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Managing the Unmanageable: A Brief Accounting of a Special Master's Thirty Years of Experience in Complex Litigation

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MANAGING THE UNMANAGEABLE A Brief Accounting of a Special Master's Thirty Years of Experience In Complex Litigation

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Managing an efficient, but fair, pretrial process in a large and complex case has always been a challenge. With the advent of electronic communications and the corresponding explosion of privilege claims, this challenge has become significantly more difficult. Indeed, it is not uncommon for corporate parties to assert tens of thousands, if not hundreds of thousands, of privilege claims. Furthermore, the resolution of these privilege questions is often compounded by difficult choice of law questions that can have the result of different substantive principles being applied to identical discovery demands originating in different jurisdictions. Additionally, before addressing the increasingly voluminous and complicated privilege question, many parties often raise other discovery issues that must be resolved before depositions and document production can proceed in a meaningful fashion.

With this increase in the numbers of claims, the privilege resolution process has become significantly more costly. The initial costs in locating documents, assessing their privilege character, preparing privilege logs, and developing evidence to substantiate each claim can be overwhelming. Compounding this effort is metadata underlying most electronic documents that may also contain privileged materials. These enormous costs are further increased when special masters must be appointed to examine the millions of pages of materials that active judges have neither the time nor the paralegal resources to coordinate, review, and individually rule upon.

I have served as a special master to resolve massive numbers of privilege claims in five cases. Most recently, I served under Judge Eldon Fallon in the *Consolidated Vioxx Cases* in the Eastern District of Louisiana. In those cases virtually all of the communications were electronic, as was true in *Consolidated Microsoft Cases* in which I also served as a judicial officer under Judge Motz in the District of Maryland. I have witnessed firsthand

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the evolution and explosion of privilege claims since the late 1970s when I first served in this same judicial capacity under Judge Harold Greene in *United States v. AT & T*, the government's divestiture action in which all of the allegedly privileged communications were hard-copy documents.

While my responsibilities have been primarily concerned with ruling on massive numbers of privilege claims (over 100,000 in several of the cases), I have also been given additional responsibilities in managing pretrial processes in *U.S. v. AT & T*, as well as *In re Amoxicillin*, and *Southern Pacific Communications Corp. v. AT & T* by Judge Charles Richey in the District Court for the District of Columbia. These additional duties were more consistent with those assigned to magistrate judges. Indeed, in the AT & T divestiture case, Professor Geoffrey Hazard and I were asked to rule on the admissibility of massive numbers of exhibits based on sample rulings from Judge Greene. We were further asked to rule on other pretrial discovery matters and to supervise a stipulation negotiation process involving dozens of teams of lawyers addressing numerous factual allegations–the equivalent of over eighty-four independent private causes of action allegedly justifying the government's demand for divestiture.

Through these experiences as a judicial officer over the past thirty years, a number of novel procedures have been employed that proved to be effective case management tools. They saved valuable time and avoided unnecessary expenses while still accommodating the needs of the litigants in preparing their cases for trial on an expedited basis. Therefore, I offer a brief accounting of these procedures and processes in the hope that others might benefit from those experiences.

I. Introduction

Fundamental to the successful use of all the novel tools employed in these large and complex cases has been flexibility. The litigants have had to be flexible by being willing to try unusual procedures to accommodate unusual circumstances. Such cooperation was facilitated by the court demonstrating the flexibility they sought from the parties when confronting unanticipated circumstances.

All of those novel solutions, of course, are not appropriate for all cases. While some certainly reflect universal truths, the universal application of any procedure often fails to achieve either fairness or efficiency. Issues and resources are seldom the same, time constraints vary wildly, and personalities of participants often complicate everything. Like hand-me-down clothing, lessons learned from one case need to be re-tailored to fit the unique circumstances of another. What has been universally true, however, is that through the cooperation of litigants who are open to new ideas and novel procedures, almost anything is possible, and everything can be made more efficient.

