Protracted Civil Trials: Views from the Bench and the Bar

Federal Judicial Center

PROTRACTED CIVIL TRIALS:
VIEWS FROM THE BENCH AND THE BAR

A Report to the Subcommittee on Possible Alternatives to Jury Trials in Protracted Court Cases

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EXECUTIVE SUMMARY

Protracted civil trials (defined here as lasting longer than 19 trial days or 100 trial hours) account for almost 12 percent of civil trial hours, even though they represent less than 1 percent of all civil trials. These trials are, therefore, a legitimate cause of concern to the judiciary. Protracted civil trials heard by juries are of particular concern for two reasons. First, they impose a considerable burden of service on jurors. Second, they tend to involve difficult issues of fact that lay juries may not be able to comprehend adequately. This report, as part of a comprehensive research program on the problems of protracted civil jury trials, describes the nature and management of a number of such trials as viewed by the judges and lawyers who participated in them.

Sixty-eight judges and lawyers consented to interviews covering trial management and advocacy in twenty-two major civil cases. Seventeen of these cases, including seven jury trials and ten bench trials, were the subject of additional analysis through the use of docket sheet entries. The shortest trials lasted 40 trial days, while the longest occupied 226 trial days. Measured in elapsed time rather than consumed time, the shortest trial took place in a two-month period and the longest in a thirty-month period. Antitrust, contract, tort, patent, civil rights, fraud, and admiralty trials were included.

One result that repeatedly emerged from the interviews may be stated briefly: There are many more differences between bench and jury trials than the finder of fact. One large difference, for example, is the density of trial activity. The seven jury trials studied occupied from 8.4 to 20.0 trial days per month (the average was 13.5 days per month), while the ten bench trials occupied from 1.6 to 19.0 trial days per month (the average was 6.9 days per month). Another obvious difference is the extent of colloquy between the fact finder and the witnesses and lawyers. Third, lawyers tend to organize their evidence and arguments differently in bench and jury trials. These differences and others are so large and significant that they should have a place in policy discussions of the relative merits of bench and jury trials.

The presentation of testimony is the primary contributor to the duration of protracted trials. Reading depositions into the record can be particularly time-consuming in jury trials; in bench trials, judges have options for more rapid handling of deposition testimony.

The participants in jury trials exhibited a relatively high frequency of disagreement among themselves when asked about the presence of complicated facts and legal issues in their trials. In antitrust jury trials especially, these disagreements may stem from markedly different approaches to the case taken by plaintiff and defense. Relative to the defense, plaintiff's lawyers tended to stress the importance of corporate intent and to deemphasize the importance of scientific and engineering facts. Thus, plaintiff's lawyers were less likely to acknowledge the difficulty of the facts at issue. Judges tended to agree with defendant's position on this matter.

Judges and lawyers responded to several questions about pretrial management and its relation to trial duration and complexity. They discussed the usefulness of the *Manual for Complex Litigation* and the roles of experts, masters, and magistrates. Lawyers tended to be critical of the lack of judicial involvement during discovery. From the judges' perspective, pretrial work was facilitated by a cooperative attitude among counsel and hindered by undue contentiousness.

The decisions to opt for jury trial were made on tactical grounds. The single factor named most often as contributing to the decision was the identity of the judge. Several lawyers also noted that they preferred jury trials when their cases were legally weak. Differences between standards of appellate review for bench and jury findings may have been a factor in the decisions of some lawyers. Most of the judges, and about half the lawyers, stated that bench trials would be faster than jury trials of the same cases.

Judges and lawyers pursued a variety of strategies in conducting jury trials. A number of lawyers employed experts to aid them in jury selection; they reported marginal satisfaction with the results of these consultations. The characteristics of jurors considered desirable varied greatly from lawyer to lawyer. Virtually all lawyers used special visual aids in their presentations to bench or jury. Jurors were prohibited from taking notes in three trials. Every judge but one presented a preliminary charge to the jury. In no case was a jury asked only for a single general verdict, and in one case several general verdicts were requested. At the other extreme, jurors in one case responded to a set of sixty-one interrogatories arranged in branching, hierarchical fashion.

