful in freeing up their increasingly limited time for other matters. However, one alternative which this paper does not advocate is awarding fees based on a simple percentage of the common fund.<sup>35</sup> Proponents of this alternative argue that after substantial time and resources are spent calculating a lodestar,<sup>36</sup> the final figure inevitably ends up in the twenty-five percent to thirty-

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31. See, Andrew Blum, *A Routine Hearing Quickly Turns Less So*, NAT'L L.J., Dec. 24, 1990, at 8; William Gifford, *Problem for Manville Trust: Torts Mount, Cash Dwindles*, LEGAL TIMES, July 30, 1990, at 1; Rita H. Jensen, *Even the Deserts are Wet; Judge Turns Up Heat on Asbestos*, NAT'L L.J., July 23, 1990, at 1.

32. Sharon Walsh, *Asbestos Cases at Another Crossroads*, WASH. POST, July 15, 1990, at H1. Leon Silverman, the court-appointed representative of future asbestos claimants, was awarded \$5 million — "double the fees he billed" — for establishing the trust. *Id.* at H6. An even higher estimate is that two-thirds of available funds for asbestos victims goes to lawyers' fees and court costs. Stephen Labaton, *Asbestos Cases Pose Test for a Court Ringmaster*, N.Y. TIMES, Aug. 16, 1991, at B16.

33. Wade Lambert & Amy D. Marcus, *Attorneys' Fees Capped in Asbestos Case*, WALL ST. J., Aug. 22, 1990, at B5.

34. See *In re Cincinnati Gas & Elec. Co. Sec. Litig.*, 643 F. Supp. 148, 152 (S.D. Ohio 1986) ("We wish to send a message . . . to the effect that the Court, in the discharge of its duty, no matter how tempting from a docket-management perspective, cannot rubber stamp attorneys' fee applications.").

35. At least three circuits (the Seventh, Ninth and D.C.) have recently expressed approval for a percentage fee system in common fund cases. See Paul, Johnson, Alston & Hunt v. Grauly, 886 F.2d 268, 272 (9th Cir. 1989); Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988), cert. denied, 493 U.S. 810 (1989); Bebhick v. Washington Metro Area Transit Comm'n, 805 F.2d 396 (D.C. Cir. 1986); see also John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 724 (1986) ("The percentage of the recovery fee award formula is such a 'deregulatory' reform because it relies on incentives rather than costly monitoring."). The Third Circuit report also recommended a percentage approach because it would increase uniformity and predictability. *Third Circuit Report*, supra note 26, at 246-55.

36. The lodestar is the "number of hours reasonably expended multiplied by prevailing hourly rate in community for similar work and is then adjusted to reflect other factors such as contingent nature of suit and quality of representation." BLACK'S LAW DICTIONARY 941 (6th ed. 1990).



three percent range.<sup>37</sup> Opponents argue, however, that there is no general rule about what is a reasonable percentage.<sup>38</sup> Judge Marilyn Patel, who favors a percentage approach, noted in the *Activision* case:

The question this court is compelled to ask is, "Is this process necessary?" Under a cost-benefit analysis, the answer would be a resounding, "No!" Not only do the *Lindy* and *Kerr-Johnson* analyses consume an undue amount of court time with little resulting advantage to anyone, but, in fact, it may be to the detriment of the class members. They are forced to wait until the court has done a thorough, conscientious analysis of the attorneys' fee petition. Or, class members may suffer a further diminution of their fund when a special master is retained and paid from the fund.<sup>39</sup>

Patel concluded: "[A lodestar approach] does not achieve the stated purposes of proportionality, predictability and protection of the class . . . . It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process."<sup>40</sup>

Judge Patel's generalizations do not fairly characterize the procedural reforms advocated in this paper. Pretrial orders, the appointment of lead counsel, and contemporaneous time records

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37. For a detailed look at this phenomenon, see *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) ("What is curious is that whatever method is used and no matter what billing records are submitted . . . the result is an award that almost always hovers around 30% of the fund created by the settlement."). But other courts have found a broader range of percentages. See *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 718 (E.D.N.Y. 1989) ("In this circuit, fees typically range from 15% to 30% of the recovery."); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749-50 (S.D.N.Y. 1985) (stating a range of 20% to 50%), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

38. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007, 1016 (E.D. Mo. 1990).

39. *In re Activision Sec. Litig.*, 723 F. Supp. at 1375.

40. *Id.* at 1378; see *Cosgrove v. Sullivan*, 759 F. Supp. 166, 168 (S.D. N.Y. 1991) ("While the advantages to a lodestar approach are readily apparent, its defect has been gradually revealed and it is today an anathema in many circles.") A variation of the percentage approach is being used by Judge Vaughn Walker in the *Oracle Securities* class action case. Judge Walker, who is critical of the lodestar approach, has ordered lawyers to submit sealed bids to handle the case on a percentage basis. John E. Morris, *Judge Injects Lawyer Competition Into Dispute*, LEGAL TIMES, Aug. 20, 1990, at 10, 11. One of the plaintiff's lawyers, Michael Malakof, argues that "[a] firm that bids too low might be tempted to settle a case too quickly, for fear of running up costs its fees would not cover. I have problems saying the lowest price is best for the class." *Id.* at 11. See *In re Bracle Securities Litigation*, 132 F.R.D. 538 (N.D. Cal. 1990) (awarding lead counsel task to one of bidders); *In re Oracle Securities Litigation*, 131 F.R.D. 688 (N.D. Cal. 1990) (establishing bid process).

neither prolong the litigation nor diminish the settlement fund. Though appointing magistrates, masters, and guardians can be costly, both in terms of time and money, such extrajudicial officers free up time for judges. Most importantly, these officers safeguard the interests of the client, a benefit for which there is no price.

A percentage approach, though attractive in its simplicity, is potentially more unfair to both the plaintiffs and the attorneys.<sup>41</sup> Percentage calculations could provide enormous windfalls to lawyers,<sup>42</sup> while encouraging frivolous litigation. In the *Exxon Valdez* case, Jerry Cohen, one of the lead counsels, said, "Obviously, if we get \$10 billion, we're not going to petition the court for 20 percent. The court would just throw us out. Those judges up there are not going to let any lawyers walk away with a fortune."<sup>43</sup> In the asbestos cases, it is unfathomable to many observers why lawyers continue to be paid on a contingency basis since the processing of asbestos claims has become relatively simple.<sup>44</sup> As one attorney close to the cases remarked, "It's clear that there's too much money going to the attorneys. There's not much controversy about that. . . . There's no question about the liability of [Johns-Manville]. Paralegals do all the paperwork. Why should the lawyers get all the money?"<sup>45</sup> A percentage approach is also unworkable in cases where no fund is created, as when injunctive relief is granted. Furthermore, the Supreme Court has never expressly approved percentage formulas in fee-shifting cases since "a reasonable fee . . . reflects the amount of attorney time reasonably expended in litigation."<sup>46</sup>

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41. For examples of when courts have considered and rejected a percentage approach, see *Rothfarb v. Hambrecht*, 649 F. Supp. 183, 238 (N.D. Cal. 1986). Cf. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *Third Circuit Report*, 108 F.R.D. at 258 (the *Lindy* method is a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar.").

42. The Manual for Complex Litigation states, "An award of attorneys' fees should fairly compensate the attorney for the *reasonable value* of the services rendered, based on the circumstances of the particular case." MANUAL, *supra* note 25, at § 24.12 (emphasis added); see *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (rejecting an argument that fees must be proportionate to the size of damage award).

43. Berger, *supra* note 8, at 14.

44. Walsh, *supra* note 32, at H1.

45. *Id.* at H6. One of the plaintiff's attorneys noted, "Most of the lawyers who got fees on the first round of settlements earned their money. . . . It took them 10 years and they worked their fannies off to bring Manville to heel. But once the [trust] was in operation, a lawyer who only had to file a piece of paper to get money should not get the same amount." *Id.*

46. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

With attorneys seemingly unable to regulate themselves, procedural, rather than substantive, reform is the answer. But current procedural protections, such as Rule 23(d) and (e), are inadequate.<sup>47</sup> Any procedural change, however, must preserve the traditionally neutral role of the judge. As Professor Arthur Miller commented, “[s]ome of these cases obligate federal judges to undertake supervisory tasks requiring enormous expenditures of time and effort, converting their role from one of passive adjudicator of a dispute staged by opposing counsel to that of active systems manager.”<sup>48</sup> The many competing interests involved in attorneys’ fees require a new way of looking at complex litigation. Reformers of the system, however, should proceed with caution.

[P]rocedures are rarely value-neutral, whether or not we believe that they should be. Any procedure — regardless of the nature of the underlying dispute or the method by which procedures are applied — will affect the outcome of a case.

Since any procedural change affects the outcome of a lawsuit, the question is whether the potential benefits from a change to non-traditional procedures will outweigh the potential losses. Of course, this calculation cannot be made with mathematical purity.<sup>49</sup>

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47. See *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978) (“[T]he law accords special protections, primarily procedural in nature, to individual class members whose interests may be compromised in the settlement process.”), *cert. denied*, 439 U.S. 1115 (1979); cf. Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 324 n.91 (1985) (“Courts’ reliance on notice as a prophylactic device is based on the assumptions that notice will reach and be read by the majority of class members and that notice will motivate some class member(s) to intervene in the action. These assumptions are probably faulty.”).

48. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the “Class Action Problem,”* 92 HARV. L. REV. 664, 667 (1979) (footnote omitted); see Monroe Freedman, *Judges Chasing Lawyers: Dangerous Sport*, LEGAL TIMES, Aug. 20, 1990, at 16 (quoting Arthur Miller, “Strong judicial management is a potential threat to the adversary system as it has existed for hundreds of years because it calls for a significant change in the power relationship between judges and lawyers and in their respective functions.”). An example of an “active systems manager” is Judge Charles R. Weiner of the Eastern District of Pennsylvania, who is overseeing more than 26,000 asbestos cases. Labaton, *supra* note 32, at B16.

49. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 450-51 (1986) (footnote omitted).

## II. MAGISTRATES AND SPECIAL MASTERS

Magistrates and masters can be invaluable resources in fee disputes by acting as fact finders and interim adjudicators. In an era of fiscal constraints and increasing caseloads, magistrates and masters are cost-efficient alternatives: "Cost realities and caseload pressures have created structural constraints that push toward the use of various alternatives to the labor intensive, formal, and discrete practices of the traditional adjudicatory model with judges at the organizational helm."<sup>50</sup> A variety of functions, too time-consuming to assign to a judge, can be assigned to these extrajudicial officers: reviewing timesheets for excessive or duplicative hours; presiding over periodic hearings on fee disputes; monitoring the assignment of work among the attorneys; and recommending a final fee award to the judge.<sup>51</sup> The magistrate or master should be appointed as soon as possible to ensure constant supervision of the attorneys. Depending on the complexity of the litigation, these officers can be assigned other case responsibilities, such as supervising discovery.

The role of the federal magistrate is entrenched firmly in the judicial system. The statutory definition of the office is given in the Federal Magistrates Act.<sup>52</sup> By the early 1980s, the number of federal magistrates equaled the number of Article III judges.<sup>53</sup> Additionally, there are no constitutional problems in assigning the attorney fee function to magistrates.<sup>54</sup> The powers of magistrates are overturned only when they overstep the district judge's role as "the ultimate decisionmaker."<sup>55</sup> Attorneys' fees do not pose such

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50. Seron, *supra* note 6, at 564.

51. Periodic review of billing during the course of the litigation was suggested by respondents to a 1984 study conducted for the Federal Judicial Center. Thomas E. Willging, *Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial 9* (Fed. Judicial Ctr. Annual Report 1984).

52. 28 U.S.C. §§ 631-639 (1991). Section 636(b)(1) allows magistrates to be assigned either dispositive or non-dispositive pretrial motions. Motions for attorneys' fees seem to fit under the non-dispositive motion category because such motions have no effect on the outcome of the case. Generally, fees are not decided until after the case is over.

53. MARCUS & SHERMAN, *supra* note 3, at 627.

54. See *Matthews v. Weber*, 423 U.S. 261 (1976) (upholding local rule allowing magistrates to conduct some factual hearings).