A. Building the Team

1. Whether to Appoint A Master

Initially, of course, a court must decide whether to appoint a special master. The parameters of when an appointment is appropriate are controlled by Rule 53 of the Federal Rules of Civil Procedure. The standard for appointment in the rule is “exceptional condition” or the court's inability to address particular matters “effectively and timely.” In the past these standards have been equated with either needs for special expertise or exceptionally difficult circumstances, such as volume and time constraints, that made efficient resolution by the presiding judge impossible. In reality, however, when the parties have been willing to pay the cost of a master, and particularly when they have agreed on the individual or individuals to be appointed, there has been little, if any, reason for judges to resist. The time when the standards of “need” and “exception circumstances” become an issue is when the presiding judge is appointing a master without the consent of the parties and expecting them to absorb the costs. In the cases in which I have been appointed, exceptionally large numbers of privilege claims have been the consistent problem (often

100,000 or more)–a problem that has multiplied in the digital age. Because each of my appointments occurred after there had already been significant delays, and a number of problems needed to be resolved before further discovery efforts could be undertaken intelligently, there was never a question raised about "need" or "exceptional circumstances."

The advent of electronic communications in the form of e-mails has significantly expanded the instances when references to special masters are needed. This expansion is attributable to a number of factors. First, due to the ease of e-mail dissemination, many individuals now receive copies of what only a few received in the era of hard copy communications. Wide dissemination has caused the number of privilege claims to increase exponentially because each copy has to be produced. Second, the form of these e-mails is not always identical. An original e-mail can be diverted to many different *indirect* recipients by each *direct* recipient, creating many non-identical e-mail threads. Therefore, a privilege decision on one e-mail thread may not be applicable to all related forms of the communication. Third, the expanded use of digital filings has itself created significant problems in coordinating the ability of parties to communicate with the court, as the different parties use different software programs to manage their documents. Such coordination requires sophisticated technological assistance that is available to few, if any, judicial officers. Finally, because of the increased number of identical, nearly identical, and similar documents, judicial officers resolving privilege claims face a much greater likelihood of making inconsistent rulings. Avoiding such inconsistencies requires sophisticated comparisons of documents and decisions by computer programs operated by paralegals–another resource generally unavailable to most courts, with consequences that were demonstrated in the *Vioxx* litigation.

In *Vioxx*, Judge Fallon attempted to review the privilege claims by examining the millions of pages of associated documents in his "spare time." In reality, he spent evenings and weekends reading box after box of communications and issuing rulings. Over time, the same documents were examined in different contexts and under different circumstances, prompting the court to see them differently. Since none of his rulings had been analyzed by sophisticated computer programs in order to compare them for consistency, a number of inconsistencies found their way into his rulings–a result that has plagued anyone who has attempted such a massive undertaking. These inconsistencies were, in part, the basis upon which Judge Fallon's decisions were successfully appealed under a *writ of mandamus*. While these inconsistent decisions would also have occurred had the process initially been managed by a special master, with paralegal assistance, they would have been identified and corrected before formal rulings were made.

2. Who To Appoint

Individuals with the substantive expertise to understand and resolve the issues, as well as the practical experience to efficiently managing the process are needed. Under extreme time pressures, individuals filling these unique judicial roles must (1) be able to manage large numbers of people and problems; (2) possess the ability and resources to coordinate the electronic exchange of millions of pages of materials from the parties; and (3) be able to comprehend and maintain the orderly flow of communications, documents, and opinions from and to the parties and the presiding judge, while simultaneously resolving numerous sophisticated and complex issues on an expedited basis. This is no mean fete, and individuals qualified to do it can be expensive–often charging hourly rates equal to those charged by the lawyers being supervised.

Compounding the problem of appointing a special master with the necessary expertise, experience, and management skills, is finding someone without conflicts of interest. The experience necessary to acquire the expertise to serve is often the experience that creates conflicts. In addition, the in-

dividual must be able to allocate months of time to the undertaking so that he can respond quickly and decisively to unanticipated problems. Once this individual is found, delegation to a master can *save* months of time and associated litigation costs if (1) the issues delegated are properly managed through effective procedures, (2) those procedures are managed with flexibility because the landscape is constantly changing and the procedures occasionally need to be fluid, and (3) compliance with those procedures is effectively monitored.

3. The Cost

While the cost of a special master in a large and complex case can be significant, the cost savings that can be experienced in an efficiently managed pretrial process can also be significant.

