Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?

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In recent years, courts have used special masters to help manage complex civil cases.[1] But this use has raised serious questions of efficacy and ethics. This paper first identifies the needs and ambitions that inspire courts to appoint masters, in order to demonstrate why recourse to this tool can be so rich in potential yet so controversial. Then, in describing some recent roles masters have played, it assays their potential contributions as well as the risks attending their use. It concludes that as masters are used more ambitiously, the potential benefits and risks increase. Masters can bring significant new skills and flexibility to bear on cases whose complexity threatens to overwhelm our traditional system. However, a correlative danger exists that using masters will fundamentally alter that system in ways we find troubling: by making adjudication too informal, by removing it from public scrutiny and challenge, and by encouraging judges to rely on masters to a degree incompatible with appropriate exercise of the judicial function.

I. Background

A. Needs That Inspire the Use of Masters

Courts appoint special masters as a means of addressing three overlapping categories of problems: judicial limitations, shortcom-

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[1] A special master is a private attorney, law professor, or retired judge who is appointed with or without the parties' consent to assist the adjudicative process. Federal courts may rely on rule 53 of the Federal Rules of Civil Procedure or other sources for authority to make such appointments. For detailed discussions of authority issues, see Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C.D. L. Rev. 753 (1984), and Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, in W. Brazil, G. Hazard, Jr. & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters 305 (1983). *See also* Administrative Office of the U.S. Courts, 1984 Annual Report app. C-4, at 280; Nat'l Inst. of Corrections, U.S. Dep't of Justice, Handbook for Special Masters 16-22 (1983).

ings of the traditional adjudicatory system, and shortcomings of parties and counsel. Judicial limitations include time constraints; lack of expertise in esoteric or technologically sophisticated areas; lack of skill in certain roles, such as the facilitation of settlement negotiations; and limitations that stem from the proprieties of judicial conduct, at least for the judge who will try the case.

The shortcomings of the traditional adjudicatory process are more subtle. First, our adversarial and dialectical pretrial process institutionalizes and legitimates both distrust and the pursuit of selfish ends. Friction is the norm in this process; yet friction saps energy and consumes resources. Second, adjudication is hampered by formalism. Pleading can be ritualistic and uncommunicative. Discovery, which was designed to compensate for pleading limitations, has become similarly stultified. Preoccupation with form and fear of loss often displace substantive communication, common sense, and good faith.

Users of the system (clients and counsel) also behave inappropriately. Parties sometimes commence litigation unwisely—where there is no hope of victory, where victory would not provide an effective remedy, or for ulterior purposes—either as a weapon to extend economic combat beyond the marketplace, or to demonstrate power or tenacity. Parties often experience considerable difficulty communicating, and may act more out of misunderstanding than by clear calculation. Relations between parties are also complicated by pervasive distrust. Although distrust can help parties to protect themselves, it also clouds their judgment and inspires overkill tactics or opaque responses to pleading and discovery. Even if individual instances of tactical excess are negligible, they can provoke cycles of retaliations. Occasionally hostility or bad faith so pollutes a case that movement toward disposition becomes virtually impossible.

B. Uses of Masters

Courts appoint special masters in an effort to circumvent these obstacles to adjudication. But the precise roles that masters play are changing. The oldest and least controversial uses of special masters developed in response to limitations on judges' time and are wholly ministerial in character. Examples include accountings[2] and calculations of damages using court-approved formulae.[3]

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[2] *See, e.g., Ex parte* Peterson, 253 U.S. 300 (1920).

[3] *See* Coolley, *Magistrates and Masters in Patent Cases*, 66 J. PAT. OFF. SOC'Y 374, 400

In these roles the work of masters is not controversial because it involves no significant exercise of judgment or discretion, no legal analysis, and no determinations of policy.

A more recent ministerial use of special masters is in the administration and distribution of large funds generated by settlements or judgments in civil class actions[4] or in criminal cases involving large-scale fraudulent schemes.[5] The court may determine in advance how money will be invested and how potential claimants will prove their membership in the class and their proportionate share of the fund. Such detailed judicial guidance, coupled with a requirement that the master submit thorough reports to both court and counsel, prevents the master from usurping judicial functions.

These uses of special masters conserve substantial judicial resources for the tasks of judging. However, masters cannot make major contributions to the larger objectives of expediting and rationalizing the resolution of complex disputes if their powers are so limited. This fact undoubtedly underlies the trend toward expanding masters' responsibilities. It also helps explain why even masters with clearly limited mandates seem pressured or tempted to gravitate into larger spheres.[6] With broader duties, masters might contribute more, but they also may invade the proper preserve of the judiciary, change the character of adjudication, or interject themselves into sensitive aspects of attorney-client relations.[7]

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n.131 (1984).

[4] *See* Galligan, *Masters to Administer Court Ordered Settlements*, in ABA SECTION OF LITIGATION, 1985 NATIONAL INSTITUTE ON NEW TECHNIQUES FOR RESOLVING COMPLEX LITIGATION [hereinafter cited as NEW TECHNIQUES]. Mr. Galligan has served as principal administrator of several class action settlement funds, including the fund arising out of *In re* Chicken Antitrust Litigation, 1980-1 Trade Cas. (CCH) ¶ 63,237 (N.D. Ga. 1980).

[5] The author has served as a special master for this purpose in United States v. LaPonsey, No. 82-0501 WAI(SJ) (N.D. Cal. June 12, 1984) (order of appointment). The court originally referred this matter to the late U.S. Magistrate Richard Goldsmith.

[6] One recent example of this phenomenon is United States v. American Tel. & Tel., 461 F. Supp. 1314 (D.D.C. 1978). The court initially employed the masters to help rule on assertions of privilege with respect to massive numbers of documents. As the litigation matured, however, the court involved the masters in substantially more ambitious undertakings, including an elaborate effort to narrow the issues through exchanges of statements of contention and proof. *See* Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, in W. BRAZIL, G. HAZARD & P. RICE, *supra* note 1, at 77, 82-86, 100-08; *see also* Strasser, *On Orders from the Court*, STUDENT LAW., Jan. 1985, at 24.

[7] The risk that a master might invade the attorney-client relationship is most obvious when the master helps negotiate a settlement or plays an evaluative role, as in the Early Neutral Evaluation program, discussed *infra* at notes 52-59 and accompanying text. Such an

Recent and proposed uses of special masters that are more ambitious and controversial involve tasks that require the skills and responsibilities of judging[8] or interventionist behavior that is generally regarded as improper for a judge. Today these categories have begun to blur because of major changes in the courts' functions, at least in the federal system. Judges are under considerable pressure to participate actively in case development. The Federal Rules of Civil Procedure invite judges to look behind the pleadings, to narrow the issues, and to improve communication between litigants.[9] The rules also encourage judges to help parties acquire and share information, contain their costs, explore settlement, and experiment with unusual mechanisms to resolve their differences.[10]

These changes in the judicial role have two implications for the use of masters. First, the assignment of some case management and settlement duties to masters becomes less controversial because broader precedent exists for a neutral person to assume this role. The second and rather ironic point is that these changes intensify pressure on courts to appoint masters (or magistrates) to perform certain interventionist functions.[11] Greater judicial involvement in case development raises ethical concerns insofar as the judge may become biased by contact with the parties prior to trial and the judge's power may intimidate counsel (even unintentionally) during the formative stage of litigation, which could distort case development.[12] By harping on these ethical concerns, critics may pressure judges to delegate the more intrusive or sensitive tasks to masters or magistrates.

Not surprisingly, courts have used masters most ambitiously

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invasion might consist of a master giving a client a much different analysis of relevant evidence or law, or a much different assessment of the client's overall position in the case, than the client has heard from her attorney.