Judges and lawyers were uniformly complimentary of the diligence of the juries. With slightly less consensus, they also affirmed the validity of the juries' deliberative processes. Criticisms of jury use centered on the difficulties faced by highly qualified venire members who cannot afford to participate as jurors in protracted trials.

With very few exceptions, judges praised the quality of the lawyers who participated in the cases we studied. Lawyers' evaluations of judicial helpfulness during pretrial and trial proceedings were more mixed. The greatest criticism of judicial management centered on the relative unavailability or unwillingness of judges to become involved in the substance of discovery disputes. Only one lawyer said unequivocally that he would have exercised a peremptory challenge of the judge, had that option been available.

Judges and lawyers were in general agreement that the best alternative to a jury trial is the traditional bench trial. There was less consensus on other alternatives mentioned, including special juries, three-judge panels, adaptation of more procedures from the Court of Claims or administrative courts, and increased use of arbitration for complex cases.

The final chapter of this report supplements the material contained in the interviews with analyses of all the protracted civil trials in cases terminating during fiscal 1977-1979. Several approaches to the definition of case complexity are explored for the purpose of establishing criteria of complexity that a court might use when faced with a motion for denial of jury trial.

I. INTRODUCTION TO THE RESEARCH

This report to the Subcommittee on Possible Alternatives to Jury Trials in Protracted Court Cases (the committee) describes progress on two research topics identified by the committee and Federal Judicial Center staff at a meeting on March 8, 1980. The major focus of the report is on the results of fifty-six interviews with federal judges and trial lawyers who played major roles in twenty-two very long and complicated civil trials, some to the bench, some before a jury. The opinions of these experts are reviewed in the context of an introductory discussion of protraction and complexity as attributes of extended litigation. The report also analyzes the characteristics of long civil trials as they emerge in the statistical information collected by the Administrative Office of the United States Courts.

The purpose of our inquiries is to provide the committee with an accurate and detailed fund of information about long civil trials in federal district courts. The research aims to help the committee form its response to the mandate by the Judicial Conference of the United States and the Chief Justice to consider possible alternatives to lay juries as fact finders in lengthy, complex trials. The directions of the research have been guided by the two general concerns expressed by the Chief Justice in his address to the Conference of State Chief Justices on August 7, 1979: (1) a concern that the masses of complicated technical information adduced at trial, combined with the often difficult legal issues involved, strain the abilities of juries to find the facts competently and (2) a concern about the fairness of requiring citizens to serve for extended durations as full-time jurors. These themes are explored separately in later sections of this chapter, after the meanings of our basic terms have been explored.

Definitions of Protraction and Complexity

The terms *protraction* and *complexity* have multiple, ambiguous meanings as applied to civil trials. Both carry evaluative connotations in addition to their apparent descriptive meanings. The pur-

pose of the following discussion is to state as clearly as possible how the terms will, and will not, be used in this report.

Protraction

Two meanings of the phrase *protracted trial* need to be distinguished here. First, one may label a trial as protracted when, as a result of its duration alone, it places significant burdens on the resources of the judicial system. This is the meaning of the term as used in the name of the committee and in the related remarks of the Chief Justice. The minimum duration of a protracted trial, in this sense, is somewhat arbitrary. For purposes of our research, we begin with the threshold established by the Administrative Office, which has for several years published lists of trials lasting twenty days or more that terminated during a particular fiscal year.[1] Although we will remain within this general framework, this threshold can be augmented. For example, in chapter eleven we present an analysis of trial protraction measured in hours rather than days, pointing to important differences between these two measures. And in chapter two we suggest that elapsed time, as well as consumed time, is also an important measure of protraction. A twenty-day trial spread over seven months may be, but is not necessarily, protracted in comparison with a twenty-day trial compressed into one month. Operational definitions of protraction should, therefore, consider density as well as total number of trial days.

A second definition of a protracted trial is that it is prolonged beyond necessity, regardless of its duration. A trial lasting six days would be protracted if it could have been well managed to a conclusion in four days, while a ninety-day trial would not be protracted if the issues could not have been fairly tried in fewer days. We accept the value of this meaning of trial protraction, but must emphasize that we do not assume that any of the very long trials we studied (easily qualifying as protracted by the first definition) were necessarily protracted in the sense that they could have been completed more expeditiously. Whether any of the trials was protracted in this sense is a matter for analysis and expert opinion to determine. Results of our research suggest that some of the trials may have been protracted in this sense; we make note of these cases in the text. However, recommendations for improvements in the management of long trials, whether before a judge or a jury, were not intended to be the major products of this report.