The services that can be provided by a special master in expediting the pretrial discovery process, facilitating preparations for trial, and making the lives of both the litigators and parties more predictable, and therefore more manageable, makes the cost outlay for the master's services far more reasonable. Often, in my experience, accumulated problems, unresolved issues, unnecessary delays, and distractions, coupled with cumbersome, inadequate, and ineffective procedural rules have created costs that an effective judicial case manager could have avoided. This is illustrated in the first novel procedure that I generally employ after being appointed to resolve privilege questions.

Because of the widely varying degrees of understanding about the attorney-client privilege, I begin by discussing with the lawyers, their associates and paralegals in an informal seminar type setting, the substantive and procedural issues that they will confront when asserting and documenting privilege claims. Through this process the lawyers educate others involved in the litigation about the unique problems anticipated, and I am given an opportunity to explain what I expect from the parties in their privilege logs and supporting materials. These discussions also give me an opportunity to address widespread misunderstandings that I have encountered as a special master and evidence consultant to law firms and corporate legal departments about the scope and application of the attorney-client privilege in the corporate context. Lawyers have often over-simplified the attorney-client privilege and its application in their attempt to maximize the scope of its protection. They have employed “rules of thumb” that are based on little more than wishes and folklore that have drastically increased the cost of the privilege resolution process for their corporate client.

Because of my experience and knowledge of the privilege, my lectures appear to be given special credibility by the parties. Regardless of whether this is true, however, it alerts them to the ground rules that will be followed and with which they must comply. After these discussions (which ideally should occur long before anything had been prepared and filed), the number of claims that need to be reviewed by the court are always significantly reduced and thousands of hours of misdirected paralegal and associate efforts are avoided (not to mention many costly hours of the special master's time).

4. How Many To Appoint

After deciding that a special master should be appointed, there is always the secondary question of whether more than one judicial officer is needed. I have served in cases where there were two masters with equal authority, one master with judicial authority and one special counsel to assist him, and one master working alone. If no agreement on the number of appointees was reached, the size and complexity of the matters being delegated would have dictated the number.

When there are exceptionally difficult substantive issues, and particularly if managing the pretrial process is envisioned as part of the delegated responsibilities, I believe that more than one appointee is essential for the most efficient and expedited process. For example, when the number of potential privilege claims exceeded 100,000, the decision to appoint two masters (or a master and

special counsel) has been popular. With the explosion of electronic communications and the expanded need for paralegal assistance in managing that document flow, a master and special counsel who can supply the paralegal resources of a law firm should be the rule. Although I am admittedly biased, an academic and a practitioner may be preferable because the theoretical perspective of the academic (and the ability to take a leave of absence from his teaching responsibilities) and the practical perspective of the litigator seem to have produced most informed, and therefore, more perceptive, decisions.

Financial resources of the parties, of course, often dictate both the decision to use masters and the number appointed. As with one special master, the apparent costs of two can also be misleading. Two will not necessarily be twice as costly as one. In fact, depending on the structure of the delegation, the appointment of two may be *less costly*.

Increased costs are incurred only if both appointees receive similar compensation and are equally involved in all aspects of the undertakings delegated. When neither is true, two can be quite cost effective. For example, if one master were the elder statesman with extensive experience and expertise, his services should cost more than the services of the much younger and less experienced practitioner or academic. If, however, the elder provides direction and counsel, but delegates most of the organizing, managing, and daily operating responsibilities to the younger (much like a senior law firm partner's relationship to juniors and associates), a quality of service can be assured with far less cost than if the elder were serving alone. In addition, the appointment of two masters or a master and special counsel allows collaboration on difficult and often novel questions, thereby increasing the accuracy and efficiency of both supervision and resolution efforts. It also offers the added benefit of training young lawyers and academics for future cases.

B. Streamlining the Privilege Resolution Process

1. Substantive Guidelines

In the largest cases, like the AT & T divestiture action that involved many government agencies, a range of privilege claims were raised by them (*e.g.*, government deliberative, executive, national security, informer, work product, and attorney-client) along with the regular work product and attorney-client privilege claims raised by AT & T and third parties. It was imperative that substantive ground rules be established so that rulings on large numbers of privilege claims would not have to be revisited if an interlocutory appeal of initial decisions resulted in different substantive principles being adopted by the appellate court. Therefore, the parties were invited to propose *Substantive Guidelines for the Resolution of Privilege Claims*. These Guidelines were the product of a joint effort by the government, the defendant, and the special masters. After they were promulgated, Judge Greene adopted them in the form of an order, giving the parties an opportunity to appeal contested substantive principles to the D.C. Circuit (which, of course, didn't occur since they had been jointly proposed by the parties). Consequently, the *Substantive Guidelines* became the law of the case, thereby assuring that the rug of fundamental principles would not be pulled from under the case in the middle of an onerous resolution process.