55. *Ford v. Estelle*, 740 F.2d 374, 379 (5th Cir. 1984); see also *Wimmer v. Cook*, 774 F.2d 68 (4th Cir. 1985) (stating that a magistrate cannot conduct jury trial referred to under § 636(b)(1)(B) because de novo review not possible). The 1990 amendments, however, are intended to promote greater use of magistrates to preside over civil cases. *Recent Federal Court Legislation Made Some Noteworthy Changes*, NAT'L L.J., Dec. 31, 1990, at 20.

problems since: 1) fees are only tangential to the ultimate resolution of the case; and 2) any decision on fees still must be approved by the district judge. Assigning the attorneys' fee issue to magistrates is no different from assigning them responsibility over discovery or giving them relative autonomy over the social security and prisoner docket, as is the practice in many districts.<sup>56</sup>

Judges also have the authority to appoint special masters under Rule 53.<sup>57</sup> Typically, a special master will be "a private attorney, a retired judge, or a law professor to whom a federal court delegates front line judicial responsibility . . . for specified, discrete tasks."<sup>58</sup> While theoretically any court task can be assigned to masters, judges usually appoint masters to oversee discovery or enforce court decrees.<sup>59</sup> In some extraordinary cases, like the asbestos litigation, masters have been appointed to help settle the cases.<sup>60</sup> Magistrate Judge Wayne Brazil argues that masters actually may be superior to judges and magistrates in their expertise, thus garnering more respect from the attorneys.<sup>61</sup> With masters, the argument goes, lawyers are less likely to attempt "tactical ploys or take

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56. See, e.g., *Sargent v. Secretary of Health & Human Servs.*, 739 F. Supp. 1067 (D.S.C. 1990); *Hargrave v. Secretary of Health & Human Servs.*, 738 F. Supp. 987 (E.D. Va. 1990) (both cases having magistrates make recommendations on attorneys' fees in social security cases originally assigned to them). See generally Seron, *supra* note 6, at 561 ("[M]agistrates may also be encouraged, however, to develop an expertise in settlement techniques or post-trial negotiation over attorney fees.") (footnote omitted).

57. FED. R. CIV. P. 53. Though Rule 53(b) states that "[a] reference to a master shall be the exception and not the rule," Rule 53(d)(3) specifically authorizes use of masters "[w]hen matters of accounting are in issue." Title 28 U.S.C. § 636(b)(2) (1991) also allows the judge to designate a magistrate as a special master.

58. Wayne D. Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RES. J. 287, 294 [hereinafter Brazil (1982)]. See generally Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Geoffrey C. Hazard & Paul R. Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RES. J. 375.

59. See, e.g., *United States v. City & County of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988) (appointing a master to monitor fire department's compliance with anti-discrimination order); *E.E.O.C. v. Burlington N., Inc.*, 1985 WL 7959 (N.D. Ill. 1986) (appointing a master to hear objections of plaintiffs to consent decree).

60. Kenneth Feinberg, the special master in the *Agent Orange* litigation, was appointed by Judge Weinstein to help settle 500 Brooklyn Navy Yard asbestos claims. Gifford, *supra* note 31, at 19. Mr. Feinberg is a partner at Kaye, Scholer, Fierman, Hays and Handler. Similarly, Boston University Law School Professor Eric Green was appointed by Judge Rya Zobel to help resolve the 2,100 active asbestos cases in Boston. ASBESTOS LITIG. REP., Dec. 15, 1989.

61. Brazil (1982), *supra* note 58, at 295; see also Seron, *supra* note 6, at 560 (stating that a federal magistrate in Oregon received the highest rating by lawyers of any judicial officer in the state).

disingenuous positions" as they would with removed or unsophisticated judges.<sup>62</sup>

Many litigators we interviewed believe that big case discovery needs a firm, sophisticated and neutral managerial presence . . . [Also required is] thorough knowledge not only of factual and legal contentions but also of the personalities, behavior patterns, and real world situations of the principal actors in the litigation drama. That kind of knowledge can be developed and maintained during the discovery stage of a large lawsuit only through a close and continuous attention the courts seem unable to provide.<sup>63</sup>

The same qualities necessary to manage discovery are also necessary to monitor attorneys' fees. Respect for a master can be increased further by allowing the attorneys to play some role in the selection of the master. In appointing the master, the court should be clear in detailing the master's powers, responsibilities, and finality of decisions, thus decreasing any uncertainty of the master's authority.<sup>64</sup>

The Advisory Committee's note to Rule 53 also states that masters may be a superior alternative to magistrates "when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case."<sup>65</sup> In turning to a master for help, Judge Harold Greene stated in *Trout v. Ball*.<sup>66</sup>

The dockets of the U.S. Magistrates in this Courthouse are already seriously overcrowded. A reference of this case to a Magistrate would mean delaying action on the individual relief portion of this case, once again, for months or even years . . . [A] special master [will be] able to devote substantial amounts of time to hearing and disposing of the many individual claims.<sup>67</sup>

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62. Brazil (1982), *supra* note 58, at 304. Masters are also more flexible in meeting counsel, can resolve disputes faster, better monitor potential problems, and are more accessible. *Id.* at 310-12.

63. *Id.* at 302-03; see also Seron, *supra* note 6, at 560 ("Open-ended interviews with lawyers in these districts disclosed that they felt equally comfortable arguing a case before a judge or a magistrate.").

64. See *Young v. Pierce*, 640 F. Supp. 1476, 1477-78 (E.D. Tex. 1986) (setting out a lengthy pretrial order on the role of the master in the litigation).

65. FED. R. CIV. P. 53 (advisory committee's note).

66. 705 F. Supp. 705 (D.D.C. 1989).

67. *Id.* at 707.

The advantage of a magistrate over a master, of course, is his permanent relationship to the district court. Judges may be more confident of a magistrate's work and more willing to accept his recommendations. It is easy to imagine, however, a group of "permanent masters" who the court would turn to for help in overseeing attorneys' fee.

The Manual for Complex Litigation explicitly recognizes the use of quasi-judicial officers to decide fee issues: "If fee requests are extensive or vigorously contested, the court should consider appointing an expert under Fed. R. Evid. 706 or referring the applications to one or more special masters appointed under Fed. R. Civ. P. 53."<sup>68</sup> The 1983 amendments to Rule 16 also removed the limits on what type of issues are referable to masters and magistrates.<sup>69</sup> The old Rule 16 only allowed referral to a master in making "findings to be used as evidence" in a case before a jury.<sup>70</sup>

While no reliable statistics are available, magistrates probably are used more often than special masters in fee disputes. The reports and recommendations of magistrates are also more likely to be published in case reporters and included in on-line data bases, such as WESTLAW or LEXIS.<sup>71</sup> In *Tarver v. City of Houston*, Magistrate Platter's report reads substantially like a judge's order in its forcefulness and tone of finality, using such language as "*the Court makes the following award*" and "[t]he City *shall* pay these amounts to the various counsel for plaintiffs within seven calendar days after the entry of this Order."<sup>72</sup> There is no hint that the magistrate's order must be approved first by the judge; in fact, the report does not even mention to which judge the case was assigned.<sup>73</sup>

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68. MANUAL, *supra* note 25, § 24.13 (p. 187). This is contrary to the general rule against use of such officers in deciding substantive issues in complex litigation. *See id.* § 21.52 (masters); § 21.53 (magistrates).

69. FED. R. CIV. P. 16 (advisory committee's note).

70. *Id.*

71. *See e.g.* Choudhury v. Blackie's House of Beef, Inc., No. 86-1247, 1988 WL 21703 (D.D.C. Feb. 29, 1988), *Tarver v. City of Houston*, 45 Empl. Prac. Dec. (CCH) ¶ 37,662 (S.D. Tex. Dec. 8, 1987); Alvarado v. Curry, No. 86 C 3555, 1987 WL 19813 (N.D. Ill. Nov. 9, 1987) (all involving fee recommendations by magistrates). Two recent opinions by a special master are: Kronfeld v. Transworld Airlines, 129 F.R.D. 598 (S.D.N.Y. 1990), and Rothfarb v. Hambrecht, 649 F. Supp. 183, 184-236 (N.D. Cal. 1986). Both the settlement and the fee award in an employment discrimination suit brought by 13,000 female AT&T employees were approved by a special master, former Chief Judge Frank J. McGarr of the U.S. District Court of Illinois. Labaton, *supra* note 10, at 2.

72. *Tarver v. City of Houston*, 45 Empl. Prac. Dec. (CCH) ¶ 37,662 (emphasis added).

73. On the other hand, in both *Alvarado* and *Choudhury*, the magistrates simply recom-

The broad authority given to Magistrate Platter to enter a final award on the issue of attorneys' fees in *Tarver* would be unusual if the issue were instead assigned to a master. Magistrates, after all, are more similar to Article III judges than masters (serving eight-year terms with the possibility of reappointment) and generally are considered integral parts of the judicial system. In fact, under 28 U.S.C. § 636(c), an entire case can be assigned to a magistrate by consent of the parties.

In *Kronfeld v. Transworld Airlines*,<sup>74</sup> however, Judge Kimba Wood gave her special master, Laura Bartell, a partner at Shearman & Sterling, an extraordinary degree of responsibility in deciding the attorneys' fees issue. In this case Bartell not only determined the hours worked by the attorneys, their billable rates, and expenses, but also added a multiplier of 1.25 based on risk, disallowed certain undocumented expenses,<sup>75</sup> and invalidated a fee-sharing agreement because it bore no relation to the services performed, or the responsibility assumed by each law firm and thus violated Disciplinary Rule 2-107(A).<sup>76</sup> The special master also presided over a hearing in which counsel were given the opportunity to challenge her draft report on fees before she submitted it to the court. Wood called Bartell's detailed report, which covered twenty-three pages in the Federal Rules Decision, "thorough, well-documented and well-reasoned" and adopted the report in its entirety.<sup>77</sup>

One of the few cases in which a judge explicitly has justified his appointment of a special master was *Róthfarb v. Hambrecht*.<sup>78</sup> Judge William Orrick recognized that "[t]he hundreds of pages of documentation submitted by counsel for the plaintiff class must be carefully screened to assure that the hours claimed are not duplicative, wasteful, or excessive."<sup>79</sup> Realizing, however, that his inability to conduct such a "thorough evaluation" would conflict with his

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mended proposed awards to the respective judges. *Choudhury*, No. 86-1247, 1988 WL 21703; *Alvarado*, No. 86 C 3555, 1987 WL 19813.

74. 129 F.R.D. 598 (S.D.N.Y. 1990).

75. Bartell was able to provide long lists of "dates upon which [the] Pomerantz Levy [firm] indicates contact with [attorney] Greenfield for which Greenfield has no similar entry" and "dates upon which Greenfield has contact with Pomerantz Levy for which Pomerantz Levy has no similar entry." *Id.* at 613-17.

76. *Id.* at 613.

77. *Id.* at 599.

78. 641 F. Supp. 71 (N.D. Cal. 1986).

79. *Id.* at 74. Judge Orrick also may have been troubled by the fact that attorneys requested \$4 million in fees and expenses from the \$11.4 million settlement, which was de-



“duty to protect the absent class members,” Orrick appointed a special master to review the fee applications, and then report back to the court, “with appropriate objections and recommendations.”<sup>80</sup>

The master, James Thacher, prepared an extraordinarily detailed report which covered fifty-three printed pages in the Federal Supplement.<sup>81</sup> Like the broad authority exercised by the master in *Kronfeld*, Thacher disallowed fees for both inadequately documented hours and unsuccessful claims and appeals which did not benefit the class. A multiplier of 1.5 was also recommended by Thacher. Especially impressive was a thirty-seven-page “computer breakdown of all the billings to determine the percentage of total litigation time spent by each attorney and the percentage of total litigation dedicated to each different category or phase of the case.”<sup>82</sup> Judge Orrick described the final report as “an invaluable tool in arriving at a final lodestar and reasonable fee award” and approved Thacher’s report almost in its entirety.<sup>82</sup>

In contrast to *Kronfeld* and *Rothfarb*, a much different posture was adopted by Judge Barbara Rothstein in *Naye v. Boyd*.<sup>83</sup> Judge Richard Bilby was appointed as special master but was given little latitude to determine the attorneys’ fees.<sup>84</sup> Despite Bilby’s status as an Article III judge (at the time, he was the Chief Judge of the District of Arizona),<sup>85</sup> Rothstein was far from deferential in her review of the master’s report:

[I]t was never this court’s intent to relinquish its discretion to review Judge Bilby’s recommendations and to determine the proper award of attorneys’ fee based on its own experience with the case. This court managed the progress of this case as well as the related cases of *Bradshaw v. Jenkins* and *Seafirst v. Jenkins* for more than four years, including motions practice, discovery and trial preparation. Although it is very appreciative of the services rendered by the Special Master in connection with the attorney’s fee request, this

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rived from multipliers of 2.37 to 2.74. The requested fees represented an hourly rate of over \$400. *Id.* at 72.