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1. *See* Administrative Office of the United States Courts, 1977-1979 Annual Reports of the Director at table C-9.

Complexity

Three dimensions of civil litigation contribute to its total complexity: managerial, factual, and legal complexities. They often, but not always, operate in combination. All create potential hazards for effective and efficient trial processes.

Managerial complexity. In its purest form, managerial complexity grows with the number of parties and the geographical distances between their home bases. The classic example is the electrical industry antitrust litigation that provided federal courts with the experience that was distilled into the *Manual for Complex Litigation.* In 1967, then Chief Justice Warren reported on this litigation to the American Law Institute:

> Beginning in 1961, there were filed in 35 district courts 25,623 separate civil antitrust claims for relief—1,912 civil actions, in many of which multiple plaintiffs joined their separate claims in a single action and in many of which there were multiple counts each based on a separate claim. Each claim for relief was a potentially protracted case and . . . this unprecedented multidistrict litigation was imposed upon the ever-increasing burden of the ordinary civil and criminal dockets. Our alarm was understandably great and makes equally understandable the measure of my satisfaction in being able to report . . . that every single one of these cases has been terminated. Not a single one remains pending. Whatever backlog problems the federal courts may have, they do not include any of these cases.[2]

In addition to developing the *Manual,* the federal judicial system responded to this form of managerial complexity by recommending to Congress the legislation establishing the Judicial Panel on Multidistrict Litigation, with the discretion to transfer multidistrict litigation to a single district during pretrial activity[3] and, for limited causes of action, during trial as well.[4]

Not all suits involving multiple parties are multidistrict cases. Many class action civil rights and institutional reform cases, for example, present management problems throughout the litigation, from early motions practice to the implementation of court orders.[5] Multidistrict and multiparty cases create potential management problems for the court regardless of the particular factual or legal difficulties the cases also present. In general, when the problem is purely managerial, the solution may be also; we learned of several

2. Manual for Complex Litigation at VII (West 1977).
3. 28 U.S.C. § 1407 (1976).
4. 28 U.S.C. § 1407(h) (1976).
5. Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 Colum. L. Rev. 784 (1978).

managerial innovations during the interviews with judges and lawyers.

Factual complexity. Factual complexity increases with the amount of evidence adduced at trial and with the technical depth or difficulty of the evidence. In some cases, although the witnesses and exhibits are numerous, the substance of the evidence falls within ordinary understanding; for example, many memorandums and depositions may be introduced to establish that defendants held meetings at certain times and places with particular intentions. In other cases, the evidence is highly technical and requires background elaboration to establish its relevance to liability or damages.[6] Rarely, but often enough to be of concern, these two situations combine, and confront the finder of fact with masses of technical information presented as witness testimony, whether in person or by deposition, and as associated documentary evidence. Trials in which this occurs are of concern because they are virtually bound to be lengthy and can easily become protracted, thereby draining scarce judicial resources unnecessarily. They also present lay juries with severe challenges and burdens.

A final factual complexity relevant to the jury trial question also gives the court both managerial and legal problems to resolve. Plaintiff and defendant may pursue markedly different theories of the case in their presentations to the jury. An antitrust plaintiff, for example, concentrates on establishing predatory corporate intent by referring to memorandums and other documents on market shares and combined manufacturing and sales strategies. Defendant minimizes the significance of the undisputed evidence and directs the jury's attention instead to the engineering principles and technical advances on which, defendant argues, business decisions were made. Defendant's presentation is inevitably, even intentionally, more detailed and technical than plaintiff's is. It is, arguably, too difficult for the lay jury to comprehend. Plaintiff's case, in contrast, not resting so heavily on technical evidence, appears well within a jury's grasp; indeed, plaintiff intentionally frames issues so that they fall within the traditional competence of juries. How should these different perspectives on the case be weighed when, for example, the trial judge is asked to assess the complexity of the case for purposes of ruling on a motion for denial of jury trial right? Similarly, how does the trial judge rule on discovery motions made in an effort to strengthen one theory of the case at the expense of the other, when the costs of the discovery will be great? We believe these questions will arise most often in

6. *See, e.g.,* Jack Winter, Inc. v. Koratron Company, Inc., 375 F. Supp. 1 (1974), for the court's description of textile manufacturing processes.

an antitrust context, but they may have broader scope as well. We raise the questions here without having answers to provide.