[8] This paper does not catalogue every such use of masters. For a more general account of how courts have used masters to supervise discovery events, to make threshold rulings on assertions of privilege, or to help resolve other pretrial disputes, see Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in W. BRAZIL, G. HAZARD & P. RICE, *supra* note 1, at 6-12.

[9] *See, e.g.*, FED. R. CIV. P. 16; *see also* FED. R. CIV. P. 7, 11 (the court may impose sanctions sua sponte for an attorney's failure to inquire into the factual or legal basis for his client's claim).

[10] *See, e.g.*, FED. R. CIV. P. 16; *see also* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Schwarzer, *Managing Civil Litigation, The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

[11] Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 426-31 (1982).

[12] *Id.* at 424-26.

in the most complex, resource-threatening cases. Three types of cases are prototypical: mass torts (such as actions involving asbestos,[13] Agent Orange,[14] or DDT[15]), massive commercial litigation,[16] and public law cases requiring courts to fashion and implement equitable decrees that cover complex institutional relationships and extend over considerable periods of time.[17] The discussion below focuses primarily on the first two categories, in part because much literature already exists regarding masters and public institutional reform.[18]

In mass tort and complex commercial cases, courts have used masters for a wide range of purposes. The most significant uses have involved attempts to rationalize and streamline the process of generating the data necessary to determine liability and damages, as well as attempts to help the parties negotiate settlements. The remainder of this paper presents case studies of recent uses of masters in these areas. In each instance, the costs and benefits of employing masters are addressed. Close analysis of these cases should lead to a better understanding of the capabilities and potential of special masters.

II. Case Management and Evaluation

Two notable efforts at case management took place in the asbestos cases in Ohio and the DDT cases in Alabama. In both settings, courts faced large numbers of claimants seeking relief from a small group of defendants for injuries having some sources and characteristics in common. The specter of processing each case

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[13] *See, e.g., In re* Related Asbestos Cases (N.D. Ohio, pending since 1980).

[14] *E.g., In re* "Agent Orange" Product Liability Litigation, 94 F.R.D. 173 (E.D.N.Y. 1982) (MDL No. 381).

[15] *E.g.,* Wilhoite v. Olin Corp., No. CV-83-C-5021-NE (N.D. Ala., pending since 1983); Hagood v. Olin Corp., No. CV-83-C-5917-NE (N.D. Ala., pending since 1983).

[16] *E.g.,* United States v. American Tel. & Tel., 461 F. Supp. 1314, 1347-49 (D.D.C. 1978); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978); United States v. IBM Corp., 76 F.R.D. 97 (S.D.N.Y. 1977).

[17] *E.g.,* Morgan v. Kerrigan, 530 F.2d 401 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd,* 679 F.2d 1115 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983); Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974).

[18] See the lengthy lists of articles cited in Levine, *supra* note 1, at nn.4, 6, 9, & 19-21. *See also* Alpert, Crouch & Huff, *Prison Reform by Judicial Decree: The Unintended Consequences of* Ruiz v. Estelle, 9 Just. Sys. J. 291 (1984); Combs, *The Federal Judiciary and Northern School Desegregation: Judicial Management in Perspective,* 13 J.L. & Educ. 345 (1984); Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions,* 1983 Duke L.J. 1265; Shane, *School Desegregation Remedies and the Fair Governance of Schools,* 132 U. Pa. L. Rev. 1041 (1984).

separately through conventional methods was so overwhelming that the courts felt constrained to develop more sensible and cost-effective strategies.

A. The Ohio Asbestos Litigation

In the Ohio asbestos litigation (OAL)[19] Judge Thomas D. Lambros appointed law professors Eric Green and Francis McGovern to develop a case management plan for each category of asbestos case (for example, insulation cases, suits by plant workers, suits by brake repairers). The goals were to streamline pleading and discovery practice and to set time schedules for completion of all major aspects of case preparation.[20] Working closely with counsel and drawing on materials generated by national organizations or in other asbestos litigation, the masters developed two sets of standardized documents: questionnaires for plaintiffs to provide information about their claims, and discovery forms for interrogatories, document production requests, and witness disclosures. Parties who desired information not accessible through the standardized procedures, or relief from some element of the program, could petition a single designated magistrate for assistance.[21]

Because no systematic empirical evaluation of the costs and benefits of this program has been completed, we cannot yet assess its value. The establishment of presumptive time frames for completing each pretrial stage, based on substantial inputs from affected parties, probably sped up case development and undercut excuses offered by dilatory lawyers. And hammering out the discovery questions probably helped educate counsel about the dynamic between facts and law.

On the other hand, negotiating the development and acceptance of standardized discovery forms was costly.[22] A lengthy set of interrogatories (containing hundreds of questions, counting subparts) emerged as the approved form.[23] This invites speculation

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[19] *In re* Related Asbestos Cases (N.D. Ohio, pending since 1980).

[20] *See* OHIO ASBESTOS LITIGATION: CASE MANAGEMENT PLAN AND CASE EVALUATION AND APPORTIONMENT PROCESS Order No. 6, Dec. 16, 1983 (1983) [hereinafter cited as OHIO ASBESTOS LITIGATION]. This book includes the orders issued by Judge Lambros, the management plan for each type of asbestos litigation, the standardized forms, and a description of the objectives of the evaluation and apportionment project.

[21] *Id.* at 24.

[22] Interviews with Francis E. McGovern, Professor of Law, University of Alabama School of Law (Aug. 14 & 15, 1985) (notes on file with the author) [hereinafter cited as McGovern Interviews].

[23] *See* OHIO ASBESTOS LITIGATION, *supra* note 20, OAL Form 2 (Defendants' First Stan-

that the masters felt constrained to include something for everyone in order to gain support for the concept itself. Having supervised discovery and hosted settlement conferences in asbestos cases in California, I question the need for all the data requested by the forms. Counsel with asbestos litigation experience seem able to value individual claims, at least for serious settlement negotiations, with only modest amounts of information about the plaintiff. This observation is somewhat unfair because the case development plan had *two* purposes—to equip parties for settlement negotiations and to prepare for trial. Since only a few cases are tried, however, the procedures may have over-rationalized the pretrial process.[24] If the information necessary for settlement is much less elaborate than that necessary for trial, the Ohio asbestos plan might have overburdened the parties in an effort to achieve a quite secondary goal.

Judge Lambros and masters Green and McGovern were well aware that rational, expedited settlement was a paramount goal of their overall strategy.[25] Toward that end, the Judge ordered the masters to undertake an even more ambitious task: to develop a quantified system for appraising individual asbestos claims and apportioning financial responsibility among defendants. The objective was to develop computer-based models or formulae for different kinds of claims, so that the computer could digest a case's data and decide the otherwise thorny questions about which parties owed what to whom.[26]

The masters originally contemplated drawing extensively on many different kinds of data, particularly from asbestos litigation in Cleveland and elsewhere, then integrating that data with two "dynamic" decision models from academic literature.[27] The goal of the first stage was to ascertain the settlement values of terminated cases and to isolate and ascribe relative weight to each operative factor in those valuations. Working with experienced local counsel, the masters developed a list of some 300 variables that could affect the valuation of individual asbestos cases.[28] The second stage would refine the historical analysis by imposing an overlay of dy-

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dard OAL Consolidated Discovery Request to Plaintiff).

[24] In fact, it appears that the OAL system's dominant objective was to facilitate settlement. *See id.* at 2-5.

[25] *See id.*

[26] *Id.* at 113-17.

[27] *Id.* at 117-18.