In the recent *Vioxx* litigation, a very different approach was taken. The ground rules established by the *Substantive Guidelines* in *AT & T* were achieved in *Vioxx* through a sampling process and through an extensive initial opinion and recommendation from the special master. Once adopted by the presiding judge, the master's opinion became the standard by which the universe of remaining withheld communications that remained would be judged. The sampling approach in *Vioxx* was used for a variety of reasons. First, the range of discovery was limited to one party, making procedural problems far less challenging. Second, the universe of documents withheld had already been produced

to the court for *in camera* inspection. Third, the various types of communications being withheld fell into identifiable categories, thereby allowing the initial rulings on samples from those categories to have universal application. Fourth, there were serious time pressures because the privilege issues had been pending for nearly two years and hundreds of cases around the country were waiting for these decisions and resulting discovery.

2. Procedural Guidelines

The procedures by which the massive numbers of claims were submitted to the Special Masters for *in camera* review in *AT & T* were also agreed upon in *Procedural Guidelines for the Resolution of Privilege Claims*. Because of the number of potential claims exceeded 100,000, it was agreed among the parties and the court that the parties would submit to the court privilege logs or indices containing an agreed upon number of claims on a rolling basis. When first submitted, privilege logs were tentative–submitted without supporting materials and subject to revision. After a designated period the tentative log was resubmitted as a final log with supporting materials for each privilege entry. The second and final iteration of each log was always considerably smaller because the required supporting materials invariably eliminated marginal and unjustified claims. As one privilege log was finalized, another privilege log was filed. This process continued until all documents had either been produced to the demanding party or submitted to the court by the responding party. At the end of the process the producing party was required to submit a certification that production had been completed, leaving no doubt about the status of a party's production effort.

My experience has been that discovering parties are frequently left in the dark relative to where document production stands because informal communications between obstinate and uncooperative parties are often limited. Therefore, when production stops, it is unclear whether all relevant communications have been produced or whether communications are being withheld on privilege grounds, requiring the uninformed demanding party to file a motion to compel. Our process avoided this in two ways. The first, which is discussed in the next section, was specifically assigning burdens in the discovery process to the producing party–requiring that party to *complete* production within the 30 day time-frame provided for in the discovery rules or file a motion for a protective order detailing the reasons for noncompliance. The second way, of course, was the final certification.

During the process of submitting documents and supporting materials, innocent delays and mistakes were inevitable. To keep the process moving forward, each decision of the Special Master on documents in previously finalized privilege logs (like the initial privilege logs themselves) was tentative for one week. During that time, if the proponent wished to supplement the record with additional supporting materials to substantiate claims that had been denied, the evidence would be received and considered (with, of course, expedited objections from opposing parties) before the order was filed with the court. This process avoided endless hours of debate, briefing, decisions, and costs on the scope of privilege loss once a privilege claim was denied and similar documents on the same subject matter were being withheld.

3. Assigning Burdens To Producing Party

In cases where the number of documents were not so overwhelming as to require a procedural structuring of the submission process, or where the special masters were given supervisory powers over the pretrial discovery process, the court specifically assigned the burden of obtaining judicial involvement in the discovery process to the producing party. The producing party had to either complete production within 30 days (the time specified in the discovery rules for responding to the discovery demand) or seek a protective order. In the absence of a request for a protective order, all objections to production, including privilege claims, were

waived.