Legal complexity. Legal complexity presents the decision maker with multiple, overlapping, or ambiguous legal issues. The complexity seems to affect the jury trial question secondarily, in connection with other forms of complexity. The legal questions usually arise in the scope and form of instructions to the jury and in the verdict or verdicts requested. Close questions of defendant's liability under the antitrust statutes, for example, must be resolved in the instructions, using language that is acceptable to the court of appeals as well as comprehensible and useful to the jury. Special interrogatories must meet the same criteria. Of course, these requirements exist for all jury instructions and verdict forms, but they are particularly demanding when the instructions must interpret vague statutory provisions that are to be applied to mountains of technical facts presented to the jury, over months of trial, by skilled advocates whose clients have literally billions of dollars at stake on the jury's decisions.

Pretrial Proceedings in Relation to Trial Protraction and Complexity

Long civil trials are usually preceded by lengthy pretrial periods. The potential for complexity in a trial can often be foreseen in the complexity that exists before trial. A major question before the committee becomes particularly salient at this point: If the elements of a long, complex trial are already discernible at a relatively early point in the life of a lawsuit, can the court and parties then reduce likely trial duration and complexity by concerted pretrial action? In particular, can they arrange the factual and legal issues at trial simply enough to fall beneath the threshold for questioning the ability of a jury to find the facts as competently as could a judge? The question is important for research because it stimulates the researcher to inquire about pretrial proceedings and procedures in order to understand the trial itself. Solutions to some of the problems of complex, protracted trials, whether before a jury or the bench, can be found through examination of pretrial proceedings and procedures. In this limited sense, then, all trial complexity is managerial, and excess trial duration and undue complexity may be minimized by sound pretrial management.

It seems unlikely that such a bald form of this idea is strictly true. But it need not be true in order to be useful as a conjecture to organize our inquiry. We return to this point several times in discussing the replies of judges and lawyers to the interview questions.

Jury Competence and Case Complexity

The committee decided at the outset of its work that it would not undertake to express an opinion on the question of whether litigants are entitled to a jury trial under the Seventh Amendment in protracted and complex cases. This issue calls for a judicial determination, not a theoretical discussion. All the members of the committee are active judges who may be called on to rule on it, and, ultimately, the issue can be resolved definitively only by the Supreme Court.

We did not, therefore, undertake to conduct research into constitutional doctrine or legal history. Nevertheless, we feel that a brief review of what has gone before will assist in putting our research program into proper perspective. Our comments do not reflect the views of the committee or of the Board of the Federal Judicial Center; they are offered only to elucidate the unresolved doctrinal and empirical problems involved in considering jury competence and its relation to jury trial right in complex cases.

To begin, reference to the preservation of a jury trial right in the language of the Seventh Amendment has invited historical analysis. Scholars of international reputation have argued at length about the scope of English civil jury trial right during the seventeenth and eighteenth centuries, about what the amendment was intended to secure for the United States, and about how the civil jury trial right has been interpreted in the subsequent 190 years.[7] These have not been academic debates entered to satisfy esoteric interests. On the contrary, they have been fueled by the immediate interests of parties to some of the largest civil litigation in history—surely seventeenth-century English court records have never before been scrutinized for such thoroughly twentieth-century purposes. Major commercial interests have weighed in on either side of the issue.[8] Positions taken in historical interpretation appear to be

7. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 80 Colum. L. Rev. 43 (1980); Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation,* 128 U. Pa. L. Rev. 829 (1980) (this article contains a complete bibliography of the earlier literature); Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold,* 128 U. Pa. L. Rev. 965 (1980); Arnold, *A Modest Replication to a Lengthy Discourse,* 128 U. Pa. L. Rev. 986 (1980). The editor's notes to Lord Devlin's and Campbell and Le Poidevin's articles indicate that they were undertaken on behalf of IBM. Devlin's paper has been submitted by IBM in its briefs on appeal in several antitrust actions. Arnold's first article was commissioned by Zenith Radio in connection with its suit against Japanese electronics manufacturers, and was submitted by Zenith to the Court of Appeals for the Third Circuit in connection with that litigation. In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (1980).