[28] McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

namic decision theory.[29]

The objective of this plan is unimpeachable, yet in conceptual reach it far exceeds our current abilities to grasp. It seems fair to ask whether a mechanism of such sophistication is necessary, and whether sufficient dividends could result to justify the massive investment of effort that it would entail. To be effective, the formulae must be credible to affected parties. Credibility would require, at a minimum, substantial efforts to educate lawyers and clients about *how* the formulae were developed. The formulae probably reflect compromises or choices between debatable positions, and each such compromise or choice could be used by a skeptical lawyer or client to justify rejecting the whole concept. Moreover, persuading lawyers and clients to accept elaborate academic decision models might pose an even larger obstacle to "selling" this kind of procedure. Many attorneys and clients would sense artificiality in this heavily conceptual undertaking and would therefore distrust it.

A thorough evaluation is impossible, since the masters were unable to produce the comprehensive set of formulae originally envisioned. Still, the masters have developed quantified portraits of numerous terminated asbestos cases from the Cleveland area, and have used this data base to propose outer limits for settlement negotiations. To achieve this end, they gather as much information about the pending case as is feasible and feed that data into their computer. The computer locates the three most similar cases in its historical file, then lists the characteristics of those three cases and the amounts of the settlements or judgments therein. These figures shape the ensuing negotiations. Professor McGovern reports that because all parties "had the computerized value ranges, the lawyers could not be too far apart and still be realistic and credible. We ended up having demands and offers within a range of about 20 percent of the values we thought the cases would be worth."[30]

But is even this scaled-down plan worth all the effort? If we focus only on asbestos litigation in Ohio, the answer is probably no. I have seen experienced counsel produce reasonable valuations of asbestos cases with relatively few elements of information. And

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[29] This would incorporate not only the psychology of decisionmaking and negotiating, but also any relevant changes that might have occurred since the dispositions of the earlier cases: changes in the law, in the general economic environment or the parties' economic situations, or in the political context of the negotiations.

[30] Center for Public Resources, CPR Legal Program Proceedings 22 (June 1984) (Fifth Annual Meeting at Aspen, Colorado) [hereinafter cited as CPR Proceedings].

networks of lawyers share information about values of roughly comparable cases. As Professor McGovern has pointed out, however, the work done in Ohio might be valuable if the recently established national claims handling facility[31] will be processing significant numbers of claims. The computer programs, lists of variables, and valuation data generated in Ohio could prove very useful in setting guidelines to guard against arbitrary or inconsistent recommendations by adjusters, and in bolstering claimant confidence in the fairness of settlement offers.

We know too little at this juncture to fairly assess the worth of the masters' approach. Yet the experience in Ohio compels us to recognize a potential problem: where a court tentatively concludes that masters are needed because a case cannot adequately be handled through established procedures, masters may feel pressured to design wholly new systems or experiment with elaborately innovative dispute resolution techniques that are expensive to generate and to "sell" to the affected community. They may overlook available resources and downplay the utility of adapting or refining established ways of solving problems. Given these pressures, judges who appoint masters might consider advising them to try first to build on traditional or accepted methods. Getting large groups of people to adopt new ways of doing things carries a cost (in resistance and education) that should be considered at the outset and avoided if possible.

B. DDT Cases in Alabama

The role Francis McGovern has been playing as special master in the northern Alabama DDT cases[32] is less conceptually ambitious and seems more derivative of familiar case management practices. Initially faced with about 4,000 claimants (the number subsequently rose to more than 9,000), all alleging DDT-related injuries, Judge U.W. Clemmons and the parties' lawyers wanted to enlist outside assistance. They selected Professor McGovern in part because of the innovative work he was doing in Ohio. Once appointed, McGovern worked with counsel to develop efficient meth-

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[31] *See* Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85) (discussing the design and implementation of a national claims handling facility).

[32] *See* cases cited *supra* note 15. Accounts of McGovern's work in these cases appear in *On Settling Toxic Tort Cases—The Role of Special Masters: An Interview with Francis E. McGovern*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Sept. 1984, at 1 (Center for Public Resources) [hereinafter cited as *Toxic Torts*], and in Arthurs, *Students Give DDT Discovery a Boost*, Legal Times, Aug. 13, 1984, at 1, 6-7.

ods of case preparation. He first held hearings to consider procedural options suggested by the parties, then added his own ideas, and finally put together a three-track package that began operating (by stipulation) in 1984.[33]

The need for innovation was obvious: the cost to both sides of using traditional discovery methods would have been staggering. Plaintiffs' counsel proposed selecting a group of test cases for full pretrial development, but defendants feared a disproportionately small or unrepresentative sample.[34] McGovern suggested a compromise that offered enough to earn both sides' endorsement: he (the neutral) would randomly select twenty cases for detailed development through established discovery devices. Through these twenty cases counsel could probe the evidentiary bases for the common legal issues, such as causation, standards of care, credibility of competing expert medical analyses, choice of law, and statutes of limitations. McGovern served as court of first resort for disputes over discovery; the parties almost never appealed his rulings on routine matters.[35]

The real innovation of McGovern's method was in the second pretrial track. The goal was to obtain basic factual information from the remaining 9,000 claimants without incurring the costs of depositions and interrogatories. This track had four significant elements: counsel worked together to negotiate an acceptable survey questionnaire; McGovern hired and trained college students (for $4.15 an hour) to administer the questionnaire through personal interviews of the claimants; counsel were forbidden to attend the interview sessions, but could send a non-lawyer to observe and report deviations from prescribed procedures; and plaintiffs' counsel agreed that any plaintiff who missed two scheduled interviews without sufficient excuse would have the complaint dismissed.[36]

This procedure worked so well that the parties agreed to extend it to claims filed later.[37] The interviewing process provoked relatively few disputes and was completed under budget; moreover, it weeded out about 2,500 claims.[38] While it is too early to gauge

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[33] McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

[34] *Id.; see also* Arthurs, *supra* note 32, at 6.

[35] McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

[36] *Id.; see also* Arthurs, *supra* note 32, at 1, 6-7; *Toxic Torts, supra* note 32, at 4-7.

[37] McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

[38] *Id.* A substantial number of plaintiffs withdrew voluntarily when contacted for the interviews, another large group was eliminated because plaintiffs' counsel could not locate them, and about 50 were dismissed for failure to attend scheduled interviews without adequate excuse.

the utility of the data produced, Professor McGovern believes that the parties will find it to be of significantly higher quality than the usual answers to interrogatories.

This novel procedure raises some difficult ethical questions, however, since claimants' interests could be sacrificed or unjustifiably compromised by the streamlined procedures. After all, defense counsel favored this process and agreed to fund part of its projected cost in the expectation that it would winnow out a large number of plaintiffs and that the neutral interviews would produce more useful, less self-aware information than responses to interrogatories, which are filtered through plaintiffs' counsel.[39] Thus, the supervising court should have a special obligation to ensure that each plaintiff clearly understands the ground rules, appreciates how his interests might be adversely affected by answering questions outside his lawyer's presence, and voluntarily consents to participate. The fact that plaintiffs' counsel could not locate several hundred named claimants suggests that attorney-client communication left something to be desired. The worse that communication is, the greater the risk that individual plaintiffs will act without any real understanding.

Although the rules did not preclude counsel from meeting with claimants before the interview to verify that they understood both the questions and how their answers might be used, the plaintiffs' lawyers generally chose not to prepare their clients.[40] This makes it crucial for the court to ascertain that the interview questions are appropriate, justified, and clear. In the DDT litigation, however, neither the court nor Professor McGovern helped formulate the questionnaire's content. The lawyers hammered out the questions through sometimes emotional negotiations. McGovern acted only as a shuttle diplomat, clarifying communications between counsel, keeping frictions to a minimum and encouraging agreements, but exercising no power over the substance of what emerged.[41]

Professor McGovern explains this self-conscious restraint by saying that he feared losing his effectiveness as a *mediator* if he exercised power to affect the product of the negotiations.[42] This position is significant. Such restraint in effect elevates the interest in securing agreements among the lawyers over the interest in as-

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[39] Arthurs, *supra* note 32, at 6-7; *Toxic Torts*, *supra* note 32, at 4-7; McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

[40] McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

[41] *Id.*

[42] *Id.* (Aug. 14 & 15, 1985).

suring that the data acquisition process is fair to all parties, and it is by no means clear that these interests will coincide.