Under the Federal Rules of Civil Procedure, the parties are expected to engage in informal attempts to resolve all discovery issues (including privilege disputes) before requesting assistance from the presiding judge. This practice occasionally has proven to be a boon for parties who wish to engage in dilatory tactics. Because the party seeking discovery knows that the court does not wish to get involved unless a necessity has been demonstrated, the discovering party is compelled to tolerate well-worn delay tactics far too long–particularly in jurisdictions employing rocket dockets–in order to satisfy the attempted informal resolution requirements before seeking judicial assistance through a motion to compel. These delaying tactics include (1) failing to respond timely to discovery demands (30 days having expired after the discovery demand has been made with no response); (2) failing to take telephone calls or return telephone messages from the demanding party inquiring about delays; (3) after responding with some production, providing no further information or only incomplete information about whether production is complete or whether documents are being withheld on privilege grounds; (4) consistently failing to fulfill promises of production or to supply information; (5) failing to file privilege logs in lieu of producing requested documents; and (6) filing inadequate privilege logs when they are finally produced. Eventually, after far too much time has elapsed (perhaps months in a pretrial process shortened to half a year or less), the demanding party is left with no choice but to ask for judicial assistance. After the motion is briefed, placed on the motion calendar, argued, and a written decision rendered (consuming three to eight weeks, depending on time restrictions in local rules), *thirty additional days* are often given to the responding party to reply when the motion to compel is granted! The consequence, of course, is that half of the pretrial preparation time may have elapsed (assuming a six month pretrial period), jeopardizing further discovery prompted by the content of the initial production. As a result, the dilatory party has succeeded.

By assigning this burden to the producing party this type of abuse was stopped because the special masters, rather than the litigators, were placed in control of delays in the discovery process. Because a special master, unlike the presiding judge, is not encumbered by the docket pressures, and therefore can be proactive in managing the pretrial process, early judicial involvement should be preferred rather than shunned because it avoids the potential waste of time in informal negotiations with parties set on manipulating the process.

If the protective order were issued, time extensions were closely monitored through informal contacts between the special masters and the producing parties. And unlike the contacts between adversaries, our calls were always taken or promptly returned. As a consequence, we avoided problems of misrepresentation and subterfuge commonly experienced by adversaries.

4. Sampling Process for Massive Numbers of Claims

In *Vioxx*, there were potentially over 100,000 privilege claims. As previously noted, while these documents were individually ruled upon by Judge Fallon, a petition for a *writ of mandamus* to the Fifth Circuit by the defendant drug manufacturer resulted in a remand for a re-examination of the claims through a suggested sampling process. It was at this point that Judge Fallon consulted me and asked if I would be interested in doing his directed "redo." I accepted the responsibility, and began working with the parties to establish an acceptable means of selecting samples from which rulings might fairly control the resolution of all remaining claims. In this effort, I was assisted by Special Counsel, Brent Barriere, and by the services of his firm, Phelps Dunbar. The appointment of Mr. Barriere proved to be indispensable, not only because of his good counsel, but also because of the staff of experienced paralegals that accompanied him. Without the assistance of that supporting staff, the electronic communications totaling millions of

pages would have been as impossible for me to manage as it had been for the presiding judge.

Because comprehensive privilege logs had already been created, identifying categories of documents proved to be easier than anticipated. These documents were assembled by category and produced in separate boxes for *in camera* review. The plaintiffs, of course, were suspicious of the defendants' selected samples. Therefore, they were permitted to designate additional samples from the log, which were incorporated in the other designations. In addition, with depositions immediately going forward, the plaintiffs were also allowed to designate as samples the documents relating to those deponents. Collectively, the samples included approximately 3,000 documents.

Whether this process will be viable in other cases is not clear, but my experience gives me hope that replication is possible. Typically, large numbers of privilege claims are a result of numerous copies of identical or similar documents being disseminated to individuals throughout a company. In addition, policies (both formal and informal) of document creation and dissemination in all the companies with which I have dealt tended to fall into consistent patterns. These realities suggest that sampling may be the answer to massive privilege claims that courts have been seeking. Following the sampling process, of course, the cataloguing of the remaining documents would also have to be sampled and tested for accuracy. The *Vioxx* litigation did not advance to that stage, however, because the parties reached a settlement agreement shortly after Judge Fallon had accepted my recommended decisions.

If the sample rulings are not rigorously followed by the producing party, the only solution, other than declaring a waiver of all remaining claims, would appear to be the examination and classification of each designated document by the special master. This solution, of course, would significantly defeat both the efficiency and cost savings of the sampling process. At a minimum, however, the sampling process will have resolved how principles will be applied to those classifications of documents, hopefully avoiding further litigation on those claims. Sampling should also resolve the question of how costs should be shared. Those increased costs should be assessed exclusively to the producing party who would be responsible for the need for the additional special master examination and classification.