8. Devlin's article, and the defense of it by Campbell and Le Poidevin, aims to convince that the historical record argues in favor of an exclusion of complex cases

related to the strategic considerations of advocates in particular circumstances of litigation—not a surprising connection, but one that, given the ambiguity of the historical record as a guide to policy, makes historical analysis even less satisfying than it might otherwise be as an objective method for resolving the jury trial question. *Clench v. Tomley* is a Chancery case, reported in 1603, over which advocates for and against jury trials continue to fight some of their battles.[9] The reach of *Clench* may exceed its grasp. The present research does not contribute to the arguments based on constitutional doctrine or history.

Putting history aside, and without attempting to evaluate the legal or constitutional arguments for and against the necessity of jury trial, a reasonable proposition seems to be that juries should not be assigned tasks they cannot fairly accomplish. As mentioned earlier, the first concern expressed by the Chief Justice in his 1979 address was about the strain on the ability of juries to find facts competently in the face of complicated technical and legal issues. If, in demonstrable fact, juries as normally constituted in United States courts are incompetent to find the facts in certain lawsuits, then their incompetence should be a sufficient rationale for avoiding jury trials in those suits. As the Court of Appeals for the Third Circuit noted in *Japanese Electronic Products,* important due process rights must be safeguarded:

> Given that a jury has both particular strengths and weaknesses in deciding complex cases, we cannot conclude *a priori* that a jury is capable of deciding a suit of any degree of complexity. A litigant might prove that a particular suit is too complex for a jury. Because of the important due process rights implicated, a litigant should have the opportunity to make that showing.[10]

The court went on to suggest standards by which a trial judge should assess whether the showing of complexity is sufficient to deny the jury trial:

> first, the overall size of the suit, the primary indicia of which are the estimated length of trial, the amount of evidence to be introduced and the number of issues that will require individual consideration; second, the conceptual difficulties in the legal issues

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from trial by lay juries, while Arnold claims that no such exemption can be read in seventeenth-century English law or in subsequent American practice. Devlin, *supra* note 7.

9. Clench v. Tomley (or Townley), Cary 23, 21 Eng. Rep. 13 (1603).

10. In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069, 1086 (1980). An earlier decision remanded the case to the district court. Then, on March 27, 1981, the district court entered summary judgment in favor of defendants. Plaintiff filed a notice of appeal on April 4, 1981.

> and the factual predicates to these issues, which are likely to be reflected in the amount of expert testimony to be submitted and the probable length and detail of jury instructions; and third, the difficulty of segregating distinct aspects of the case, as indicated by the number of separately disputed issues related to single transactions or items of proof.[11]

The court describes these measures as "fairly objective" yet possessing a "relative lack of precision."[12] They are offered to help trial judges, in advance of trial, to predict how complex a jury trial will be according to the showings of the parties. Each case can be evaluated on its individual merits, but, presumably, a series of cases accumulating over time provides further guidance to the trial judge in making the proper determination. Behind each of these decisions lies the assumption that a *particular* trial may be too complex for a jury and that examples of such trials are properly characterized according to the standard listed above. Yet in this process there is no direct examination of either the assumption or the standard. Is such an examination possible, and if so, what form should it take?

As to the assumption itself, is there reason to deny that some cases are too complex for a jury to determine fairly? The question is easier to ask than to answer. In dissent to the majority in *Japanese Electronic Products,* for example, Judge Gibbons contended that without a trial record, one cannot recognize a case that a judge could fairly decide but a jury could not:

> If the issue were properly ripe for decision I would be prepared to hold that I cannot conceive of a case in which what would be a separate claim for relief at common law, sufficiently comprehensible to a trial judge to satisfy due process, would be too complex for trial to a jury. There may be such a case, but it is inconceivable to me that it could be recognized as such in the absence of a trial record.
>
> . . . .
>
> In light, therefore, of the important functions served by the seventh amendment's protection of the right to a trial by jury, I would hold that there is no case in which properly separated claims for relief cognizable at common law would be so complex that trial by jury would amount to a violation of due process.[13]