80. 641 F. Supp. at 74.

81. *Rothfarb v. Hambrecht*, 649 F. Supp. 183, 184-236 (N.D. Cal. 1986).

82. *Id.* at 236-37.

82. *Id.* at 237.

83. No. C83-771R, 1988 WL 75236 (W.D. Wash., Jan. 20, 1988).

84. The class counsel had suggested appointing Bilby, since Bilby had been involved in the settlement of the case.

85. *Naye*, No. C83-771R, 1988 WL 75236, at \*1.

court will not hesitate, where necessary, to substitute its own judgment in light of its more extensive knowledge of the case.<sup>86</sup>

Consequently, Rothstein disallowed Bilby's percentage formula for determining fees and essentially redecided every minutiae of the fee issue, including the billable rates of each attorney. It is unclear whether Bilby's work was simply subpar or whether Rothstein's defensive posture was an example of judicial reluctance to rely on outside actors. As to the former, Rothstein complimented Bilby for "render[ing] an invaluable service." The latter explanation loses some of its credibility since Bilby was a sitting judge and was familiar with the case (he had helped in the settlement).

Similarly, in *Martin v. University of South Alabama*,<sup>87</sup> the district court rejected the special master's findings of hourly rates and multipliers in a sex discrimination case, only to have the order reversed. The Eleventh Circuit noted that "the findings of fact made by a Special Master must be accepted by the district court unless clearly erroneous."<sup>88</sup>

For whatever reason, judges are reluctant to appoint magistrates and masters to decide fee matters. The Federal Judicial Center study found that 72.3% of judges (forty-seven of sixty-five) have never used a magistrate or master to help determine attorneys' fee, and only 21.5% sometimes used them.<sup>89</sup> Usually, these extrajudicial officers were used to decide attorneys' fees when the master or magistrate already had another role in the litigation, for instance, supervising discovery.<sup>90</sup> Perhaps one of the explanations for judi-

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86. 911 F.2d 604 (11th Cir. 1990).

87. *Id.* at 608.

88. *Id.*

89. FEDERAL JUDICIAL CENTER REPORT, *supra* note 16, at 226. Admittedly, this survey is probably outdated. For recent examples of courts using magistrates to decide attorneys' fee, see *Cutting v. Town of Allenstown*, 936 F.2d 18, 20 (1st Cir. 1991) (§ 1983 action); *Willis v. Sullivan*, 931 F.2d 390, 394 (6th Cir. 1991) (social security claim); *Walt Disney Co. v. Best*, No. 88 Civ. 1595 (swk), 1990 WL 144209 (S.D.N.Y. Sept. 26, 1990) (copyright infringement); *Royal Exch. Assurance Co. v. M/V Gulf Fleet No. 54*, Civ. No. 86-1367, 1990 WL 124291 (E.D. La. Aug. 9, 1990) (indemnification of attorney's fee); *Albrecht v. Stranczek*, No. 87C 9535 1990 WL 114610 (N.D. Ill. July 26, 1990) (Rule 11 sanctions); *Farone v. Sciarretta*, 131 F.R.D. 29 (1990) (§ 1988 fees).

90. The FEDERAL JUDICIAL CENTER REPORT gives examples of other functions in which these officers have been involved: *Senter v. General Motors Corp*, 383 F. Supp. 222 (S.D. Ohio 1974), *aff'd*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) (back pay in discrimination); *Antibiotic Antitrust Cases*, 410 F. Supp. 680 (D. Minn. 1975) (settlement); *Stamps v. Detroit Edison Co.*, 17 Empl. Prac. Dec. (CCH) ¶ 8,583 (E.D. Mich. 1978) (back pay). FEDERAL JUDICIAL CENTER REPORT, *supra* note 16, at 261. For a more recent example

cial reluctance was given by Judge Seitz in *Lindy I* when he stated: “[a] judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers.”<sup>91</sup>

A second explanation is the perception that using extrajudicial officers will prolong the litigation. In the *Activision* case, Judge Patel used a special master to analyze “the attorney billing records, declarations, and documentation.”<sup>92</sup> Despite praising the special master for having “done a skillful job of thoroughly analyzing” the materials, Patel noted that in the future she would use a simple percentage basis since “a similar result could have been achieved much earlier in the litigation.”<sup>93</sup>

A third explanation for judicial hesitation is that appointing a magistrate or master decreases the judge’s ability to exercise control over the eventual fee award to strong-arm the plaintiffs’ attorneys into a settlement. Such strong-arm tactics are not necessarily desirable since they force the attorney to conform his actions to the desires of the judge, rather than the client. Victor Yannacone, one of the *Agent Orange* attorneys, claimed that depending on his view of the proposed settlement, “he would be rewarded or punished for his position when the judge came to award fees.”<sup>94</sup> As Peter Schuck notes in his book, *Agent Orange on Trial*:

[T]he judge, because he has staked his credibility on a difficult settlement or for some other reason, may acquire a strong interest in a particular outcome. It is often easy for dissidents to portray the judge in such cases as having used the formidable powers . . . especially control over appointment and discharge of the [plaintiff’s management committee] and over fees as instruments to gratify his

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of a special master exercising increased authority on behalf of the court, see *Cosgrove v. Sullivan*, 759 F. Supp. 166, 169-70 (S.D.N.Y. 1991) (threatening to appoint special master to oversee Medicare payments to class unless HHS takes prompt action).

91. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.* (*Lindy I*), 487 F.2d 161, 169 (3d Cir. 1973). Other courts, however, have allowed expert testimony. See, e.g., *Pelican Prod. Corp. v. Marion*, 893 F.2d 1143 (10th Cir. 1990) (allowing an expert witnesses to testify at Rule 11 evidentiary hearing held before a magistrate); *Oppenlander v. Standard Oil Co. (Indiana)*, 64 F.R.D. 597 (D. Colo. 1974) (allowing attorneys unconnected to the litigation to testify to risk involved in suit and counsel’s competence).

92. *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1379 (N.D. Cal. 1989).

93. *Id.*

94. Schuck, *supra* note 27, at 200.

desire. Such suspicions, even when unfounded, can contaminate the case, mocking the court's pretensions of justice. The significance of innuendo like Yannacone's, therefore, transcends its truth or falsity; so long as it is even entertained, it will blight the Agent Orange case.<sup>95</sup>

Judge Weinstein, in fact, was criticized by many observers for his strong desire to settle the *Agent Orange* case. Allowing a neutral extrajudicial officer, such as a magistrate or master, to decide such a sensitive issue as attorneys' fees enhances the appearance of judicial neutrality and reduces unreasonable pressures on the attorneys to settle the case.

A final issue is the cost associated with using a magistrate or master. While the cost of a magistrate usually is borne by the judicial system, masters can be paid by the parties or "out of any fund or subject matter of the action, which is in the custody and control of the court."<sup>96</sup> In *Pray v. Lockheed Aircraft Corp.*, the master's fee of \$103,000 was charged to plaintiffs' counsel.<sup>97</sup> In *Young v. Pierce*,<sup>98</sup> both plaintiff and defendant were required to contribute \$12,500 to compensate the court-appointed master. More often, the master is paid out of the common settlement fund since the master presumably is providing a service for the entire class.

But payment can be a problem when settlement creates no common fund. In *Trout v. Ball*, a sex discrimination case involving the United States Navy, the court recognized this problem and after determining the Navy's liability, ordered the government to pay the cost of the master appointed to decide individual back pay claims.<sup>99</sup> The costs of a master, however, can be quite high. Kenneth Feinberg, one of the masters in the *Agent Orange* case, and other members of his firm received more than \$3 million in fees and expenses.<sup>100</sup> In any evaluation of the cost of extrajudicial of-

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95. *Id.*; see Kane, *supra* note 6, at 407 ("[i]f the public perceives that the court has become a participant, rather than an independent arbiter, that itself may undermine the integrity of the process").

96. FED. R. CIV. P. 53(a).

97. 644 F. Supp. 1289, 1291 n.1 (D.D.C. 1986).

98. 640 F. Supp. 1476, 1478 (E.D. Tex. 1986).

99. 705 F. Supp. 705, 708 (D.D.C. 1989). The court also ruled that paying the master a \$200 hourly fee was appropriate and that the master should be compensated monthly by the government. *Id.* at 709.

100. Labaton, *supra* note 10, at D1, D2. Mr. Feinberg was not only criticized for his high fees but also for appointing Aetna Life and Casualty, one of the major insurers of the defendant chemical companies, to process the veterans' claims. *Id.* at D2.

ficers, however, the liberation of judges' time to work on other issues should be taken into account.<sup>101</sup>

But freeing up the time of judges through the use of magistrates and masters should not be seen as a judicial abdication of power.<sup>102</sup> Judges should continue to be involved intimately in supervising the pretrial preparation of the case and discussing possible settlements with the attorneys.<sup>103</sup> An extrajudicial actor should act as a "neutral observer to gather facts and to propose a practical solution to a difficult problem."<sup>104</sup>

Judges should continue to wield their enormous power and prestige, something masters and magistrates do not possess. A Brookings Institution task force noted:

Magistrates can and do fulfill a valuable function in alleviating judges' work loads by performing many *critical nonjudicial tasks* . . . [But] the notion that by assuming core judicial functions magistrates can economize on judicial resources is fundamentally flawed. Decisions by magistrates on matters of importance — for example, summary judgment motions — are often appealed to the supervising judge, requiring the parties to brief and argue the same questions twice. In addition, active judicial management of cases can prevent lengthy disputes between counsel for the parties before magistrates over minor procedural issues.<sup>105</sup>

Attorneys' fees are an example of the type of "critical nonjudicial task" that can best be performed by a magistrate or master.

Finally, a related alternative is to hire more support staff to aid the judge. The Brookings report proposed that "relatively modest" increases in administrative staff, computer facilities, and software support can make "substantial improvements" in the judicial sys-

101. See Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 737-38 (1978) (stating that masters can undertake "complex fact-gathering . . . more economically" than judges).

102. "[T]he delegation of pretrial tasks to magistrates is simply part of a much larger trend in the judicial community toward informalism, flexible dispute resolution practices, concern for improved efficiency, and experimentation based on research and development." Seron, *supra* note 6, at 567.

103. See Kane, *supra* note 6, at 407 ("The judge should not delegate this [supervisory] responsibility to a master or magistrate because it is not a question of ruling on issues that may be sent to another independent professional and then reviewed by the court."); MANUAL, *supra* note 25, § 20.14 ("Judicial supervision in complex litigation should ordinarily be exercised directly by the judge rather than by referral to a magistrate or master").

104. Young v. Pierce, 640 F. Supp. 1476, 1484 n. 9 (E.D. Tex. 1986).

105. BROOKINGS REPORT, *supra* note 7, at 28 (emphasis added).

tem.<sup>106</sup> In the *Agent Orange* case, Judge Weinstein hired three temporary clerks, all law school graduates awaiting admission to the bar, to process the fee petitions.<sup>107</sup> These temporary clerks were supervised by a senior clerk, while another clerk researched legal issues related to the petitions. In addition to these five full-time clerks, a member of the Clerk's Office staff helped organize the petitions and other submissions by counsel.

### III. COURT-APPOINTED CLASS GUARDIANS

In the class action framework, the judge is supposed to act as a guardian of the class members' interests.<sup>108</sup> With respect to attorneys' fees, concern for the fairness to the absent class members takes on added significance since the attorneys' fees can come directly from the class compensation. In short, both attorneys and class members are competing for the same pool of money:

In these situations, the plaintiffs' attorney's role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit. The perspective of the judge also changes because the court now must . . . act as a fiduciary for those who are supposed to benefit from it, since typically no one else is available to perform that function — the defendant has no interest in how the fund is distributed and the plaintiff class members rarely become involved.<sup>109</sup>

The procedural safeguard of providing notice to the class members is inadequate, since intervention is both intimidating and costly.<sup>110</sup> While class members theoretically are free to challenge

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106. *Id.* at 30-31.

107. *Third Circuit Report*, 108 F.R.D. at 272 n.120 (citing *In re "Agent Orange" Prods. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987)).

108. See e.g., *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1203 (N.D. Ill. 1989) ("[T]his court must act as 'fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications,'" (quoting *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988))); *Grinin v. International House of Pancakes*, 513 F.2d 114, 116 (8th Cir. 1975) (stating that under Rule 23(e), "[the] district court acts as a fiduciary which must serve as a guardian of the rights of absent class members.>").