The success of the sampling process in *Vioxx* was complemented by another novel process that I have used in virtually all of the cases in which I have served. It is a process that many readers will find controversial because it generally is shunned by judges: *ex parte* contacts between the special master and the parties.

C. Effective Management Requires Immediate Access and Close Supervision

1. Ex Parte Contacts

Often, in managerial positions, when you are not constantly in contact, you are quickly out of touch. In my experience, effectively maintaining this contact requires occasional *ex parte* communications–communications with one party outside the presence of the other. *Ex parte* communications were first employed in the AT & T divestiture action in the late 1970s. Because the novel privilege submission and resolution processes in that action were exceptionally large and complex, the parties and the masters agreed that unforeseeable circumstances might make it imperative that parties be able to obtain information from the special masters, or seek extensions for scheduled filings when the managing lawyers for the opposing side were not available. Therefore, it was agreed that parties could telephone the masters' office with problems and relate their needs and concerns. It was understood, however, that following each *ex parte* exchange, opposing counsel would be contacted by the master and the substance of the previous conversation would be relayed. If either side was concerned with the actions or comments of the other, a conference call or a face-to-face meeting would be

arranged within 24 to 48 hours. The special masters also initiated contact with the parties when it was believed that closer supervision would ensure prompt compliance with informal agreements as well as formal orders. This contact also allowed the masters to elicit concerns that had not yet been communicated to the court. Each contact, of course, was immediately reported to the opposing side. This judicial involvement assisted in keeping the armies marching and all of the machinery of the litigation moving more smoothly and without unexpected disruptions. With constant communications between the masters and the presiding judge, the practice also permitted the judge to have a more sensitive hand on the pulse of the action without being in the trenches with the parties.

Such a process, of course, required the consent of the parties. That consent, in turn, required confidence in the objectivity of the masters and in their ability to keep such contact to a minimum–excluding all but essential substantive discussions as was needed to take appropriate action. This practice proved to be essential when our responsibilities as masters were increased to managing more of the pretrial discovery process and supervising an evidence stipulation process in which unanticipated circumstances and unexpected problems were far more numerous.

Those who were supervised reported that the *ex parte* communications had an immediate sobering effect. Those who previously had been inclined to push the envelope (or perhaps more accurately to suppress the envelope) for adversarial gain were restrained. Responsibilities were attended with greater care and the professionalism between opponents was reported as having improved. I can certainly report that delaying tactics that I had encountered in other cases were all but eliminated. Being in the figurative trenches with the lawyers, able to know or quickly discover what everyone was doing, created a sea change in both attitudes and tactics.

2. Countering the Rumor Mill

In litigation, rumors abound. There are rumors about actions that have been taken, actions that have not occurred, and tactics that are planned. While most are untrue, or at least inaccurate, they have the potential to create significant distractions, regardless of truth, if the potential consequences would be significant. Therefore, when such rumors were heard, we encouraged the parties to relay them to the special masters so that we could make inquiry and take appropriate action when necessary.

Management without current information is always behind the curve–responding, rather than directing and controlling. An inquiry regarding a rumor either allayed suspicions and allowed the litigation machinery to continue to operate smoothly, or confirmed what was feared, prompting us to set wheels in motion to ensure the least disruption to the process. In instances of rumored actions, our experience was that attorneys respond to our questions directly and honestly when they were not direct, complete, or honest with opposing counsel. As a consequence, these informal inquiries avoided numerous delays by either minimizing unproductive distractions or controlling what had been rumored and feared.

Ex parte contacts were particularly important in the *Vioxx* case because it allowed each party to voice concerns about the fairness of the process and to gain a better understanding of how each side's interests were understood by me and would be protected. Furthermore, it allowed candid discussions about matters that involved confidential information that I was reviewing. With neither party having requested my appointment or having had any experience in working with me, the *ex parte* discussions gave each a better understanding of me, my expertise and expectations, and most importantly, my understanding of their needs and concerns. Through this personal contact, fears were allayed, cooperation was achieved, and potential problems, disruptions, and delays were avoided.