It is significant that Judge Gibbons appends the possibility that such a case might be identified after the fact if the trial record were available, for this distinguishes the *a posteriori* identification

11. *Id.* at 1088-89.
12. *Id.*
13. *Id.* at 1092, 1093.

of key cases from their *a priori* identification from pretrial information. Except in an experimental setting, the accuracy of predictions of case complexity too great for jury comprehension can never be verified. It is also notable that Judge Gibbons's opinion is based on the comparative fact-finding abilities of judges and juries in "properly separated claims" because the contested jury trial right cases have often involved multiple districts or parties. With both of these qualifications, Judge Gibbons transforms the assumption that some civil trials are too complex for lay juries into the more difficult, yet plausible, assertion that it is practically impossible to predict, on the basis of pretrial information alone, that a trial will be beyond the fact-finding capabilities of a jury whose members have not yet been selected.

To understand the cases in which the jury trial right is likely to be contested, it is imperative to gain direct information about cases in which it might have been contested but was not, as well as about cases in which the right could have been asserted but was not. Information from these cases should be viewed in the light of problems arising in cases, equally long and perhaps equally difficult, in which there is no jury trial right, in order to gain a full comparative picture of all cases containing complex issues and likely to be lengthy at trial. One sound approach to this information is through interviews with experts possessing firsthand experience, namely, judges and lawyers who have participated in relevant cases. This is the rationale for the effort we expended to collect the interview data reported here.

The Burden of Jury Duty

As mentioned previously, the second concern expressed by the Chief Justice in his 1979 address was about the fairness of requiring citizens to serve for the duration of a long civil trial. In the extreme case, for example, the service might require over 200 trial days in a fourteen-month period; even in the more typical long trial, jurors might contribute more than 100 hours of duty in a one-month period. At what point does the duty of civil jury service become an unfair imposition?

The solution to the problem presented by this question depends on resolving two competing interests. First, there is the interest of the parties in the availability of jurors who can comprehend enough evidence and law to render a fair verdict. In trials of technically difficult issues, adequate comprehension may depend on certain minimum backgrounds of education or training. Second,

since these trials also tend to be longer than average (the most difficult cases are often the longest), the jurors, as well as being particularly qualified, should be prepared to serve for a relatively long period of time. Thus the demands on the jury may be double and, in combination, may require of qualified persons a greater sacrifice than society should request. The proper interests of qualified venire members are placed in competition with the proper interests of parties.

The court resolves the tensions between these interests by its policies on excuses from jury service. The proper policy in each case must avoid the extremes of unfair conscription and the de facto creation of a volunteer jury. The difficulty of the problem grows with the expected duration of the trial. Informal understanding of the problem is easily garnered from trial lawyers, judges, and other court personnel, but for purposes of policy formation and analysis, empirical information should supplement this anecdotal material. Jurors who have served in both long and short trials should be surveyed to learn what, if any, were the burdens of their jury service. Also, the demographic characteristics of jurors who have served in both long and short trials should be compared to determine whether length of service influences the representativeness of the community cross section from which the jurors come. We have already begun both of these research projects, and the results will appear in a subsequent report.

Although we have relied on the language of the Third Circuit's opinion to frame this introduction, it is not our intention to take a stance relative to the positions expressed by the court's decision or Judge Gibbons's dissent. Our purpose is to emphasize the difficulty of predicting whether a case will be too complex for a jury to decide, particularly because the lawyer or lawyers who have moved for the jury trial have a considerable portion of that complexity under their control. The assumption of the majority in *Japanese Electronic Products* that some suits may be beyond jury competence seems unassailable. Yet, given its qualifications, Judge Gibbons's dissent also seems eminently reasonable. Because both sides to the argument rest heavily on empirical assumptions (as distinct from the district court's holding in *Japanese Electronic Products*, in which it explicitly ignored consideration of the complexity of the instant case in reaching its conclusions),[14] we should attempt to specify the information that might be useful for further clarifica-

14. "We have concluded, therefore, that the complexity of the case before us is not a constitutionally permissible reason for striking the plaintiffs' jury demands." Zenith Radio Corp. v. Matsushita Electric Industrial Co., 478 F. Supp. 889, 942 (1979).

tion and resolution of the issues. The information required by individual courts bears primarily on the case at hand; information about cases in general is secondary to the court's consideration, except insofar as the instant case is seen as covered by a rule applicable to all cases of its type, where the type has previously been identified as meeting, or failing to meet, the standard for jury trial denial. The committee, on the other hand, needs a set of relatively general principles to develop its policy alternatives.