109. *Third Circuit Report*, 108 F.R.D. at 255. In the *Agent Orange* case, however, one of the defendants filed a brief challenging the fee award, but this was done more out of spite. SCHUCK, *supra* note 27, at 196.

110. *Lazos*, *supra* note 47, at 324; see, e.g., *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 295 (N.D. Ill. 1990) (noting only one class member appearing at a settlement meeting to object to fee petition).

any settlement and fee award, the reality is far different since class members lack "the necessary knowledge, interest, or ability to exercise vigorous control."<sup>111</sup> The court in the *WICAT Securities* case<sup>112</sup> ruled:

Although this court agrees that responses by the class [to a proposed fee award] would have been a relevant consideration it does not necessarily follow that the failure to respond is particularly meaningful. Class litigation is a process that seems strange to many class members and participation in that process would seem to be fairly intimidating. Accordingly, failure by the class to object to a 16% fee is not persuasive evidence that further enhancement is appropriate in this case.<sup>113</sup>

Another very real problem in statutory fee cases is when plaintiffs' attorneys trade a settlement which is unfavorable to the class for an agreement with higher attorneys' fees.<sup>114</sup> Even in the absence of collusion, there is a possibility that attorneys will accept a small settlement in order to ensure some fees, rather than risk losing at trial and recovering nothing. In short, the court must simultaneously scrutinize any settlement under Rule 23(d) and try to protect the interests of the class.<sup>115</sup> These are two very different hats for a judge to wear.

Consequently, the Manual for Complex Litigation has approved the use of court-appointed "special counsels" to represent the class in order to preserve the adversarial nature of the proceedings.<sup>116</sup>

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111. Lazos, *supra* note 47, at 318. "Because the individual class member's settlement award tends to be small, no member is financially motivated to expend the time and effort required to supervise the attorney closely. Moreover, any increase in the settlement award derived from close supervision of the attorney must be shared with all other class members, making it unlikely that the benefits of supervision will outweigh the costs." *Id.* at 319.

112. *In re WICAT Sec. Litig.*, 671 F. Supp. 726 (D. Utah 1987).

113. *Id.* at 741.

114. See *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977).

115. "[T]he unethical attorney can too easily circumvent the safeguards of Rule 23. These weaknesses lead to abuse of the class action process." Lazos, *supra* note 47, at 316. Furthermore, the Model Code of Professional Responsibility, which is geared toward traditional litigation, provides little guidance to the class action attorney faced with a conflict of interest. *Id.* at 317; see *Alexander v. Chicago Park Dist.*, 927 F.2d 1014, 1024 (7th Cir. 1991) (district court must closely scrutinize fee agreements which place counsel and class in adversarial relationship).

116. MANUAL, *supra* note 25, § 24.13; see also Lazos, *supra* note 47, at 322 ("[T]he lack of 'adversarialness' in the pretrial class action settlement process forces the court into an unjustified passivity").

The guardian can serve as "devil's advocate" both to safeguard the interests of the absentee class and to provide more information to the court.<sup>117</sup> Similarly, the Third Circuit task force recommends appointing "a non-judicial representative — who typically will be an attorney" to negotiate the fee with plaintiffs' counsel.<sup>118</sup> As soon as possible, a guardian should be appointed to work throughout the case to monitor the actions of counsel. The Third Circuit report recommends that the guardian work with the plaintiffs' counsel "immediately after the pleadings are closed and before discovery is fully underway."<sup>119</sup> There necessarily will be some overlap if a magistrate or master is also employed.

The initial work of a guardian, however, should be cursory, since a guardian need not be involved intimately in the pretrial process to be able to scrutinize a final fee application. As long as contemporaneous time records are required with recording by activity (see Section VI below) and the guardian has a knowledge of the issues involved in the case, he should be able to challenge duplicative and otherwise questionable charges. A guardian should also be present at any settlement negotiations with defendants to ensure that if attorneys' fees are discussed, no collusion is involved.<sup>120</sup> Though a guardian is appointed by the court, it should be made clear that the guardian's first obligation is to the class.

The importance of an adversarial relationship in the fee process cannot be underestimated. In *Trist v. First Federal Savings &*

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117. Lazos envisions a more neutral role for the guardian, a role in which "[t]he guardian would not be a party to the proceedings, but a friend of the court — a fact finder." Lazos, *supra* note 47, at 326-27. Such a role closely resembles that of a magistrate or master, and thus this paper opts for a different role for a guardian. In fact, Lazos writes, "Courts already make extensive use of neutral third parties as fact finders in the class action process [with] the appointment of magistrates, masters, and expert witnesses to help manage the class action device." *Id.* at 327 n.107.

118. *Third Circuit Report*, 108 F.R.D. at 256.

119. *Id.* at 255 n.62. Some judicial members of the Third Circuit task force preferred waiting until "the case is better formed," while the attorneys on the task force wanted the percentage issue determined as early as possible. *Id.*

120. "Adding a third party to the negotiating process could be seen as an infringement on the private negotiating rights of the parties. However, the confidentiality . . . is not necessarily justified in the class action context . . . [which involves] the interests of the absentee class members and society's interest in preventing abuse of the class action mechanism." Lazos, *supra* note 47, at 332; *cf.* *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1518-20 (11th Cir. 1988) (stating that a judge should deal with the problems of negotiation of settlement and fees simultaneously under the authority of Rule 16). Professors Macey and Miller advocates a limited experiment of using guardians in the settlement process, although they express no view on their sue in the fee process. Macey & Miller, *supra* note 30, at 47-48.



*Loan Association of Chester*,<sup>121</sup> fee petitions were presented ex parte to the court. Without the benefit of adversarial arguments, the court lamented its sole reliance on a "cold record of hours and tasks performed, albeit in this case a detailed and thoroughly documented one. . . ."<sup>122</sup> Consequently the court approved generous fees, based on counsel's good faith, "uncommon dedication to the interests of the clients," and "restraint" in hours billed.<sup>123</sup> Courts, however, should be wary of relying on counsel's professed good faith, despite one court's belief that attorneys are in a position of "public trust" and "share[] with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees."<sup>124</sup> The potential for attorney abuse is simply too high.

As with the appointment of masters and magistrates, judges are reluctant to appoint class guardians. In the Federal Judicial Center study, 87.5% of the judges (fifty-six of sixty-four) have never appointed a guardian, and only 9.4% sometimes appointed them.<sup>125</sup> A survey of reported cases reveals that there are few examples of judges appointing a class guardian in a fees dispute. The two most often cited cases are *Miller v. Mackey International, Inc.*<sup>126</sup> and *Haas v. Pittsburgh National Bank*.<sup>127</sup> In both cases, there was a concern that the judge could not be an adequate advocate for the class without undermining his impartial position.<sup>128</sup> Only the appointment of a guardian could "obviate[] this considerable problem of judicial schizophrenia."<sup>129</sup> The success in these two cases should have motivated other judges to experiment with this device, but that has not happened.

In *Meyer v. Citizens and Southern National Bank*, Lee Redmond, Jr., was appointed guardian ad litem "to represent the interests of unborn, unknown, incompetent, and minor members of the plaintiff class" in evaluating the fairness of a settlement which

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121. 89 F.R.D. 8 (E.D. Pa. 1980).

122. *Id.* at 10.

123. *Id.* at 10, 13.

124. *Zeffiro v. First Pa. Bank*, 581 F. Supp. 811, 812 (1983) (quoting *Alpine Pharmacy v. Charles Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973)).

125. FEDERAL JUDICIAL CENTER REPORT, *supra* note 16, at 226.

126. 70 F.R.D. 533, 536 (S.D. Fla. 1976) (stating that the 1845 hours billed to the class "lack[ed] credulity").

127. 77 F.R.D. 382 (W.D. Pa. 1977).

128. *See id.* at 383; *Miller*, 70 F.R.D. at 535.

129. *Haas*, 77 F.R.D. at 383.

included a provision for attorneys' fees.<sup>130</sup> The extent of Redmond's independent inquiry is unclear from the published opinion, but the opinion does note that he was present at the fairness hearing and was able to conclude that adequate notice had been given and that the proposed settlement was fair.

A more obvious use of a guardian ad litem was in *Pray v. Lockheed Aircraft*, in which the guardian represented the estates of seventy-six children killed in an airplane accident.<sup>131</sup> Here, the guardian, Charles R. Work, represented the interests of the decedents throughout the litigation, rather than merely at the attorneys' fees process. The cost of the guardian was "the relatively modest amount" of \$92,000 and was paid out of the class settlement.<sup>132</sup>

As with the use of masters and magistrates, the cost of the guardian should come out of the general class fund,<sup>133</sup> but judges should pay careful attention to limiting the amount of compensable time to the guardian,<sup>134</sup> particularly if other non-judicial officers, such as masters, also are examining the fee petitions. If the guardian's responsibility goes beyond the role of an advocate and includes checking the fee petition, judges should exercise greater latitude in paying the guardian. In most cases, however, a fixed salary seems appropriate, with adjustments if necessary.<sup>135</sup>

For the appointment of a guardian to be effective, the costs of the guardian's work must not outweigh the benefits. As is apparent, the benefits are more evident in complex cases where the attorneys' fees are high, and where closer scrutiny of the fee petitions may decrease the eventual award. There is also the possibility, however, that a guardian can provide a less tangible,

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130. 677 F. Supp. 1196, 1200 (M.D. Ga. 1988). The settlement provided \$25 million to the class, \$7 million to attorneys' fees and \$625,000 for attorney expenses. *Id.* at 1204.

131. 644 F. Supp. 1289 (D.D.C. 1986).

132. *Id.* at 1309-10. The \$92,000 included a 20 percent "bonus" of slightly more than \$15,000 for risks incurred in the litigation. This same bonus was given to all the plaintiff's lawyers. *Id.* at 1310.

133. In *Meyer* the guardian's fees and expenses of \$19,265.57 were paid out of the interest from the settlement fund. *Meyer*, 677 F. Supp. at 1213. In both *Haas* and *Miller*, the guardian's fee was charged against the common fund. *Lazos*, *supra* note 47, at 331. *Lazos'* proposal that one percent of the fund be set aside for paying the guardian seems problematic, since the guardian's compensation should not be contingent on the final settlement. *Id.*

134. See *Third Circuit Report*, 108 F.R.D. at 257 ("[T]he court should fix a limit on compensable time, an hourly fee limit, or a total fee limit on the representative"). The Third Circuit did not reach a consensus on who should pay the guardian's fees.

135. See *Lazos*, *supra* note 47, at 331.

non-monetary benefit, that is, to "protect against abuse in fee requests and, perhaps as importantly, provide an independent adversary to the fee request, avoiding the appearance of impropriety that results from large unopposed fee awards."<sup>136</sup> Though the importance of safeguarding the class' interests cannot be underestimated, the Federal Judicial Center report rightly questions whether such a function could be performed equally well by masters or magistrates.<sup>137</sup> It is up to the individual judge's preference as to whether he uses a disinterested observer (e.g., magistrate or master) or an interested advocate (e.g., guardian).

#### IV. PRETRIAL FEE CONFERENCES

By exercising tight control early in the litigation, courts will be able to compel class action lawyers to stay abreast of these cases, keep fees down, and most importantly, to keep the cases moving along. Arguably, tight judicial management should force attorneys to become better case managers. One of the most effective means courts have to force lawyers to become better managers is their control over fees.<sup>138</sup>

Judges should exercise their case management authority under Rule 16 to control attorneys' fees from the outset; the 1983 amendments specifically contemplated the use of pretrial conferences to achieve this goal. Of particular relevance to the attorneys' fees question are Rule 16(a)(2) "establishing early and continuing control so that the case will not be protracted because of lack of management"; (a)(3) "discouraging wasteful pretrial activities"; (c)(6) "the advisability of referring matters to a magistrate or master"; and (c)(10) "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues."<sup>139</sup> The Manual for Complex Litigation states: "At the out-

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136. FEDERAL JUDICIAL CENTER REPORT, *supra* note 16, at 232 (citation omitted); *see also* Rothfarb v. Hambrecht, 641 F. Supp. 71, 74 (N.D. Cal. 1986) ("this Court is keenly aware of its duty to protect the absent plaintiff class members, and determined to avoid . . . even the appearance of having awarded windfall fees"); *In re* Capital Underwriters, Inc. Sec. Litig., 519 F. Supp. 92, 98 (N.D. Cal. 1981), *aff'd in part, remanded in part*, 705 F.2d 466 (9th Cir. 1983) ("Excessive fees have a broader detrimental effect as well on the continued usefulness of the class action mechanism since such awards provoke criticism of the legal professions and class representation in particular.").