Ex parte contact has provided other benefits for the pretrial process. It has permitted me to have direct discussions not only with attorneys for the litig-

ants, but also with the lawyers representing third parties whose documents had been sought. This third party contact was especially helpful in the AT & T divestiture case because it allowed me to have frank discussions with the third parties' attorneys, conduct informal tutorials on privilege law, and explain the novel procedures we had instituted as well as the supporting evidentiary materials that we were expecting for each privilege claim. These informal communications expedited the pretrial discovery process, by increasing understanding and encouraging cooperation. In addition, it ensured adequate filings so that final decisions could be rendered more quickly and less expensively. For everyone involved, it proved to be a win-win proposition.

In a similar fashion, masters need to have regular informal contact with the presiding judge. This is particularly true when the masters are given responsibilities for managing the pretrial process because the results will directly affect the trial. Regular meetings are necessary not only to keep the judge apprised of developments, but also to get a read on whether novel procedures meet with the judge's approval. This approval is particularly important when parties agree to a process or course of action with the understanding that a safety valve will later be available if unexpected difficulties arise. With the assurance from the special masters that the presiding judge was on board, litigators showed great flexibility for the sake of efficiency and cost savings. Without assurances from the special masters about the presiding judge's attitudes and flexibility, lawyers were appropriately skeptical and far less likely to venture into uncharted waters.

D. Supervising Depositions

There are many roles in which masters can serve to expedite the pretrial discovery process, aside from resolving privilege claims for documents sought in discovery. Supervising depositions is another one of those roles. By presiding at a deposition or being available via telephone to immediately resolve privilege claims, the duration of depositions have been radically shortened and the need for their reconvening has been avoided. For example, by presiding at the deposition of the chief executive officer of a multi-national corporation and requiring the restructuring of lengthy, and perhaps abusive, questions, an examination noticed for one week (which would no longer be possible in federal courts because of a two day limit that has been imposed) was completed in one day. A number of the lawyers in attendance commented that whatever my fees were going to be in the action, I had probably earned them by limiting that single deposition. While obviously hyperbole, the efficiency that impressed them is a demonstrable result of what can be achieved through closer judicial supervision.

Because masters can be available on limited notice during depositions, even to the point of a professor being called out of the classroom, disputes can often be resolved immediately and without the necessity of a ruling. On more than one occasion, opposing lawyers at depositions resolved their own disputes after telephoning me and responding to my pointed questions about their arguments. In the heat of combat, disagreements were often more imagined than real because both sides had stiffened their stances with neither listening to the arguments or compromises being offered by the other. The voice of an impartial third party was all that they needed to break the impasse. In other instances, privilege objections were obviously frivolous and an immediate decision with an explanation permitted the deposition to proceed.

E. Timely Rulings

After the expansion of the special masters' responsibilities in *U.S. v. AT & T* and in other cases referred to me by Judge Richey (*Southern Pacific Communications Corp. v. AT & T* and *In re Amoxicillin*), the success of the supervision of each pretrial discovery process was ensured, in large part, by the masters putting themselves under the same time pressures that were being imposed on the parties. Lawyers have long commented that they do not believe that judges appreciate the difficulties

that court-imposed time constraints create, because judges often leave important disputes unresolved far too long. Whether this is true or not, the masters in the AT & T divestiture case (Geoffrey Hazard and I) decided that we needed to manage by example and maximize the limited preparation time available to the parties. Therefore, when concerns arose and were transmitted to us (either informally or by formal motion), meetings by telephone or in person were scheduled within 24 to 48 hours. When face-to-face meetings were called in actions involving lawyers predominately from Washington, D.C. and New York City, they were held alternately in those cities for the convenience of the lawyers.

At these meetings we attempted to give verbal indications of what we were inclined to do as each issue was argued so that the parties could prepare accordingly. This helped eliminate the expressed exasperation of litigants over their lack of information about the status of matters taken under advisement by judges. This allowed expensive and time-consuming trial preparations to proceed efficiently by eliminating armies of paralegals and associates marching in place until judicial instructions are received. In addition, we made it a point to issue written decisions within two to four days after each meeting, depending on the length and complexity of the issues being addressed. However, because of the speed with which we were acting, we made all of our written orders tentative for 24 hours. Within that time-frame, factual errors committed in haste could be corrected before the decision became final and was filed with the court. If agreements were reached by the parties at a meeting, these were orally verified the next day and incorporated into the minutes that were circulated to all parties within 24 hours.