The committee should have before it clear descriptions of the nature and number of complex civil trials in district courts. But this material must be presented in a way that allows important questions to be addressed rather than begged. We therefore explore the development of a quantitative analysis of complexity that a judge might find useful when applying the guidelines suggested by the Third Circuit for the determination of a case too complex for jury trial. This is, of course, a difficult task, for reasons that were clear at the outset of our research and for others that emerged as we collected and collated our interviews with judges and lawyers. Chapter eleven of this report presents the results of our analyses to date. The reader may have some difficulty with that chapter, even after our best efforts to clarify the analyses. The difficulty is, in part, inherent in the material and hence unavoidable. It is also due, in part, to the preliminary and somewhat tentative nature of our approaches, which are based on work in progress.

We, as well as the committee, have been aware from the outset of this work that there is no valid substitute for the candid expressions of experts speaking to a matter of mutual concern. The committee's interest in learning of the practices and opinions of judges and lawyers who have participated in long civil trials prompted the interviews that make up the bulk of this report. It is to those interviews that we now turn.

II. THE CASES AND THE INTERVIEWS

Selection of Persons to Be Interviewed

The original research design planned for interviews of judges and lawyers who had participated in twenty long civil trials. The trials were selected to be representative of the 159 civil trials terminating in federal district court, after twenty trial days or more, during fiscal 1977, 1978, and 1979. The original list of twenty was chosen from among the longest of these trials and was consistent with the goal to match the whole population in regard to case type, geographical distribution, and proportion of jury trials.

One of the ground rules guiding the research was to obtain permission from all prospective interviewees to conduct an interview if the case in question was still active in any court. Rather late in the series of interviews, lawyers in two cases denied permission to proceed, leaving us with eighteen cases. A third case had to be dropped when it was discovered that it had been entered incorrectly in the Administrative Office data.[15]

In each of the remaining seventeen cases, at least two lawyers from opposing sides provided interviews. Lawyers from opposing sides were always interviewed separately. Single interviews often included two or three members of the team that had represented a client during pretrial and trial work. Although lawyers usually agreed among themselves in a single interview, there were exceptions, and we tried to keep track of these. In general, however, results are reported on the basis of the interview as a single unit of information or analysis. When there were multiple parties to a case, we attempted to reach lead or liaison counsel first. If unsuccessful, we contacted other counsel active in the case until at least one interview from each side had been completed. In two cases, the interviewed lawyers had represented either a third-party defendant or an intervening plaintiff.

One judge had presided in two of these seventeen trials; he was interviewed for both. Four other presiding judges were unavailable

15. *See* note 1 *supra.*

for interview: Two had died since the case was terminated in district court, and two declined to be interviewed.

In addition to serving as the focus of the judge and lawyer interviews, the seventeen cases provided a basis for research on the usefulness of court docket sheets as records of case complexity. Some results of the docket analyses are presented later in this chapter.

The case-based interview sample was supplemented by interviews with four additional judges whose experiences with five more protracted trials were particularly valuable for this research. Table 1 summarizes the number of cases, interviews, judges and lawyers interviewed, and dockets analyzed in the present research.

TABLE 1
Number of Cases, Interviews, Interviewees, and Dockets Included in the Research

Cases	Judge Interviews/ Judges	Lawyer Interviews/ Lawyers	Dockets Analyzed
13	13/12	31/44	13
4	0	8/ 8	4
5	5/ 4	0	0
22	18/16	39/52	17

In total, then, the study comprises fifty-seven interviews with sixty-eight federal judges and lawyers, focusing on their experiences with twenty-two instances of major civil litigation.