The third track in the DDT cases was called the "law track."[43] In it, all parties were free at any stage to raise by motion any potentially significant legal issue. McGovern's role in this arena was less clearly delineated than elsewhere. Under the stipulated order of reference, Professor McGovern could rule initially on all pretrial motions, including those raising legal or potentially case-dispositive questions. He quickly recognized, however, that it would be unwise for him to rule on motions involving substantive questions outside his areas of expertise or raising determinative issues. Thus, McGovern simply refused to hear such motions, leaving them for the judge.[44]

Professor McGovern's role in the "law track" raises several important questions about the use of masters generally. The most obvious is why a non-judge should be permitted to rule, even in a non-binding setting, on issues of substantive law. One answer might be to save the judge's time for other duties. But declaring the law is a judge's most important basic function. And if the issue is of any consequence, appeal de novo is virtually certain, thus negating any time-saving while needlessly burdening the parties. A second answer might be to enhance the judge's consideration of the legal issues. A sophisticated neutral, giving careful initial consideration to the matter, might uncover more authorities and elevate the debate by exposing undefended premises for arguments or new implications of established lines of reasoning. The danger of such a process, however, is that if the judge's ultimate ruling and reasoning echo the master's work, an impression may be created that the court is not deliberating independently—or at all.

In the DDT litigation the court extended the master's role in substantive legal matters one step further. With the parties' knowledge, the judge asked Professor McGovern to act as a law clerk, submitting analytical memoranda on issues raised by motion. McGovern complied, but now feels that it was a mistake to do so, not out of concern over undue influence, but in fear of harming his effectiveness as a mediator.[45] He believes that facilitating communication and promoting agreements is largely incompatible with wielding actual or apparent power to decide important disputes. McGovern thinks that masters risk alienating parties by exercising

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[43] *Toxic Torts*, *supra* note 32, at 5.

[44] *Id.*, at 5-6; *see also* McGovern Interviews, *supra* note 22 (Aug. 14 & 15, 1985).

[45] McGovern Interviews, *supra* note 22 (Aug. 14 & 15, 1985).

power. Parties who can be or have been hurt by a master will be distrustful or resentful.[46] McGovern assumes that a mediator can be fully effective only if the parties have confidence in him and are willing to talk more freely with him than with an opponent.

Professor McGovern may exaggerate the fragility of relations between neutrals with power and litigators, as well as the extent to which such litigators, or their clients, will confide even in someone having no direct power over their fate. McGovern also may invest more significance in the distinction between formal power and informal influence than many litigators would. His concerns about the potential ill effects of blurring or combining the two roles, however, arise out of considerable experience and warrant careful consideration by judges deciding how to use a master most effectively.

C. Dialogue Through Storytelling: The AT&T Case

Special masters have played two additional roles in developing complex cases that are worth describing briefly. One evolved in the Federal government's antitrust suit against AT&T,[47] which involved scores of separate "episodes" of alleged misbehavior—each of sufficient factual complexity to constitute a separate lawsuit. To organize the judicial exploration of these events the court, the parties, and the masters (Professors Geoffrey C. Hazard, Jr. and Paul R. Rice) groped toward a system ultimately revolving around exchanges and comparisons of the parties' narrative versions of each episode.[48] As first designed, the system compelled the litigants to exchange "statements of contention and proof" (including authority and evidence). These proved unwieldy and unhelpful in part because they were loaded with argumentation and posturing, some of which had no purpose other than preserving options to take positions that might become feasible later.[49] Learning from this, the masters requested simplified narratives describing the *facts* that each side believed made up each episode. Comparing the narratives exposed areas of disagreement and allowed for provisional agreement on some facts, so that these did not need to be subjects

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[46] *Id.*

[47] United States v. American Tel. & Tel., No. 74-1698 (D.D.C., filed Nov. 20, 1974).

[48] *See* United States v. American Tel. & Tel., 461 F. Supp. 1314 (D.D.C. 1978). The several roles played by the masters in this case are described in detail in Hazard & Rice, *supra* note 6. The assigned judge (Hon. Harold H. Greene) and trial counsel for AT&T (Robert D. McLean) offer comments about the procedures developed in this case in their essays in W. Brazil, G. Hazard & P. Rice, *supra* note 1, at ix-xi and 275-92, respectively.

[49] Hazard & Rice, *supra* note 6, at 100-05.

of discovery or evidence at trial.[50]

Building on this example, courts might use masters to coordinate an exchange of fact narratives and, ultimately, statements of contention and proof. The first narratives would be used to identify the factual disputes and to guide discovery.[51] Using the narratives, the masters and parties could try to isolate the legally significant facts, in order that initial discovery could focus on disputed or unknown facts. Parties might be more comfortable working with a master than with the assigned judge, and using a master would avoid the risk of the judge prematurely forming opinions about the merits. As discovery unearths new data, the parties could edit their narratives. This process could continue until the parties had enough information to begin exchanging statements of contention and proof, which they also could update as necessary. The first statements could assist settlement negotiations and locate areas needing eleventh-hour discovery. A subsequent set of statements could serve as detailed roadmaps for the trial itself.

D. Early Neutral Evaluation

Another innovative use of special masters is evolving in the Early Neutral Evaluation program in the United States District Court for the Northern District of California.[52] This experimental program was produced by a task force of lawyers and judges appointed by Chief Judge Robert F. Peckham to seek ways to reduce the parties' costs of civil litigation. The court directs a senior, highly regarded, neutral litigator to host an evaluation session for a case in an area where the litigator has substantial expertise. The parties submit brief statements identifying issues whose early resolution might materially affect the suit as well as the discovery that should contribute most to meaningful settlement negotiations. At the evaluation, which occurs about 150 days after the complaint is filed and which clients as well as counsel must attend, each side presents its case and answers questions from the evaluator. The

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[50] *Id.* at 104-08.

[51] One version of this idea is described in some detail in Brazil, *Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RESEARCH J. 873.

[52] *See* General Order No. 26, U.S. District Court for the Northern District of California (May 1985); *see also* Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation*, 69 JUDICATURE 279 (1986).

For a discussion of some of the ambitions for Early Neutral Evaluation when the idea was still embryonic, see *The Proposed Early Neutral Evaluation Project*, in CPR Proceedings, *supra* note 30, at 26-32.

evaluator then frankly assesses the strengths and weaknesses of evidence and arguments, and suggests an overall case valuation range (based on educated guesses about the probability of liability and the amount of damages). If the parties are open to exploring settlement at this juncture, the evaluator may attempt to facilitate negotiations. If no settlement is reached, the evaluator helps the parties plan for sharing information and conducting discovery on key issues, in order to generate the data needed for subsequent settlement efforts.[53] Everything that transpires at this evaluation session remains strictly confidential. In particular, everyone is prohibited from discussing information resulting from the session with the assigned judge.[54]

The program's designers hope that it will assist case development in three ways: by affording parties a vehicle for substantive communication, providing some inexpensive and informal discovery, and forcing counsel and litigants both to investigate early and to analyze and appraise their own situations. The evaluator's assessments should serve as a reality check, and may foster early settlement discussions. In complex cases much of the session will be devoted to planning data acquisition, in the hope that the neutral will help produce a focused, commonsense, and cost-effective discovery plan.[55]

This program is unique in its timing: it interposes serious case evaluation early in litigation, before funds are spent wastefully on ill-focused discovery.[56] Masters preside, instead of judges, in part because of the necessary time commitment and in part because the evaluator is expected to be more assertively probing, more frank, and more judgmental than would be appropriate for a judge, at least one who might subsequently rule on important matters. The

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[53] General Order No. 26, *supra* note 52; *see also The Early Neutral Evaluation Program*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Special Issue 1985, at 12 (Center for Public Resources).