Effective management of litigation, however, requires more than quick attention to issues. It also requires that issues be addressed in a way that encourages the greatest cooperation among the parties. Too often, lack of cooperation has little to do with substance and more to do with personalities and adversarial posturing. This was demonstrated in *In re Amoxicillin*.

F. Responding Quickly and Completely

Some litigators attempt to make adversarial gains by overwhelming their adversaries with motions and objections. This tactic, of course, diverts the opposition from their trial preparation efforts and runs up their adversary's costs. Therefore, the practice needs to be stopped before it has its desired effect.

In *Amoxicillin* the parties had been litigating against one another throughout the world over this penicillin derivative. A mountain of discovery motions and objections had been filed with the court and little was moving because those motions had been unresolved for more than a year. All efforts by the judge to cajole and pressure the parties to resolve the matters informally had been unsuccessful. The judge commented that because the parties and their lawyers had been fighting for so long, they were acting “like male rams butting their heads together in an extended mating season.” In other words, there could be no compromise, because one side had to prevail on every issue. With the case in this posture, I was brought in as special master.

It was apparent that the progress of the pretrial program would continue to be stymied until the tables were cleared and attitudes (or at least practices) were changed. I, therefore, notified the parties that this clearing process would begin at our second meeting at the plaintiff's law firm's offices in New York City. I also made it clear that the hearing would continue until all matters had been addressed and were ready for decision. While the principle purpose behind the mountain of motions may not have been to delay and harass, it was clear that the parties were no longer cooperating. It was equally clear that the impasse had to be resolved quickly, with or without the cooperation of the parties.

The meeting/hearing started a 9:00 AM on Fri-

day. When little was accomplished by noon, I asked for lunch to be brought to us. When little was accomplished by 5:00 PM, I asked that dinner be provided. As the evening advanced, I asked the firm to get me a room at a convenient hotel so that we could reconvene at 9:00 AM on Saturday morning. Protests about theater tickets, dirty shirts, and social engagements were unavailing. By the time Saturday lunch had come and gone, I indicated to the parties that I was prepared to continue through Sunday. After a requested break, selected senior attorneys were conspicuously absent from the Saturday afternoon proceedings. When they returned, I was advised that the parties had reached agreement on all remaining issues. Apparently, when tactics distract and inconvenience the lawyers employing them, as much as they do their opponents, cooperation is the better option. The “piling on” tactic never resurfaced.

G. No Rulings, Only Recommendations

A referral to a special master can add an additional layer of procedure, and therefore add delay, as decisions are sometimes appealed to the presiding judge. Therefore, the structure of the referral to a master should change when decisions on the matters referred are likely to be contested, particularly when time is of the essence. For example, in the *Vioxx* litigation, where hundreds of cases around the country were waiting for the court's decisions on privilege issues, Judge Fallon recognized this problem and resolved it by having me issue only recommendations to him. After he reviewed and adopted my opinion and recommended rulings (with only slight modifications), only an appeal to the Fifth Circuit (which was not taken) was viable.

Orders, as opposed to recommendations, by the special master may be more appropriate either when the process does not need to be expedited or the master is given broad responsibilities for managing the pretrial process and the decisions are highly discretionary. In the latter instance, the parties understand that the probability of success on appeal is slight, even though the matters may be examined by the presiding judge *de novo*, because the presiding judge's support of the master's decisions is fundamental to the master's success in effectively managing the pretrial process.

Conclusion

While my experiences may be unique and my practices occasionally controversial, they are tried and proven, and perhaps most importantly, often shown to be cost effective. Other former special masters undoubtedly have had equally unique experiences that could assist trial judges in effectively and fairly managing both large cases as well as smaller ones placed under extreme time pressures. I have been honored to serve in a unique judicial role in many important cases over more than three decades. Through those experiences I have learned a great deal about not only privilege (particularly the attorney-client privilege), but also how to effectively manage the process in which privileges are asserted and other discovery issues are resolved. I hope this brief accounting can be helpful to others facing similar challenges.

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