137. FEDERAL JUDICIAL CENTER REPORT, *supra* note 16, at 232.

138. Kane, *supra* note 6, at 391.

139. FED. R. CIV. P. 16.

set of any litigation in which it may be called upon to review or award attorneys' fees, the court should institute procedures that will not only be useful in later determining these awards but also deter wasteful expenditures of time and money by counsel."<sup>140</sup>

The support for active pretrial management is broad-based. According to the 1988 Harris survey, more than eighty percent of litigators and judges favored "the concept of increasing the role of federal judges as active case managers."<sup>141</sup> One litigation manual noted: "To avoid abuse, disappointment and unnecessary controversy, the procedures for eventual fee determination should be discussed at a status conference early in the litigation."<sup>142</sup> And the Eighth Circuit, in affirming a district court's reduction of fees for attorney misconduct, noted that "[i]n almost all cases the key to avoiding excessive costs and delay is stringent judicial management of the case."<sup>143</sup>

Pretrial conferences and orders should provide clear guidelines to the attorneys on: acceptable billing rates; what functions can be performed by different attorneys (i.e., what are appropriate tasks to be performed by partners); the number of attorneys allowed to attend court appearances or depositions; what type of records must be submitted (e.g., contemporaneous time sheets); how often and to whom these records should be submitted; what time will and will not be compensated (e.g., review of documents); the use of paralegals; how the litigation will be structured to minimize attorneys' fees (e.g., designation of lead counsel); and what aspects of case administration (e.g., preparing and reviewing fee petitions) will be compensated.<sup>144</sup> If an extrajudicial officer is employed (e.g.,

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140. MANUAL, *supra* note 25, § 24.2.

141. BROOKINGS REPORT, *supra* note 7, at 25. The report concluded that "[m]uch unnecessary cost and delay can be avoided at the outset of many cases through sensible case management evaluation and scheduling techniques." *Id.* at 23.

142. WILLIAM SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION 190 (1982); see also Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

143. *Jaquette v. Black Hawk County*, 710 F.2d 455, 463 (8th Cir. 1983).

144. See SCHWARZER, *supra* note 142, at 191. The Manual for Complex Litigation (Second) gives an example of sample pretrial guidelines relating to attorneys fees in § 24.22 and the responsibilities of lead counsel in § 41.31. See also *In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912, 918 n.17, 919 (D.P.R. 1991) (coordinating discovery of both plaintiff's and defendant's attorneys); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 666 F. Supp. 547 (S.D.N.Y. 1987) (approving plaintiff's steering committee as lead counsel in a pretrial order).

masters, magistrates and guardians), the court should establish the precise role that the officer will play in the litigation.<sup>145</sup> Additionally, the judge should require that any private fee-sharing arrangements be disclosed at the conference.<sup>146</sup>

Several judges have used pretrial orders to avoid potentially protracted fee disputes. The most notable example is the *Continental Illinois Securities* case.<sup>147</sup> Judge John Grady issued a pretrial order setting out the tasks for which lawyers would be compensated, specifying that "attorneys should work independently," and that only one attorney would be compensated for a court appearance, deposition or pretrial conference.<sup>148</sup> Senior partners would be compensated at their usual rates only when doing work meriting the attention of a senior partner.<sup>149</sup> Grady warned against unnecessary research on legal issues "which [are] well known to practitioners in the areas of law involved," and stressed that attorneys would not be compensated for reviewing another's work.<sup>150</sup> Finally, the order cautioned against too much communication among the lawyers: "If the attorneys for the class are competent, there is no need for a legion of other lawyers to be looking over their shoulders; if they are not competent, the legion will do no good anyway."<sup>151</sup>

Grady's order received widespread attention. Professor Kane commented on the case: "[Grady's] message was clear: lawyers have the responsibility to develop more efficient means of coordinating and managing complex class actions, and the failure to do

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145. For an example of a pretrial order relating to special masters, see *Young v. Pierce*, 640 F. Supp. 1476 (E.D. Tex. 1986). See MANUAL, *supra* note 25, § 20.14 ("If matters are to be referred, the court should enter an order that adequately describe what is being referred and, to the extent not covered by existing rules, the authority of the magistrate or master to make rulings and the procedures for obtaining review by the judge.").

146. In *Agent Orange*, the plaintiff's fee-sharing arrangement was disclosed to Judge Weinstein only after a settlement had been reached. Weinstein's decision to uphold the arrangement was reversed by the Second Circuit which ruled that such plans must be disclosed. 818 F.2d 216, 226 (2d Cir. 1987). See *In re "Agent Orange" Product Liability Litig.* (Appeal of Dean), 818 F.2d 216, 226 (2d Cir. 1987) ("Only by reviewing the [fee] agreement prospectively will the district courts be able to prevent potential conflicts from arising. . .").

147. *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983). Note the similarities between Judge Grady's order and the sample guidelines in the Manual for Complex Litigation. See MANUAL, *supra* note 25, § 24.22.

148. *In re Continental Ill. Sec. Litig.*, 572 F. Supp. at 933.

149. *Id.* at 933.

150. *Id.* at 933-34.

151. *Id.* at 934. Other aspects of the order included tightening controls over expenses, requiring contemporaneous time records, and limiting communications between counsel and plaintiff class.

so will not be at the expense of the class of the opposing party."<sup>152</sup> Grady's order led Thomas Willging to survey reactions to this type of pretrial management.<sup>153</sup> The thirty-nine attorneys in the survey felt that: Grady's order was fair to both the client and the attorney; such orders could be extended easily to most other types of litigation; plaintiff's lawyers would not be deterred from initiating litigation; and most importantly, these pretrial orders could result in substantial cost savings (the average estimate was a fifty percent reduction in fees and expenses).<sup>154</sup> Many of the attorneys in Willging's survey justified such pretrial orders by noting that defense counsel is not always given free rein in billing. In-house counsel impose similar restrictions on outside firms, while senior partners of a law firm usually issue billing guidelines to members of their firm.<sup>155</sup> Therefore, any incidental restrictions on plaintiffs' lawyers would not put them at a significant disadvantage vis-a-vis their adversaries.

Another case which used pretrial orders to control attorneys' fees was *In re American Integrity Securities Litigation*,<sup>156</sup> in which the court made two pretrial orders designating the lead counsel and the process by which contemporaneous time records would be submitted. The attorneys were ordered to submit time records to lead counsel within twenty days after the end of each month; the lead counsel was then to submit all the time records within thirty days after each month. Implicit in this order was that lead counsel was to check each time record: "said submission is a representation that the time spent as submitted was reasonable and necessary." The court also ruled that any time not submitted originally or without adequate documentation would be disallowed; time submitted late might be compensated but no multiplier would be awarded for this time.<sup>157</sup>

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152. Kane, *supra* note 6, at 393.

153. See Willging, *supra* note 51. "The overwhelming majority of lawyers interviewed expressed appreciation for the concept of the order and applauded the judicial recognition of the need for such an order." *Id.* at 11.

154. *Id.* at 7-9. For specific comments of survey participants, see *id.* at 15-34.

155. *Id.* at 8. But note that defense counsel usually outspends plaintiff's counsel. In *Agent Orange*, defense counsel spent between \$75 million and \$100 million, while plaintiffs' counsel spent \$13 million. Labaton, *supra* note 10, at D2.

156. Fed. Sec. L. Rep. (CCH) ¶ 94,738 (E.D. Pa. Aug. 8, 1989).

157. See SCHWARTZER, *supra* note 142, app. at 211-410 (giving several examples of pretrial orders in complex antitrust litigation); General Management Order No. 1 (July 29, 1974), *In re Equity Funding Corp. of Am. Sec. Litig.*, reprinted in WILLIAM SCHWARTZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* (1982) app. at 211-21 (1982); Pretrial Order No.

In *Fisher Bros. v. Cambridge Lee Industries*,<sup>158</sup> Judge Norma Shapiro issued several pretrial orders "to ensure as little duplication of effort as possible by the 23 firms serving as counsel . . . and in anticipation of [the] fee petition." These orders appointed co-lead counsels and their responsibilities, required contemporaneous time records "specifically describing the tasks performed," and described the process by which fee petitions would be submitted to the court — a process similar to the one used in *American Integrity Securities*. One of the co-lead counsels was responsible specifically for reviewing the time records before filing to ensure that hours were "spent appropriately and for the benefit of plaintiff and the class it seeks to represent." Judge Shapiro's overall purpose in issuing the orders was unmistakable: "No fees shall be allowed for time which is not documented in this matter."<sup>159</sup>

But pretrial orders can also involve the judge too intimately in the details of the case as happened in the *WICAT Securities* case.<sup>160</sup> Not only did Judge Thomas Greene appoint a lead counsel and liaison counsel, but he also assigned responsibilities for different parts of the case to each of the nine law firms representing the plaintiff. These responsibilities included: discovery of third parties, discovery of the underwriters, discovery of the defendant, preparation of class action certification, preparation of the amended complaint, and entering necessary stipulations. An order of such detail decreases the possibility of duplicative work, but it also restricts the autonomy of lawyers to develop litigation strategy on their own, while raising questions about the judge's impartiality.

In defining the scope of pretrial orders, judges must be careful not to harm the legitimate interests of either the client or the attorney. While the vast majority of the attorneys in the Willging survey felt pretrial orders were necessary to control fees, "[m]ore than half of the respondents favorable to . . . [Judge Grady's] order tempered their applause with a concern that the order was unduly rigid, impractical, or restrictive of quality legal representa-

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1 (July 2, 1976); *In re Folding Carton Antitrust Litig.*, reprinted in WILLIAM SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* app. at 223-37 (1982).

158. No. 82-4921, 1987 WL 26480 (E.D. Pa. Nov. 30, 1987).

159. In her final award, Judge Shapiro not only disallowed all inadequately documented hours but also hours contained in any time record submitted late. The only exception for this stringent rule was for the time records submitted to co-lead counsel on time but not filed on time "due to the inadvertence of co-lead counsel or the Clerk of the court." *Id.* at \*12.

160. *In re WICAT Sec. Litig.*, 671 F. Supp. 726 (D. Utah 1987).

tion."<sup>161</sup> There was some concern that the plaintiff's bar would be placed in a dilemma: play by the judge's rules and operate at a disadvantage against defendant's lawyers who have greater overall resources, or continue billing the same amount of hours and risk not being compensated.<sup>162</sup> On an objective level, such concerns are probably overstated since most plaintiffs' attorneys are amply compensated, perhaps even overcompensated. And a central tenet of this article has been that lawyers are not able to adequately police themselves. Furthermore, it is doubtful that any litigation will be deterred merely by more active pretrial management.

## V. COURT-APPOINTED LEAD COUNSEL

One of the inherent difficulties in complex litigation, particularly multidistrict litigation, is the large number of attorneys involved and their lack of accountability to their clients. "Class litigation requires a degree of organization and tight management by lawyers that seldom is necessary in an ordinary two-party lawsuit."<sup>163</sup> The *Agent Orange* and *Fine Paper* cases provide telling examples of too many lawyers spoiling the broth. As one court noted almost a century ago:

[T]here can be but one master of a litigation on the side of the plaintiffs. It is also plain that it would be as easy to drive a span of horses pulling in diverging directions, as to conduct a litigation by separate, independent action of various plaintiffs, acting without concert, and with possible discord.<sup>164</sup>

Consequently, some judges act under the implicit authority of Rule 42(a) to appoint a lead counsel.<sup>165</sup> Others use Rules 23(d)(1) and (3) to designate a lead counsel and "to restrict the activities of those attorneys who represent individual class members but who are not lead counsel for the class itself."<sup>166</sup> Whatever the justifica-

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161. Willging, *supra* note 51, at 11.

162. *Id.* at 12-13.

163. Kane, *supra* note 6, at 389.

164. *Manning v. Mercantile Trust Co.*, 57 N.Y.S. 467, 468 (N.Y. Sup. Ct. 1899); *see also* Kane, *supra* note 6, at 390 ("Lawyers have been slow to recognize the need to be more economical and coordinated in their preparation for class action litigation . . . perhaps revealing some disturbing features about the bar as a whole.")

165. *See e.g.*, *MacAlister v. Guterma*, 263 F.2d 65 (2d Cir. 1958).