[54] General Order No. 26, *supra* note 52.

[55] Some modifications have been made in the proposed program implemented by the court. For example, no fee has been charged the parties or paid to the evaluator, and the master has not reported to the court his or her recommendations about discovery or motion practice. Since the program will evolve as the court learns from its experience with the first cases processed, changes in procedures or ground rules may well occur during the next several months. The court has appointed Hastings Law School Professor David I. Levine to conduct an independent analysis of the effects and utility of the program.

[56] Compare, for example, the program developed in the Western District of Washington under Local Rule 39.1, where attorneys who serve as settlement facilitators generally remain uninvolved until late in the case development process. *See Volunteer Attorney Mediation Program, Western and Eastern Districts of Washington*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Special Issue 1985, at 11-12 (Center for Public Resources).

program's designers also hope that a master can create an environment that is less formal and intimidating than the courtroom. Since the evaluator, unlike a judge, has no power over the case, the parties might be more candid about their objectives and positions.[57]

However, some thorny difficulties also arise in this context. Finding appropriate persons to serve as masters may be difficult. An ideal candidate should possess recognized expertise in the field without being so thoroughly identified with a type of client or case that parties will distrust the master's neutrality.[58] This problem, and the related one of avoiding conflicts of interest, can be especially acute in sub-specialties of practice (such as maritime or patent law) in which only a few law firms are involved. One partial solution to this problem is employing law professors and retired judges as evaluators.

Another possible constraint on enlisting masters might be their fear of being called to testify about the evaluation session, or being sued for actions taken or opinions offered while serving as masters. Such fears could arise in connection with virtually any special master assignment, but are likely to be more pervasive in a program that institutionalizes use of masters in a significant number of cases. One antidote to this problem is a court order making confidential everything that occurs at the session.[59] No one can be confident, however, that other jurisdictions will honor such an order.

The possibility of suits against masters raises additional concerns. Would a special master be protected by the immunity doctrines available to judges? To what extent? Would a lawyer's malpractice insurance cover a suit for acts committed while serving as a master? If not, could private attorneys insure this risk (would carriers write such policies)? Fortunately, these issues remain merely theoretical. To my knowledge, no party has either sued a master or subpoenaed one for testimony.

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[57] There is some tension between the notions that an evaluator should be assertively probing and frank and that parties will be more candid with an evaluator because of the informal, less intimidating environment of the early evaluation session. It is not at all clear that clients or counsel will posture less with an evaluator, especially if they know that one major purpose of the session is to assess the overall value of the case. Also, different evaluators will have different strengths and will set different tones in the sessions, some emphasizing mediation techniques, others sensing a greater need for frankness of judgment.

[58] *See* Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, in W. BRAZIL, G. HAZARD & P. RICE, *supra* note 1, at 14, 64-66.

[59] *See, e.g.*, General Order No. 26, *supra* note 52.

III. Innovative Contributions to the Settlement Dynamic

A. Fishing Rights in Michigan

As has been shown, special masters can add a great deal to case management, although there are two costs: the parties lose some control over their case, and the master necessarily has great discretion. Different concerns are raised, however, when masters attempt both to exercise power over case development and to participate in settlement negotiations.

Although there is debate whether settlement facilitation by a master will be unacceptably compromised by a delegation of formal power, Professor McGovern himself successfully combined settlement facilitation with considerable front-line power in a dispute over Great Lakes fishing rights.[60] The parties included several tribes of Indians asserting rights based on nineteenth century treaties, the Secretary of the Interior, and the Michigan Department of Natural Resources. The suit also implicated the considerable fishing interests of non-Indians. Judge Richard A. Enslen recognized two problems at the outset: the litigation would require processing and analysis of vast amounts of economic, scientific, and environmental data, and the parties were intensely hostile regarding matters of great political sensitivity.[61] The judge decided that the case cried out for a special master who could devote the requisite time and attention.

In part because of the emotions permeating the case, the judge thought it especially important that the parties have confidence in the person who would serve as master. Toward that end, Judge Enslen set up a procedure in which he and the parties interviewed eleven nominees, with each party having veto power.[62] The candidates included some highly visible senior people, such as two former Attorneys General of the United States and a law school dean.

Professor McGovern emerged with the job. He had two primary assignments: to manage the pretrial case development and to orchestrate settlement efforts.[63] In the former capacity he wielded considerable power over the procedural aspects of discovery. Given his greater time resources, he could immerse himself in the details of the case, be readily accessible to the parties, and still rule on

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[60] United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *as modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981). Comments about McGovern's role in this case appear in Strasser, *supra* note 6.

[61] McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

[62] Strasser, *supra* note 6, at 27.

[63] *Id.*; *see also* McGovern Interviews, *supra* note 22 (Aug. 14, 1985).

discovery disputes rapidly—thus preventing the delays that can arise when a judge must take matters under submission for substantial periods.[64]

Delegating responsibility for the discovery phase to a master, then, may result in several significant advantages. First, decisions of higher quality, based on familiarity with all the circumstances, may be reached, and often can be delivered more promptly. Second, the master's thorough understanding may also contribute to more consistent rulings. This in turn can increase efficiency by equipping counsel to identify circumstances where launching an expensive challenge to a pretrial ruling would be fruitless. More generally, the master's intimate knowledge of the case can be an important stabilizing influence that discourages posturing for some undeserved tactical advantage. Finally, a knowledgeable master who enjoys the parties' confidence is well positioned to suggest cost-effective, cooperative methods for sharing or acquiring information.

The familiarity with the issues that Professor McGovern developed during discovery also proved extremely useful during settlement facilitation. Lawyers believe that one of the most important attributes of an effective settlement facilitator is command of the relevant facts, evidence, and law.[65] Busy judges have little time to develop this sophisticated understanding of a complex case. Moreover, litigators are uncomfortable when the prospective trial judge becomes deeply involved in settlement negotiations, especially in a matter not triable to a jury.[66] Lawyers are also more frank in settlement discussions with a judicial officer who will not preside at trial.[67] Thus, by assigning a special master as settlement facilitator, the court can foster a negotiated disposition yet avoid either appearing prejudiced by counsel's behavior in negotiations or by matters learned off the record, or appearing to abuse the power it would have at trial to pressure parties into accepting settlements.

These considerations helped shape Professor McGovern's role in the fishing rights case. He was expected to insulate Judge En-

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[64] McGovern Interviews, *supra* note 22 (Aug. 14 & 15, 1985). Special masters Paul Rice and Geoffrey Hazard similarly believe that such benefits constituted an important part of their contribution to the pretrial development of the AT&T litigation. *See* Hazard & Rice, *supra* note 6, at 91-93, 109-11.

[65] *See* WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 46-48, 83 (1985).

[66] *Id.* at 84.

[67] *Id.* at 92.

slen, to the extent feasible, from contact with the case that might lead him to form opinions that were premature or based on unreliable information. Since there were no appeals from McGovern's pretrial orders, nothing occurred to compromise this objective.[68]

Professor McGovern's service in the Michigan fishing rights litigation illustrates a special kind of contribution that masters can make to the settlement process. Having studied extensively the various theories and strategies of dispute resolution, McGovern understood one of his primary responsibilities to be the introduction of a fresh perspective in order to break down old patterns of party interaction and conceptualization of objectives. McGovern believes that litigants usually assume they can gain only by taking something away from their opponents.[69] He tries to get parties to broaden their vision and look for steps they might take, perhaps in concert, that would create net gains for *both* sides. He also tries to shake up assumptions and compel dialogue along holistic rather than fragmented lines. In the fishing rights case, for example, he helped each party to appreciate the limits on what it could expect to achieve even if it "won" at trial, then tried to demonstrate that by using a negotiated settlement to terminate their case all parties could secure valued ends that could not be part of a court-imposed judgment. His proposals involved governmental commitments to establish and fund new administrative bodies that could improve the natural resource base from which all parties could benefit for years to come.[70]

It would be naive to assume that most complex cases admit of solutions benefiting both sides. Yet a master at least has the leisure to search out, analyze, and try to sell a wide range of proposals. Judges have little time for such creativity, and may have no access to the people and publications generating innovative procedures and ideas.