166. *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989).



tion, lead counsel should be appointed as soon as possible.<sup>167</sup>

The Manual for Complex Litigation suggests some of the various responsibilities which can be assigned to lead counsel: coordinating the filing of motions; maintaining an orderly discovery process; conducting settlement negotiations; and delegating work assignments.<sup>168</sup> The lead counsel is essential to an orderly fees process, since he coordinates the activities of the attorneys and lessens the possibility of excessive or duplicative work.<sup>169</sup> Time records, for example, should be submitted to a lead counsel who reviews and submits them to the court.<sup>170</sup> While there is no clear consensus about how much authority the lead counsel should be given, the Ninth Circuit in *Vincent v. Hughes Air West, Inc.*<sup>171</sup> upheld an order that forbade non-lead counsel from initiating discovery or filing motions without the permission of the lead counsel.

Whenever possible, courts should appoint lead counsel instead of allowing the attorneys to appoint one themselves. Even if a judge simply ratifies the lead counsel nominated by the attorneys, judicial appointment will strengthen the authority of a lead counsel, thus lessening conflict and dissension among the plaintiffs' attorneys. A lead counsel who is elected by the other attorneys will often be forced to cut deals over how work will be distributed in order to get votes. Judicial appointment also is more likely to prevent the proliferation of subcommittees, delegation of responsibilities, and duplication of work which characterized the *Fine Paper* litigation.<sup>172</sup> The importance of judicial appointment is reflected in

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167. See e.g., *Raymark Indus., Inc. v. Stemple*, 714 F. Supp. 460 (D. Kan. 1988) (advising plaintiff's counsel to have lead counsel selected before pretrial conference in which discovery was set); *In re Equity Funding Corp. of Am. Sec. Litig.*, reprinted in WILLIAM SCHWARTZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION*, at app. 211-14 (1982) (establishing committee structure in a complex antitrust suit with a pretrial order); and *In re Folding Carton Antitrust Litig.* reprinted in WILLIAM SCHWARTZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION*, at app. 229-30 (1982).

168. *MANUAL*, *supra* note 25, § 41.31.

169. The Manual for Complex Litigation also provides that lead counsel can be responsible to "monitor the activities of co-counsel to assure that schedules are met and unnecessary expenditures of time and expense are avoided." *Id.*

170. *In re American Integrity Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94,738 (E.D. Pa. Aug. 8, 1989).

171. 557 F.2d 759 (9th Cir. 1977).

172. As the most incredible example of abuse, Kane cites the 1500 hours spent by nine law firms to prepare and take the deposition of one third-party witness. Kane, *supra* note 6, at 390 (citing *In re Fine Paper Antitrust Litig.*, 98 F.D.R. 48, 75 (D. Pa. 1983)). Several courts have gone the opposite direction, believing that many subclasses all represented by separate counsel can best eliminate any conflicts of interest. *Id.* at 401.

the change between the first and second Manuals for Complex Litigation: the second gives this authority to appoint lead counsel to the court, while the first Manual left this responsibility to the attorneys.<sup>173</sup>

In many complex suits, the litigation is handled either formally or informally by a committee.<sup>174</sup> It is important, then, that the court recognize this situation and try to provide a sense of order.<sup>175</sup> If a judge agrees to a committee structure, it should be allowed only in conjunction with a lead counsel. The *Agent Orange* case demonstrated the danger of a committee system without a leader. In the *Exxon Valdez* case, the co-lead counsels are delegating the responsibilities of pleadings, depositions, documents, pretrial motions, and defense motions to dismiss to the many subcommittees and task forces.<sup>176</sup> But the appointment of two lead counsels in this case has not eliminated conflicts among the eighty-four law firms involved. As an attorney for Exxon noted, "There were more papers filed by plaintiff lawyers questioning the role and qualifications of other plaintiff lawyers than anything else in this case. . . . A lot of energy was spent on the subject of which lawyers have what responsibilities. I still would not characterize them as a unified front."<sup>177</sup>

In other cases a separate liaison counsel has been appointed to

173. See MANUAL, *supra* note 25, § 41.31 (showing a sample order setting out the responsibilities of lead counsel).

174. "Even where the court does not formally appoint liaison counsel or lead counsel, everything in an antitrust class action is handled by committee, anyway." Dando B. Cellini, *An Overview of Antitrust Class Actions*, 49 ANTITRUST 1501, 1505 (1980). The virtues of the committee system have been extolled by many courts:

The benefits derived from a committee of attorneys would outweigh any prejudices which could otherwise occur to individual counsel or their clients in limiting their participation. Full participation by each individual plaintiffs' counsel would likely result in numerous attorneys each vying for the attention of the Court, zealously representing the interests of their individual cases and possibly leading to the presentation of confusing and conflicting theories. Clearly, this would be detrimental to the interests of the larger group of plaintiffs. Experience has shown that this small cadre of attorneys, as compared to the free-for-all participation of all attorneys, has better served the interests of all parties as well as those of the Court.

*In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912, 918 (D.P.R. 1991).

175. See, e.g., *San Juan DuPont Plaza Hotel Fire Litig.*, 768 F. Supp. at 918-19 (describing appointment and responsibilities of eleven-member steering committee); *In re Union Carbide Corp. Consumer Prod. Business Sec. Litig.*, 666 F. Supp. 547 (S.D.N.Y. 1987) (approving plaintiff's steering committee as lead counsel); *Asbeston Counsel*, NAT'L L.J., Oct. 21, 1991, at 2 (Judge Weiner naming 13-member plaintiffs' steering committee).

176. Berger, *supra* note 8, at 16.

177. *Id.* at 14; see also *Dickstein's Snow Job*, LEGAL TIMES, Feb. 26, 1990, at 3.

communicate with both other attorneys and the class members.<sup>178</sup> While communication is important, particularly in a large class action suit, there is also the danger that too many billable hours will be consumed by needless communication. The Manual for Complex Litigation echoes this sentiment:

[S]ound judgment and discretion must be exercised by lead and liaison counsel in communicating with other attorneys in the group. Periodic, concise notices and reports of major activities in the litigation are useful in keeping other counsel informed, particularly if they may be called upon to perform assigned tasks from time to time, such as conducting a deposition. However, furnishing all counsel with copies of all briefs, motions, orders, correspondence, and the like will be inefficient and uneconomical — one of the principal reasons for designating counsel to act on behalf of others is to save the time that would be wasted if many attorneys had to read identical documents.<sup>179</sup>

As for notices to the class, attorneys should notify class members of important events in the litigation, such as a proposed settlement. Indeed, Rule 23 requires such notice. But judges should caution attorneys against consulting class members on every decision. As Judge Grady noted in his *Continental Illinois* order, "Class members should be kept apprised of the progress of the litigation, but in no greater detail or frequency than the typical client is kept advised by his attorney. Periodic informational mailings to the class should suffice."<sup>180</sup>

The work of lead and liaison counsel also can continue after the litigation ends. In the *Dalkon Shield* cases, lead counsel, along with two court-appointed masters, conducted and catalogued discovery. After some suits were settled before Judge Miles Lord, the discovery information was made available to the attorneys who had not settled.<sup>181</sup> Another interesting variation of using lead counsel

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178. See e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. at 919 (describing responsibilities of liaison counsel); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007 (E.D. Mo. 1990) (appointing both lead counsel and liaison counsel); *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983) (appointing two liaison counsel originally, although appointment subsequently vacated).

179. MANUAL, *supra* note 25, § 24.23.

180. *In re Continental Ill. Sec. Litig.*, 572 F. Supp. at 928 (N.D. Ill. 1983). In the Federal Judicial Center Study conducted by Thomas Willging, this aspect of Judge Grady's pretrial order was one of the most sharply criticized. Willging, *supra* note 51.

181. For a description of the proceedings before Judge Lord, see *In re A.H. Robins Co.*, 880 F.2d 709, 712 (4th Cir. 1989).

was from the *Swine Flu* Litigation. After the multidistrict litigation had ended and the suits were returned to the original lawyers, the lead counsel and steering committee ran schools for the original lawyers and provided periodic reports on trials and settlements.<sup>182</sup>

Several courts have recognized the importance of the lead counsel's work by compensating the lead counsel at a higher rate. Judge Marvin Aspen stated in the *Gould Securities* case that "the amount of work done and risk undertaken by lead counsel is disproportionately high, and the results in the litigation are largely attributable to lead counsel's efforts."<sup>183</sup> While this extra compensation may come as a result of a higher hourly rate, courts typically have used a higher multiplier to compensate lead counsel.<sup>184</sup> In the *Gould Securities* case, lead counsel was given a 1.75 multiplier, compared to 1.25 for the rest of the attorneys.<sup>185</sup> The differential was even more extreme in *In re Cenco Inc. Securities Litigation* in which lead counsel received a multiplier twice as high: 4.0 compared to 2.0 for rest of counsel.<sup>186</sup> The Supreme Court, however, has taken a restrictive view on the use of multipliers: "[A]n upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar. Any additional adjustment would require the most exacting justification."<sup>187</sup> Lower courts, however, seem largely to have disregarded

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182. Paul D. Rheingold & Clifford J. Shoemaker, *The Swine Flu Litigation*, LITIG., Fall 1981, at 28, 29.

183. *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1206 (N.D. Ill. 1989). For examples of courts praising lead counsel for their work, see *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 529 (D. Nev. 1987) ("To the court's knowledge, the results of the [plaintiff's lead committee's] efforts have never been equaled in any other mass disaster litigation . . . none of [these cases] have concluded except this one, and from the court's viewpoint, that says it all."); *Dekro v. Stern Bros. & Co.*, 571 F. Supp. 97, 106 (W.D. Mo. 1983) ("class counsel prosecuted the case in an economical and efficient manner . . . The cost-cutting measures utilized by class counsel merit an award in addition to the lodestar since the very effect of these measures was to reduce the lodestar.").

184. The non-lead counsel in the *Gould* securities litigation argued that different multipliers for lead counsel were unnecessary since they had a higher lodestar which compensated both the higher risk and the amount of work. The court, however, rejected this argument. *In re Gould Sec. Litig.*, 727 F. Supp. at 1206.

185. *Id.* at 1207; see also *In re American Integrity Sec. Litig.*, 1989-90 Fed. Sec. L. Rep. (CCH) ¶ 94,738 (E.D. Pa. Aug. 8, 1989) (awarding lead counsel 2.5 multiplier compared to 2.1 for other counsel because the "increased responsibility" and "success in coordinating this litigation contributed greatly to the creation and protection of the common fund"); *In re Union Carbide Corp. Consumer Prod. Business Sec. Litig.*, 718 F. Supp. 1099 (S.D.N.Y. 1989) (awarding a 2.6 multiplier for lead counsel; 2 for other counsel).

186. 519 F. Supp. 322, 326-28 (N.D. Ill. 1981).

187. *Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711, 730 (1987) (opinion

this standard.<sup>188</sup>

A related question is to what extent time spent on administrative responsibilities should be compensated.<sup>189</sup> The Manual for Complex Litigation is ambiguous, stating only, "[t]he court can award fees to lead counsel, liaison counsel, and other attorneys performing tasks on behalf of a group of litigants."<sup>190</sup> In *Robinson v. Ariyoshi*,<sup>191</sup> the court reimbursed for the time spent for conferences and correspondence between counsel. The court recognized that "[i]n a case of this magnitude and importance," the attorneys

would have failed in their ethical obligation to their client if there had not been many and persistent conferences between lead counsel to make sure that every avenue of law and fact were searched, researched, and reviewed to make sure there was no hole, loophole, or pinhole through which the State might escape with its ill-gotten water.<sup>192</sup>

The *Robinson* decision probably is limited to cases in which the lead counsel can prove some dramatic time saving as a result of the meetings.<sup>193</sup> In the *Corrugated Container Antitrust* case, for exam-

of White, J.).

188. See, e.g., *McKenzie v. Kennickell*, 684 F. Supp. 1097 (D.D.C. 1988) (justifying upward calculation of lodestar for lead counsel's dedication of 15 years to case), *aff'd*, 875 F.2d 330 (D.C. Cir. 1989); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) (justifying multiplier of 2.26 since counsel constituted "cream of the plaintiff's bar"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Edmonds v. United States*, 658 F. Supp. 1126, 1149 (D.S.C. 1987) (justifying multiplier of 2.75 to lead counsel "who had the lion's share of the responsibilities and burdens of this litigation). But see *In re Burlington N. Employment Practices Litig.*, 810 F.2d 601 (7th Cir. 1986) (upholding district court's order that lead counsel not entitled to multiplier), *cert. denied sub nom.*, *Sprenger v. Burlington N. Ry.*, 484 U.S. 821 (1987). For a detailed list of cases in the 1980's in which multipliers have exceeded 2.75, see *Edmonds*, 658 F. Supp. at 1149.