B. Agent Orange in New York

Separating the trial judge from a master who is facilitating settlement has one obvious drawback: it may reduce the master's leverage with and ability to persuade the parties. This consideration apparently affected how Judge Jack B. Weinstein structured his relationship with the settlement masters in the Agent Orange

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[68] McGovern Interviews, *supra* note 22 (Aug. 14 & 15, 1985).

[69] See the report on Professor McGovern's remarks in CPR Proceedings, *supra* note 30, at 21-22.

[70] McGovern Interviews, *supra* note 22 (August 15, 1985).

litigation.[71] Judge Weinstein's first task for special master Ken Feinberg was to write a detailed memorandum outlining the issues presented by the case and suggesting principles on which to allocate damages among the defendants.[72] Feinberg's ability to persuade parties to consider his settlement recommendations depended in part on whether he could convince them of his sophisticated understanding of relevant law. His effectiveness also depended somewhat on parties' perceptions about how much influence his views had on the judge, or at least on the likelihood that the judge would similarly resolve important issues.

This connection between settlement master and judge may have been uniquely necessary in *Agent Orange* because of the great uncertainty in the law.[73] Since so much was left to the almost unfettered judgment of the court, the parties might well have ignored the master's opinions unless they were tied to the judge. The situation in *Agent Orange* was loaded with socio-political sensitivities, and desperately in need of a solution perhaps not achievable through more cautiously crafted procedures. On balance, it was arguably worth risking so much communication between settlement facilitator and trial judge.

However, separation generally seems much wiser. It would be unseemly if the settlement master were ostensibly only an instrument for the judge to exercise power over the litigants; judicial coercion of settlement is no less attractive when indirect. Moreover, substantial communication between a settlement master and the judge could damage the negotiation process. Parties might become more reluctant to speak candidly to the master and the master might be so identified with the judge that parties resume the posturing and other strategic behavior we hoped to avoid by using masters. Off-the-record communication between master and judge also risks creating the impression that the master is unduly influencing the court. Parties could justifiably object that such ex parte communication deprives litigants of an opportunity to challenge the information and ideas that might influence the court's subse-

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[71] For a short history of the Agent Orange litigation and the multitude of judicial opinions and orders it has generated, see Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 337 n.6 (1986).

[72] *See* Flaherty & Lauter, *Inside Agent Orange*, NAT'L L.J., May 21, 1984, at 1, 39. Other articles about the masters' roles in the Agent Orange litigation include Moore, *Long Road Ends in Agent Orange Pact*, Legal Times, May 14, 1984, at 1, and Moore, *Master Says Mass Torts Don't Belong in Courts*, Legal Times, Oct. 15, 1984, at 5.

[73] *See* Flaherty & Lauter, *supra* note 72, at 39-41.

quent decisions.[74]

Concern about a judge's indirect (or direct) participation in settlement negotiations could be especially acute in class actions. As Vincent Nathan has pointed out, the public might well doubt that a judge who participated in settlement negotiations can later make an independent determination that a proposed class settlement is reasonable and fair to all members.[75]

IV. Shaping Equitable Decrees: Technical Expertise and Politics in the Boston Sewage Case

One other innovative role played recently by special masters seems especially noteworthy: helping a court and parties flesh out an equitable decree in a complex public lawsuit. Masters have long been used to monitor compliance with injunctions or to administer funds. But employing a master to help a court decide the content of an injunction is more controversial.[76]

A fascinating recent example of this kind of assignment occurred in *City of Quincy v. Metropolitan District Commission,*[77] a case filed in Massachusetts state court in late 1982. Roughly six months after filing, Judge Paul Garrity heard the plaintiffs' motion for a preliminary injunction. He concluded that the defendant Commission was seriously violating state and federal pollution control laws by permitting excessive sewage to be dumped into Boston Harbor and its environs. Concerned that the water degeneration might soon become irreversible, and doubting a speedy political solution, the judge appointed a special master in response to plaintiffs' motion. The master's broad and urgent mandate was to investigate, conduct hearings, find the relevant facts, analyze possible solutions and, within thirty days, draft a set of proposed remedies in the form of an injunction.[78]

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[74] *See* Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master,* 78 Colum. L. Rev. 707, 724-25 (1978) (describing Judge Weinstein's behavior in the Coney Island school desegregation case, where he remained scrupulously aloof from special master Berger).

[75] Nathan, *The Use of Masters to Oversee Compliance with Court-Ordered Institutional Reorganization,* in New Techniques, *supra* note 4; *see* Fed. R. Civ. P. 23(e), (declaring that a class action "shall not be dismissed or compromised without the approval of the court").

[76] *See* Nathan, *The Use of Masters in Institutional Reform Litigation,* 10 U. Tol. L. Rev. 419, 427 & nn. 60-62 (1979).

[77] Civ. No. 138,477 (Mass. Dist. Ct., Norfolk County, filed Dec. 17, 1982).

[78] My description of the master's role is based on an excellent article by Timothy G. Little, *Court-Appointed Special Masters in Complex Environmental Litigation:* City of Quincy v. Metropolitan District Commission, 8 Harv. Envtl. L. Rev. 435, 473-75 (1984).

Judge Garrity invested this considerable authority in Charles M. Haar, Brandeis Professor of Law at Harvard Law School. The judge permitted Professor Haar to hire a Boston attorney to serve as deputy special master, to employ several research assistants, to consult formally with three professors having relevant technical expertise, and to consult informally with financial experts, including the state's bond counsel.[79] While this staffing temporarily converted the master's office into a mini-bureaucratic agency, it also aided completion of a complex assignment in a very short time. Moreover, because Professor Haar was appointed during the Law School's summer recess, he could commit his full-time resources to the master's tasks.

Professor Haar's role became a blend of traditional special master and court-appointed expert.[80] He and his staff started by undertaking an intensive investigation of the history and current operation of the area's sewage system. Here the master functioned essentially as a research scholar: identifying and digesting a large volume of documents, then conducting interviews to learn the physical, political, and economic dimensions of the problem and its historical evolution. At the same time, Haar also consulted extensively with the EPA.[81] Professor Haar informed the parties of this ex parte investigation, and the appendix to his report to the court identified the written sources he had examined.[82] The litigants, however, had no control over this informal process and apparently were not afforded an opportunity to probe the reliability or balance of the sources, or to add materials to the informational hopper.

This lack of adversarial challenge, so different from traditional concepts of formal adjudication, is extremely significant. Professor Haar's initial ex parte investigations largely defined the issues for subsequent work. Moreover, while he assured the parties that he would base his ultimate findings of fact solely on evidence introduced at hearings and documents in the public record, he viewed this first private work as laying "a foundation for the eventual findings of fact and proposed remedies."[83]

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[79] *Id.* at 444-45.

[80] Authority for making such appointments in the federal system might be derived from rule 706 of the Federal Rules of Evidence. It is also arguable that courts have inherent authority to make such appointments. For a discussion of this issue, see the sources cited *supra* note 1.

[81] Little, *supra* note 78, at 446 n.94.

[82] *Id.* at 446-47.

[83] *Id.* at 446.

An unusual dimension of Professor Haar's work in *City of Quincy* is that he viewed his role as partly political.[84] He decided that feasible long-range solutions would require the support of the public and of the many governmental agencies operating and regulating the sewage system. He encouraged that support in several ways. First, he tried to comprehend the perspectives and problems of the affected governmental agencies and to persuade them of his understanding and sympathy. This may have been a goal of his ex parte interviews. It clearly affected his report in that he repeatedly expressed strong respect for the roles played by the defendant agencies.[85] In addition, his substantive recommendations included procedures to accommodate agency inputs and to utilize their resources.

More controversially, Professor Haar intentionally drafted his report so as to "arouse public opinion and illustrate [how] the problem had been 'ducked, postponed, and put away' by previous reports."[86] He tried to make his report an instrument to "actively . . . rearrange political agendas by stimulating public opinion."[87] And while preparing his investigation he publicly toured the four treatment plants primarily targeted by the suit, accompanied not only by the parties, but also by "media representatives and interested citizens."[88] Apparently Professor Haar did all this without alienating any affected parties. His efforts reportedly led to improved communication and cooperation by the agencies involved. More dramatically, all parties greeted his report with enthusiasm and, shortly thereafter, voluntarily agreed to comply with its recommended remedies.[89] Thus the master's report became the settlement, and Judge Garrity never had to rule on plaintiffs' motion for an injunction. Instead, he appointed Professor Haar to monitor the implementation of the stipulated disposition.

Professor Haar is not the only special master who has sensed and responded to the politics of his work environment. Vincent M. Nathan, while overseeing implementation of equitable decrees aimed at reforming major prison systems, has dealt "directly with the 'hidden defendants,'" including legislators, governors, and public agencies, who, in his eyes, "are essential elements of the

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[84] *Id.* at 473-74.
[85] *Id.* at 474.
[86] *Id.* at 473-74.
[87] *Id.* at 474.
[88] *Id.* at 446-47.
[89] *Id.* at 467.

compliance process."[90] He also has used informal consultations with parties to try to understand underlying problems and to facilitate amicable relations.[91]

V. Some Cautions

As has been shown, special masters are making innovative contributions to our system of dispute resolution and helping the courts successfully process the most unwieldy, potentially interminable cases. The achievements of special masters in the areas of case management, settlement facilitation, and ongoing decree implementation give us cause for celebration. Yet this success is at best partial: new dangers lurk just below the surface as we move out of the mainstream. This final section discusses some of the problems we must confront and solve if we are to continue delegating ambitious tasks to special masters.

A. Masters' Discretion and Judicial Responsibility

Two competing schools of thought exist about how courts should supervise masters. According to one school,[92] the best orders of reference are phrased only in generalities. This frees the master, who will get to know the case much more intimately than will the judge, to tailor procedures to evolving needs, to act quickly and informally, and to acquire the influence (or power) over litigants and counsel necessary to serve effectively and minimize appeals of his rulings. Advocates of this approach tend to trust masters' discretion, to be skeptical of judges' capacity to predict how best to employ masters, and to disparage procedural formalism. They fear that the cost and time savings of using a special master will be dissipated if the judge invades the master's sphere or forces the master to make lengthy reports or to obtain judicial approval for most acts.

The other school of thought emphasizes the court's need to

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[90] Nathan, *supra* note 75, table 3, at 7.

[91] *Id.*

[92] The word "school" probably suggests more coherence and visibility than the real world situation warrants. It might be more accurate to say that some people would err on the side of looser, more general orders of reference, while others would err on the side of tighter, more specific orders. One high-visibility, experienced master who apparently falls in the former group is Vincent M. Nathan, who has expressed the view that, at least for implementing equitable decrees in institutional reform litigation, the best orders of reference are cast in general terms. *See* Remarks by Vincent M. Nathan, in New Techniques, *supra* note 4. *See generally* Nathan, *supra* note 76 (discussing the advantages and disadvantages of a reference and examining the effectiveness of the reference technique).

maintain tight control over both the master and the case. Orders of reference should describe the master's duties and powers as specifically as possible. Courts also should require the master to file frequent and formal reports, and should prohibit him from any ex parte communication with either the court or any litigant. Adherents to this school believe that insulating the assigned judge from case development, as was done in the Michigan fishing rights litigation, can have serious negative consequences. The judge may learn too little about the relevant facts, law, or the lawyers' behavior to rule properly on appeals from the master's decisions. If his knowledge remains superficial, the judge is more likely to defer to the master and thus be unable to verify the correctness and wisdom of the master's actions. A master operating in such an environment acquires a great deal of power that is susceptible to abuse. Parties who perceive few restraints on the master's power may be intimidated or frustrated into abandoning significant rights.

The judge who stands aloof from case development may be unable to control litigants and their lawyers, whereas a judge familiar with the case can by his presence encourage parties to act responsibly and civilly and avoid contentious behavior. In contrast, if the parties observe the judge's detachment they may succumb to temptations to posture for undeserved advantages. If the special master is weak, the parties may try to manipulate him. Thus the remote judge poses three threats to case development: the judge will be unable to discharge his judicial function, the master will abuse his power, and litigants will skew the process through undisciplined behavior.

When a special master conducts substantial out-of-court investigation, as Professor Haar did in *City of Quincy,* new problems arise. The master is functioning like a court-appointed expert (or a continental judge), but without the procedural safeguards that check the reliability of an expert's reasoning and conclusions. As the *Manual for Complex Litigation, Second,* points out, court-appointed experts, unlike masters, may be targeted for pretrial discovery, may be deposed, and usually testify at trial, where they are subject to full cross-examination.[93] Moreover, the appointed expert's work enjoys no presumption of correctness, whereas in matters tried to the bench a special master's findings of fact, unless clearly erroneous, must be accepted by the court.[94] In addition, a

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[93] MANUAL FOR COMPLEX LITIGATION, SECOND § 21.51 (1985).

[94] FED. R. CIV. P. 53(e)(2); *see also* Coolley, *supra* note 3, at 397-99. *But see id.* at 405 & n.164 (citing Livas v. Teledyne Movable Offshore, Inc., 607 F.2d 118 (5th Cir. 1979), for

court-appointed expert has less power than a master to frame issues and to control their exploration. Because the court receives less from an appointed expert, it is less likely to rely as heavily on or defer completely to her as it might to a master having both a broader mandate and legal training.

The procedural differences between using masters and using court-appointed experts might make judges hesitate to use masters to ameliorate the court's lack of expertise in an esoteric subject area. For example, special masters in high-tech intellectual property cases are often lawyers with specialized engineering backgrounds.[95] Their dual expertise in substantive law and science can create a real risk of judicial abdication of the ultimate responsibility to decide legal issues.[96] Use of a court-appointed expert, in contrast, poses less of a threat to the court's independence of mind, since the expert's views are testable through cross-examination and must compete openly, on even terms, with the views of the parties' experts.

Thus, when a special master is employed to investigate a complex situation and propose solutions, or to lend the court expertise in some sophisticated technological or other esoteric subject, serious dangers may face our dispute resolution system. Because parties often lack an opportunity to challenge the master's findings, and generalist judges may be tempted to rely too heavily on the master's expertise, the resulting decision may be less well reasoned and less acceptable to affected parties than if a court-appointed expert had been utilized instead. The rules applying to experts incorporate mechanisms to test publicly the appointee's work and to guard against the problems that can arise when the court's agent is not limited, in forming his opinions, to information on the record. This issue is especially sensitive in public law cases, where a master can affect important policies or social institutions. These cases demonstrate an acute need to maximize public confidence in

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the proposition that "a district court has an obligation to determine that the findings of the master are not clearly erroneous regardless of whether any objection is made to the master's report").