189. See MANUAL, *supra* note 25, § 20.12. Administration should be distinguished from time spent preparing and litigating attorneys' fees, which courts generally will not reimburse. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.* (Lindy II), 540 F.2d 102, 111 (3d Cir. 1976); *MARCUS & SHERMAN*, *supra* note 3, at 705.

190. MANUAL, *supra* note 25, § 24.11; see also *id.* § 24.12 ("As a touchstone for answering many of these and other similar questions, judges should look to the bill for services rendered that would properly be submitted to a fee-paying client.").

191. 703 F. Supp. 1412 (D. Haw. 1989), *rev'd and vacated on other grounds*, 933 F.2d 781 (9th Cir. 1991) (vacating district court's award of attorney's fees for lack of subject matter jurisdiction).

192. *Id.* at 1424. The court, however, rejected timesheet entries which did not specify the nature of the conferences and correspondence. *Id.*

193. In *Tarver v. City of Houston*, 45 Empl. Prac. Dec. (CCH) ¶ 37,662 (S.D. Tex. 1987), the court allowed time for updating files and checking addresses of claimants since "the integrity of the computer fields" was essential to distributing checks to claimants. *Cf. Skel-*

ple, the lead counsel was compensated for monitoring the other plaintiffs' attorneys and limiting duplication to only four percent of total time spent by all lawyers.<sup>194</sup> More often, courts are very suspicious of lead counsel spending large amounts of time reviewing the work of the other attorneys. In the *WICAT Securities* case,<sup>195</sup> Judge Greene cited an example of a document being drafted in twenty-eight hours but being reviewed for 149 hours. In reducing the hours by forty percent, he wrote:

The word 'review' seems to be a catchall category with great versatility in counsels' application. It is also a signal for the padding of hours. . . .

There was considerable review by counsel who appears to have taken the laboring oar in this litigation on behalf of the Abbey firm which served as lead counsel. Much of that time is presumptively valid but it seems that some of the efficiency in delegating responsibility among plaintiffs' counsel was defeated by such overly extensive review.<sup>196</sup>

Another difficult issue is whether to allow fee agreements among the lawyers. Such agreements are often disregarded<sup>197</sup> and in some

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ton v. General Motors Corp., 661 F. Supp. 1368, 1384-85 (N.D. Ill. 1987) (disallowing 23 hours spent in conferences, including 16.5 hours spent conferring with attorney's partner), *aff'd in part, rev'd in part*, 860 F.2d 250 (7th Cir. 1988), *reh'g denied*, No. 87-1404, 1989 U.S. App. LEXIS 648 (7th Cir. 1989); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1325 (E.D.N.Y. 1985) (disallowing time spent in conferences between members of same firm); *Metro Data Sys., Inc. v. Durango Sys., Inc.*, 597 F. Supp. 244, 246 (D. Ariz. 1984) (discounting time for 58 telephone conferences between two law firms). *But see* General Management Order No. 1 (July 29, 1979), *In re Equity Funding Corp. of Am. Sec. Litig.* (reimbursing counsel for "the expense and time involved in preparation, duplication and distribution of court orders, notices, and other papers intended for distribution"), reprinted in WILLIAM SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* app. at 215 (1982).

194. *In re Corrugated Container Antitrust Litig.*, 1983-2 Trade Cas. (CCH) ¶ 65,628 (S.D. Tex. 1983). *See* *Fisher Bros. v. Cambridge Lee Indus.*, No. 82-4921, 1987 WL 26480 at \*22 (E.D. Pa. Nov. 30, 1987) (stating that lead counsel's ability to coordinate 23 law firms "allowed plaintiffs' counsel to act efficiently and with a minimum of unnecessary activities and protected the fund from unnecessary claims for attorney fees"; adding 1.1 multiplier).

195. *In re WICAT Sec. Litig.*, 671 F. Supp. 726 (D. Utah 1987); *see also In re PSFS Sec. Litig.*, No. 85-4978, 1987 WL 26282, at \*1 (E.D. Pa. Nov. 30, 1987) (praising lead counsel for "not pad[ding] their hours by needlessly reviewing the responses filed by [co-counsel]").

196. 671 F. Supp. at 735-36.

197. In *Agent Orange*, Judge Weinstein informed plaintiff's counsel that he would nullify their internal fee-splitting agreement unless they amended it. SCHUCK, *supra* note 27, at 203. Under the terms of the original agreement, Weinstein said, "those who advanced money would be advantaged to an extraordinary degree over those who gave the time and skill to the enterprise." *Id.* at 202. Consequently, the agreement was amended to reflect more

rare instances penalized.<sup>198</sup> Likewise, courts have disagreed on whether to compensate time spent preparing fee petitions or litigating fee disputes.<sup>199</sup> This paper will not address either of these "substantive" issues, since they are beyond the scope of the procedural reforms this paper advocates.

## VI. CONTEMPORANEOUS TIME RECORDS

Perhaps, the most commonly used of all the procedural tools is the requirement that counsel file contemporaneous time records at regular intervals.<sup>200</sup> Usually, the requirement is fairly flexible:<sup>201</sup> all that is required is the name of attorney, the number of hours spent, the billing rate, the description of work performed, and the date the work was performed.<sup>202</sup> One court interpreted a Second

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closely the percentage of the overall fees that each attorney was awarded by Weinstein. *Id.* at 203. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 768 F. Supp. 912, 922 (D.P.R. 1991) (disregarding fee agreements and capping contingency fees at 25% for attorneys representing minors and incompetent persons and 33% for other plaintiff attorneys); 'Vultures Circling,' NAT'L L. J., Oct. 14, 1991, at 2 describing battle of more than 15 attorneys to enforce fee agreements in \$17 million personal injury suit).

198. See, e.g., *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11 (S.D.N.Y. 1980) (disregarding fee agreement among lead counsel and other attorneys and punishing lead counsel by reduction in fee).

199. See, e.g., *Martin v. University of S. Ala.*, 911 F.2d 604, 610 (11th Cir. 1990) ("It is well settled that time expended litigating attorney fees is fully compensable."); *Rode v. Del-larciprete*, 892 F.2d 1177, 1192 (3d Cir. 1990) (vacating district court's reduction of time spent on fee petitions from 101.6 hours to 35 hours); *In re Bicoastal Corp.*, 121 B.R. 653 (Bankr., M.D. Fla. 1990) (entitling attorneys for official creditors in Chapter 11 to fees for time spent on fee applications).

200. In *NYSARC v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983), the Second Circuit noted, "[W]e think it appropriate to convert our previous expressed preference for contemporaneous time records, . . . into a mandatory requirement, as other Circuits have done."

201. "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983). For other cases allowing fees, see *Johnson v. Kay*, 742 F. Supp. 822, 837 (S.D.N.Y. 1990) (allowing attorneys' fee for reconstructed time records when supplemented by affidavits from attorneys); *Meriwether v. Coughlin*, 727 F. Supp. 823, 826 (S.D.N.Y. 1989) (allowing "chronological computer printouts" but not "computer printout of its billing memorandum" in the absence of contemporaneous time records); *United States Football League v. National Football League*, 704 F. Supp. 474, 477 (S.D.N.Y.) (considering retyped computer records considered contemporaneous time record), *aff'd*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990).

202. Some courts have required very specific descriptions of the work done. *Metro Data Sys., Inc. v. Durango Sys., Inc.*, 597 F. Supp. 244, 245-46 (D. Ariz. 1984), offers a humorous look at lawyer jargon in which the court criticized the use of the words "review" and "analysis."

There are no less than 95 time entries in which a lawyer reviewed something. In most instances "review" appears to be merely a synonym for "read," a less impressive

Circuit ruling to mean "that courts should not be faced with an impossible chore when making fee determinations, and that lawyers should not be required to expend even more hours reconstructing the past in assembling a fee application."<sup>203</sup> The court should require time sheets to be submitted at monthly intervals unless many attorneys work on the case or the case generates a great deal of work.<sup>204</sup> In these latter instances, weekly submissions may be more appropriate. When used in conjunction with other procedural devices, contemporaneous time records can be even more effective. Lead counsel should review all records before submitting them to the court.<sup>205</sup> Masters and magistrates should use the records as a starting point in determining an appropriate fee award.<sup>206</sup> Used properly, contemporaneous time records eliminate wasteful attorney time spent recreating hours after the litigation has ended, thus reducing the possibility of more protracted litigation.<sup>207</sup>

Most courts, following the instructions in the Manual for Complex Litigation,<sup>208</sup> have reduced fees in which contemporaneous time records were required by the court but not maintained by counsel.<sup>209</sup> The importance of such records was recognized in

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term. After all, anyone can read, but it takes a lawyer to review.

An even more amorphous term is "analysis." There are no less than 15 time entries for analysis. When the Court attempts to envision a lawyer engaged in five hours of analysis, Rodin's "The Thinker" comes to mind.

*Id.* at 245-6.

203. *Johnson*, 742 F. Supp. at 837.

204. *See* MANUAL, *supra* note 25, § 24.21 (recommending submission of records every 60 days).

205. *In re American Integrity Sec. Litig.*, 1989-90 Fed. Sec. L. Rep. (CCH) ¶ 94,738 (E.D. Pa. Aug. 8, 1989) (requiring counsel to submit time records for each calendar month to lead counsel within 20 days after the close of each month, while requiring lead counsel to submit the records to the court within 30 days).

206. *See* MANUAL, *supra* note 25, § 24.21 (allowing periodic review of time records by magistrates or masters "to ascertain whether counsel are spending excessive time and money in the litigation").

207. *See id.* ("Fee applications should not result in substantial additional litigation.").

208. "[F]ailure to keep contemporaneous time records justifies an appropriate reduction in the award, if not denial of all fees." *Id.* "Except for good cause, the court should deny compensation or reimbursement for items not reflected on these [contemporaneous] summaries." *Id.*

209. *See, e.g. Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 527 (1st Cir. 1991) (absence of contemporaneous time records justified denial of fee application); *See e.g., Major v. Treen*, 700 F. Supp. 1422 (E.D. La. 1988) (reducing fee award due to duplicative work); *Genden v. Merrill Lynch, Inc.*, 700 F. Supp. 208, 210 (S.D.N.Y. 1988) (awarding "remiss" attorney only \$20,085 in fees for "over 206" hours of undocumented work); *Tarver v. City of Houston*, 45 Empl. Prac. Dec. (CCH) ¶ 37,662 (S.D. Tex. 1987) (considering time



*Dutchak v. International Brotherhood of Teamsters*:<sup>210</sup>

[T]his court is well aware that a delay in recording time often leads to its expansion. The attorney recalls that he worked all day on a certain matter and did not leave the office until very late. He does not recall the interruptions or the fifteen-minute diversions to handle other matters. The failure to keep contemporaneous time records must be recognized, and we do so by reducing the lodestar hours of [the attorney] and his associates by 10 per cent.<sup>211</sup>

Deciding which hours to disallow can be "problematic" since there is no evidence that the time was not spent as the attorney suggests.<sup>212</sup> However, periodic review of records by a magistrate or master should tip off the court to inadequate time records.<sup>213</sup> And as long as counsel is on notice that the court will follow strictly its pretrial order, as in the *Exxon Valdez* case, there is no unfairness in disallowing time actually spent on the case.

When contemporaneous records are being used in conjunction with a lead counsel, the lead counsel should consolidate the records and submit them to the court according to each activity, project,<sup>214</sup> or attorney. In other words, the court should be able to learn quickly the total number of hours spent on a deposition or mo-

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entries of "work on case" not specific enough to be compensated); *Rothfarb v. Hambrecht*, 649 F. Supp. 183, 200 (N.D. Cal. 1986) (rejecting vague descriptions of work done). *But see Carter v. Sedgwick County*, 929 F.2d 1501, 1506 (10th Cir. 1991) (contemporaneous time records not "a per se absolute requirement"); *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988) (contemporaneous time records not "a per se absolute requirement").

210. No. 76-C-3803, 1989 WL 36210 (N.D. Ill. Apr. 10, 1989).

211. *Id.*; see also *In re Churchfield Management & Inv. Corp.*, 98 B.R. 838, 891 (Bankr. N.D. Ill. 1989) ("There is simply no way accurately to measure the amount of time reasonably, necessarily, and productively expended in the absence of a proffer of detailed contemporaneous time records") (citation omitted).