[95] *Cf.* Coolley, *supra* note 3, at 400 & n.131 (discussing other issues that are appropriate for reference to a special master). Judge Robert P. Aguilar, U.S. District Court for the Northern District of California, also has appointed masters in this kind of case. *See, e.g.*, Syquest v. Micro Storage, C85-20321 RPA (N.D. Cal. July 9, 1985) (order of appointment of special master); IBM v. Cybernex, C83-1277 RPA (N.D. Cal. May 20, 1983) (same).

[96] *See* Coolley, *supra* note 3, at 398-99 & n.123 (stating that courts can avoid being confined by the clearly erroneous standard if, in their orders of reference, they direct the master "only to report the evidence or to make recommendations").

the openness and fairness of the decision process.[97]

B. Informality

Special masters are touted for their ability to proceed much more informally than a judge in managing case development, fostering settlement, and implementing equitable decrees.[98] Informality has much to commend it: it can refresh relations, open communications, reduce self-protective actions, cut costs, and generally infuse litigation with common sense. It can eliminate the delay and expense associated with full briefing, staged argumentation, and written opinions. I have found, in my work as a magistrate, that informal conferences often suffice to resolve emerging discovery disputes or to plan for sharing information and for advancing the pretrial process.

Informality, however, may also impose costs and create problems. For example, one informal procedure masters use is the quick-fix discovery ruling, often given over the telephone after a brief argument by counsel.[99] Prompt rulings can save parties considerable expense and expedite the pretrial process. But the depth of consideration, by both counsel and the neutral, is necessarily limited. I have been forced to acknowledge that fact by parties urging reconsideration of my tentative discovery rulings. In some instances, my initial instinct was misplaced, the situation was more complex than I appreciated, and after more careful consideration I have reversed my original decision. These sobering experiences have not led me to conclude that most discovery disputes require formal briefing and argument. But I have become more sensitive to the dangers inherent in speedy and wholly oral procedures.

Informality may create a related danger of imprecision. If the neutral renders fuzzy decisions, or imposes poorly-specified obligations, he sets the stage for breaches, disputes, and disillusion. He also creates opportunities for lazy or unscrupulous counsel to take advantage of others. Without a precise foundation, it is virtually impossible to impose sanctions or otherwise control the litigants. These unfortunate consequences of imprecision can be especially troublesome and costly in complex cases, where duties are less self-

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[97] *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-90 (1984); *see also* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Comment, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975).

[98] *See* Hazard & Rice, *supra* note 6, at 91-93, 109-11.

[99] The author has used this technique in many cases in which all discovery matters have been referred to him.

evident and where the ripple effects of poor communication on one matter can extend to many others.

Conducting business off the record is a potentially more troublesome informality. Arguably, communicating without the costs, inhibition, and posturing that accompany recorded proceedings is a virtue of using special masters, especially in the pretrial period. A master working away from public scrutiny may more easily convince the parties to talk candidly about their objectives and concerns and be more flexible in eschewing impractical but technically defensible positions to pursue commonsense solutions. Communicating ex parte can arguably increase these benefits of proceeding off the record. A master may discern the parties' real agendas and induce cooperative attitudes through sympathy, frankness, or pressure.

Private proceedings may well offer significant advantages in some pretrial situations, most obviously in settlement conferences. Yet we may exaggerate how much counsel's behavior changes simply because no transcript is being made. Also, we may not fully appreciate the risks entailed in proceeding in this manner. In my experience the absence of recording often affects the tone or style of conversation, but not its substance or purpose. Counsel remain quite self-conscious; they continue to posture, albeit more gently and subtly, for the neutral's sympathy. Litigators seldom forget that a key objective is to shape the neutral's perceptions to serve their client's interests. Thus, lawyers are not suddenly transformed from self-protective partisans into trusting nonpartisans, interested only in justice, responsibility, and cost-effective information sharing: they remain lawyers. This counsels some caution in going off the record, for litigators may become even more manipulative, less forthright, and less thoughtful than if they knew the neutral could reproduce their words later and hold them strictly accountable.

The absence of a record can create similarly perverse incentives for the neutral. A retired judge who recently served as a master handling discovery in a complex case told me that he acted very differently when a record was being made. Off the record he felt freer to cajole or pressure counsel. He also may have felt less constrained in arriving at and articulating his decisions. Yet this master, as a former judge, had been schooled for years in the virtues of thoughtfulness and restraint. Other special masters might be even more likely to slide into unbecoming, unwise, or unfair behavior.

The absence of a record can both exaggerate a master's sense

of power (by removing the constraint of appellate review) and increase temptations to abuse it. The most likely abuse is not born of malice or bias, but of sloppiness or sloth. Thus risks arise that the master's reasoning will be faulty and that the parties will disparage his rulings because of failure to understand the reasoning underlying them. In our system, power is illegitimate unless we expose the basis upon which it is exercised. This observation should make us cautious about proceeding off the record or ex parte. The distrust that such communications can engender could negate all the benefits that informality is intended to achieve.

C. Masters in Political Roles

Masters' apparent successes as quasi-judicial politicians raise many perplexing questions about masters' roles in these cases. Given that judges issue orders affecting complex institutional relationships and having significant political and economic implications, should we consider expanding or changing the processes by which courts reach their decisions? These decisions may impinge on all of society, but who should be allowed to participate in the decisionmaking processes? Should courts be explicitly permitted to take into account political considerations, for example, in selecting feasible remedies? Should courts attempt to influence public opinion in order to facilitate implementation of legal rulings? Should the judiciary's capacity to perform administrative functions be expanded so that it could implement its own orders or step in to fill legally mandated but unmet administrative needs? Changes along these lines might rob the judiciary of the appearance of neutrality and objectivity arguably essential to perceptions of its legitimacy and authority.

Some commentators argue that the risk of polluting the judiciary with politics is greater than the potential benefits of more politically sophisticated judicial behavior. If that is true, should courts tolerate quasi-political behavior by special masters that would be unacceptable or unwise in judges? We must recognize that judges may employ the less visible and less accountable master to play roles or pursue ends deemed improper for the courts. Such use of masters might jeopardize public confidence in the integrity of the judiciary itself.

D. Neutrality

One difficult issue regarding a master's proper role arises frequently in nearly every context. What should or may a master do

when he perceives a legal theory, or a line of reasoning, or a source of evidence, that would substantially improve one party's position but to which that party seems oblivious? Does a master have a right or a duty to share his perception? More generally, should the master help a clearly weaker party against a stronger opponent, or prevent a party from accepting an unfairly low settlement? These questions go to the heart of the adversary system. The answers for masters may be the same as for judges—but the answers for judges are less than self-evident.[100]

Conclusion

None of this should be read as an argument against using masters or as a blanket condemnation of more flexible, less structured procedures. The ponderousness and cost of our inherited procedures create a pressing need to develop more efficient means to achieve justice. But we must take care that new methods include adequate safeguards against subtle corruptions of neutrals and misbehavior by litigants. In the past we have relied on the public visibility of our procedures and on precision in our pronouncements to assure the accountability essential to all actors in the litigation drama. We should hesitate to abandon these features of the system until we have developed similarly effective sources of restraint and intellectual discipline.

We must also keep in mind that the special master is not a procedural panacea. The problems that embarrass and encumber our system have roots too deep in our institutions and in human nature to admit of complete solution. Appointing special masters will not convert litigants and lawyers into saints. We can reasonably hope only for modest gains. Carefully used, masters will help the courts sustain the tension that prevents the dispute process from unravelling altogether.

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[100] *See* W. Brazil, *supra* note 65, at 58 (reporting that most of the lawyers surveyed believe that a judge hosting a settlement conference who thinks that a party is about to accept a clearly unreasonable settlement should not intervene). Note, however, the great differences of opinion on this sensitive question between the plaintiffs' and defense bars. The majority of plaintiffs' lawyers believe that the judge should take some action in this situation. *Id.* at 61.