212. *Hutchison v. Wells*, 719 F. Supp. 1435 (S.D. Ind. 1989). The court in *Hutchison* chided counsel ("lax record-keeping is hardly to be commended"), but only disallowed \$208 for undocumented research. *Id.* at 1144-45; see also *In re Churchfield Management & Inv. Corp.*, 98 B.R. at 891 ("Without the time-and-hours data . . . the bankruptcy judge had little choice but to treat (the) petition with great conservatism.").

213. As the Third Circuit noted, "If a district court requires the submission of monthly [attorney's fee] reports and has difficulty with the sufficiency of the content of those monthly reports, it should express its difficulty immediately so counsel can correct any deficiencies." *Rode v. Dellarciprete*, 892 F.2d 1177, 1192 (3d Cir. 1990).

214. In *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294 (N.D. Ill. 1990), the court decreased the attorneys' fee requested by class counsel since "[n]owhere is there one chronological submission so that it can be readily determined which activities were being performed at the same time by different attorneys." *Id.* at 296-97.

tion.<sup>215</sup> While this function can be performed by a master, as in *Rothfarb v. Hambrecht*,<sup>216</sup> it is more appropriately the role of lead counsel. One of the more egregious examples of abuse arose in the *Fine Paper* litigation in which 4,500 hours were spent on preparing one of the plaintiffs' pretrial memoranda, at a cost of \$1 million to the class.<sup>217</sup> Consequently, Judge Grady, who oversaw the *Continental Illinois Securities* case, required time records by activity:

Keeping time by activity or project seems a good way for a lawyer to document the worth of his services, and it strikes me as the *only* way for a group of lawyers to show the worth of their *combined* services. The alternative — and regrettably, the tradition — is to leave it to the judge to attempt an evaluation of a morass of unrelated time entries which can and often do obscure the existence of duplication and excessive charges.<sup>218</sup>

This aspect of the *Continental Illinois* case was applauded widely by lawyers in a Federal Judicial Center survey, with predictions of significant cost savings.<sup>219</sup> Other courts also have required time records by activity. In *Hutchison v. Wells*,<sup>220</sup> the magistrate who oversaw the fees process instructed the attorneys at a pretrial conference that they would be required to break down their fees "as to each count of the complaint."<sup>221</sup> When the attorneys con-

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215. Compare *Norman v. Housing Auth.*, 836 F.2d 1292, 1303 (11th Cir. 1988) ("A well prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case.") with *Rode*, 832 F.2d at 1189-90 (criticizing the specificity required in *Norman*).

216. 649 F. Supp. 183 (N.D. Cal. 1986).

217. *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 75 (D. Pa. 1983). Among the 51 plaintiffs lawyers and deputy attorneys general involved in the memo's preparation were 21 partners from 19 different law firms. What is especially astounding is that the memo was not filed until after several states had filed a similar document covering many of the same issues. *Id.* at 75.

218. *In re Continental Ill. Secur. Litig.*, 572 F. Supp. 931, 935 (1983) (emphasis in original).

219. Willging, *supra* note 51, at 30-32. "Typical reactions [by the attorneys] included 'best part of [the] order,' 'good management too,' 'very reasonable, even ingenious,' 'interesting and innovative,' and 'great idea.'" *Id.* at 30; see also *MANUAL, supra* note 25, § 24.13 ("When several attorneys are seeking fees, either in the same or separate applications, they may be required to provide the court with a compilation arranged by each particular task or function, listing the hours and expenses (including travel) claimed by each particular lawyer. This tabulation will enable the court to determine whether excessive or duplicative hours are being claimed with respect to the same conference, deposition, brief or other activity.")

220. 719 F. Supp. 1435 (S.D. Ind. 1989).

221. *Id.* at 1441 n.9.

tested this requirement after the case was settled, the judge noted: "This court appreciates the difficulty of separating billing hours per count, but the fee applicant must bear the burden of documenting hours to establish entitlement to an award."<sup>222</sup> The judge upheld the magistrate's requirement.

In *Johnson v. Kay*,<sup>223</sup> the plaintiffs' attorney submitted reconstructed timesheets, instead of contemporaneous timesheets. Consequently, the attorney proposed voluntarily to reduce his requested fees by twenty percent "in an effort to avoid major litigation over fees."<sup>224</sup> The judge accepted this proposal.

## VII. INTERIM AWARDS AND AWARDS TO REFERRING LAWYERS

One of the major barriers to the consolidation of multidistrict litigation is the uncertainty of how attorneys' fees will be awarded. After consolidation, most of the attorneys who filed the original suits play little or no role in the litigation and thus are unlikely to be able to justify a fee petition to the court of consolidation. In *Agent Orange*, for example, the only lawyers who were awarded fees were those who worked on the consolidated case.<sup>225</sup> Consequently, many "referring" attorneys will resist consolidation and failing that, will opt out of the case.

Support for compensating these referring attorneys comes from a line of cases which suggests that attorneys' fees can be awarded when a "substantial benefit" has been furnished, even when no fund has been created.<sup>226</sup> Certainly, the filing of suits can be seen as a "substantial benefit" to the consolidated case; without these

222. *Id.* at 1441 (citing *Hensley v. Eckhart*, 461 U.S. 424, 437 (1983)).

223. 742 F. Supp. 822 (S.D.N.Y. 1990).

224. *Id.* at 837

225. SCHUCK, *supra* note 27, at 196.

226. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394 (1970) ("[T]he expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor"); *see also* Barbara Thompson, Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 DEL. J. CORP. LAW 671, 674 n.20 (1984). The legislative history of 42 U.S.C. § 1988 (1991) specifically allows the awarding of interim fees:

[T]he phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits . . . A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case . . .

H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4990.

suits, no consolidation could occur. But to allow referring attorneys to enforce their original one-third contingency fee agreements with the plaintiffs would cheat the class members, forcing them to compensate two sets of lawyers.

In the *Beverly Hills Fire* litigation,<sup>227</sup> Judge Henry Wilhoit, Jr., devised an innovative solution. He allowed "referring" lawyers to charge their clients up to 6.3% of the net final distribution, on top of the ten percent awarded to the attorneys who worked on the consolidated case.<sup>228</sup> Wilhoit justified his decision, writing:

In a very real sense these attorneys have continued to provide valuable services to their clients and to the [lead counsel committee]. These are the attorneys that have answered the many ". . . when will I get my money?" telephone calls, the personal conferences at their offices, homes, as well as inquiries on the street. This has been most exasperating to many people because this complex litigation has spanned nearly a decade. The ordinary citizen simply cannot understand why it would take so long to wind these matters up. We are confident that many times these attorneys felt that they had lost credibility with their clients. They have been required to administer files and they stood ready, willing and able to actively develop their clients' damage claims had that eventually ever become necessary.<sup>229</sup>

While Judge Wilhoit's view of the plaintiff lawyer may be a bit generous, his compromise seems to have a great deal of merit. In the asbestos cases, some of the attorneys who settled the cases voluntarily paid local counsel who originally developed and prepared the cases.<sup>230</sup>

In the rare cases that actually go to trial on one common issue (usually liability), many are returned to the original forums to decide individual issues, such as damages. In these cases there is the difficult issue of whether some interim attorneys' fees should be awarded to those who litigated the common issue. While courts are generally wary of awarding interim fees since the plaintiffs may

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227. *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915 (E.D. Ky. 1986).

228. *Id.* at 925. The 6.3 percent figure was derived from a desire to compensate referring lawyers at 7 percent. But because 10 percent of the settlement already went for attorneys fees, the 7 percent was reduced by 10 percent to leave 6.3 percent. The attorneys who worked on the consolidated case were also allowed to charge their clients an additional 6.3 percent. *Id.* at 925 n.11.

229. *Id.* at 925.

230. Jensen, *supra* note 31, at 9.

eventually lose,<sup>231</sup> courts have been willing to grant such fees when the suit is against the government.<sup>232</sup> In *People Who Care v. Rockford Board of Education District No. 205*,<sup>233</sup> interim fees were awarded in a school desegregation case, after a partial consent decree resulted in systemwide integration. Nevertheless, “[m]any questions remain for future determination.”<sup>234</sup> The district court granted the plaintiff’s request for \$112,935.50 in fees,<sup>235</sup> and the defendants appealed. The Seventh Circuit dismissed the appeal since the resolution of the interim fee issue does not “materially advance the ultimate termination of the litigation.”<sup>236</sup> In *Doe v. Calumet City*,<sup>237</sup> interim fees were awarded to attorneys representing a class of women arrested for misdemeanors and subjected to unconstitutional strip searches. The district court had already resolved the issue of liability,<sup>238</sup> and all that remained was the determination of damages. To ensure that the interim fees would not be excessive, the court required one of the attorneys to be liable for restitution if the final fee award were found to be lower.<sup>239</sup>

To maximize fairness to the attorneys, judges should attempt to devise a reasonable distribution of fees to all attorneys who provide a “substantial benefit” to the class or help make the class a “prevailing party.” What constitutes a “substantial benefit” or a “prevailing party” is a difficult matter and one which has not been resolved conclusively by the courts.<sup>240</sup>

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231. See *Woolridge v. Marlene Indus. Corp.*, 898 F.2d 1169 (6th Cir. 1990) (allowing no fees for litigating unsuccessful damage actions).

232. See, e.g., *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (allowing interim fees under Freedom of Information Act); *Haitian Refugee Ctr. v. Meese*, 791 F.2d 1489 (11th Cir.), modified on reh’g, 804 F.2d 1573 (11th Cir. 1986) (per curiam) (allowing interim fees under Equal Access to Justice Act); *Allen v. Department of Defense*, 713 F. Supp 7 (D.D.C. 1989) (allowing interim awards under Freedom of Information Act); *McKenzie v. Kennickell*, 669 F. Supp. 529 (D.D.C. 1987) (allowing interim awards under Title VII); *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987) (allowing interim awards under Title VII). See generally Gregory C. Sisk, *Interim Attorneys’ Fee Awards Against the Federal Government*, 68 N.C. L. REV. 117 (1989).

233. 921 F.2d 132 (7th Cir. 1991).

234. *Id.* at 133.

235. *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, No. 89-C-20168, 1990 WL 25883 (N.D. Ill. Feb. 23, 1990).

236. *People Who Care*, 921 F.2d at 134 (quoting 28 U.S.C. § 1292(b)(1991)).

237. No. 87 C 3594, 1991 WL 22537 (N.D. Ill. Feb. 15, 1991).

238. The district court’s liability determination is contained in *Doe v. Calumet City*, 754 F. Supp. 1211 (N.D. Ill. 1990).

239. *Doe*, 1991 WL 22537, at \*2.

240. The Supreme court most recently addressed this issue in *Texas State Teachers Ass’n v. Garland Indep. School Dist.*, 489 U.S. 782, remanded, 874 F.2d 242 (5th Cir. 1989). The Court defined a prevailing party as “one who has succeeded on any significant claim afford-

## VIII. CONCLUSION

According to Professor Kane, "No one suggestion or procedural change can eliminate the complex management problems of or the potential for conflicts in this modern form of litigation."<sup>241</sup> Perhaps the utility of this paper, then, is to show judges the different options available to them and how they have been employed by their colleagues. Only in the most complicated cases, like the *Agent Orange* litigation, will all of the above procedural devices be necessary. But using any single device can dramatically improve the attorneys' fees process.

As noted already, the benefits of these procedural reforms may be immeasurable in terms of restoring the credibility of legal system. Frank McCarthy, one of the plaintiffs in the Agent Orange case said, "You can't in all honesty say that the legal system worked — it hasn't. It has destroyed my belief in the judicial system forever, and the majority of the vets in this litigation feel this way."<sup>242</sup> Whether judicial resistance to using these devices can be eliminated is difficult to predict. After all, the American tradition of judicial autonomy and decentralization allows judges "to run their own show and thus to develop flexible, individualistic, and personal styles of judging."<sup>243</sup> Though many judges continue to believe that the existing procedural requirements are adequate protection,<sup>244</sup> the recent case law suggests that an increasing number of judges are embracing the innovations described in this article.

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ing it some of the relief sought, either *pendente lite* or at the conclusion of the litigation." *Id.* at 791. The Court also noted that a prevailing plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792. The practical application of these ambiguous guidelines by the lower courts remains to be seen.

241. Kane, *supra* note 6, at 409.

242. Labaton, *supra* note 10, at D1.

243. Seron, *supra* note 6, at 567.

244. See Kane, *supra* note 6, at 399 & n.83.