The Promise of Anonymity

A major goal of the interviews was to solicit candid responses about the management of cases that, by any standard, are among the largest, longest, and most expensive in the history of United States courts. The stakes for the parties, their lawyers, and the courts have been enormous, whether measured in dollars, as in an antitrust case, in social consequence, as in a school desegregation case, or in use of scarce judicial resources. Naturally, the judges and lawyers we interviewed became deeply invested in the process of this research and its outcomes; their feelings often ran high, and their opinions continue to be strongly held. To allow these sensitive matters to surface and be explored, we decided, after consultation with the committee, to promise all persons interviewed freedom from recognizable attribution of any of their statements. The respondents were free to express themselves without being concerned

that their comments might subsequently be attributed to them in some way or context not of their liking.

Characteristics of the Seventeen Main Cases

Seven of the main cases were jury trials and ten were bench trials. Four of the jury trials were antitrust cases, two were civil fraud, and one was a contract dispute. Four of the bench trials included claims for which jury trial was available: One was an antitrust case, two were diversity contract disputes, and one was a tort case. Bench trials were obligatory in the remaining six cases: One was in admiralty, three involved civil rights claims for equitable relief, one presented an environmental pollution dispute, and one was a multiparty patent interference action.

Some basic quantitative characteristics of the cases are presented in tables 2 and 3, which describe jury and bench trials separately. Four time measurements are included for each case:

1. Time, in months, from the filing of the complaint to the opening of discovery, defined as the date on which the first discovery event was noted on the docket sheet

2. Time, in months, from the opening of discovery to the first day of trial (usually obvious from the docket sheet, but not always; in one case, the docket did not record the opening day of trial, and the date was determined from newspaper reports)

3. A measure of trial time, in days, obtained from Administrative Office data,[16] which, in turn, are based on form JS-10 filings of judges' reported time on the bench (this measure excludes judicial time taken to prepare findings, conclusions, judgments, or orders, as well as the duration of jury deliberations)

4. A measure of trial time, in months, calculated from docket sheets, that includes the time from the first day of trial to the entry of judgment.

The tables also contain two indicators of the discovery activity in each case: the number of depositions and number of motions to compel discovery, both collected from the docket.

16. *See* note 1 *supra.*

Two additional measures related to the pace of trial, not included in these tables, figure in later discussion: (1) trial days per month, which can be used generally to calculate the influence of recesses and other "down time" on rates of trial disposition and is used specifically in this chapter to compare bench trials with jury trials and (2) trial hours (with the same exclusions as trial days), which can be juxtaposed to measures of trial days to compare average length of trial days for bench and jury trials. This comparison is made for national trial statistics in chapter eleven.

TABLE 2
Four Measures of Duration (in months) and Two Measures of Discovery Activity for Jury Trials

	Duration				Discovery	
Case Type	Complaint Filing to Discovery Opening	Discovery Opening to First Trial Day	Judge's Reported Time on Bench (Days)	Complaint Filing to Judgment Entry	Depositions*	Motions to Compel Discovery
Antitrust	1.0	36.5	3.0 (54)	40.5	573	5
Antitrust	0	54.5	12.0 (135)	66.5	82[a] (3)	13
Antitrust	0	47.0	18.0 (226)	65.0	347 (60)	38
Antitrust	3.0	46.0[a]	8.0[a] (98)	57.0[a]	89 (15)	8[a]
Fraud	2.5	36.0	5.0 (42)	43.5	42	11
Fraud	1.5[a]	58.5	9.5 (111)	69.5	44 (1)	5
Contract	2.0	35.0	2.0 (40)	39.0	29	2

*When the number of depositions noticed is different from the number filed, the latter is given in parentheses.
[a]Median entry for the column.

Note that the small number of cases studied, and the means by which the cases were selected, does not permit valid inferences to be drawn about larger populations of long bench and jury trials or about differences between them. All these cases are extreme; they come to our attention precisely because they are not representative of the entire population of trials.

With this caveat, we offer these observations for their possible heuristic value: (1) The median total time from filing a complaint to the entering of judgment does not appear to differ markedly between the two kinds of cases. (2) Jury and bench trials are preceded by large amounts of discovery, but there is remarkable variation for both kinds of trials (which is also present for other discovery events as well). (3) The most obvious difference between the seven jury and the ten bench trials is the density of trial activity as

measured in trial days per trial month. The densities are shown below, arranged from least to greatest.

Jury Trials in Days per Month: 8.4, 11.3, 11.7, 12.3, 12.6, 18.0, 20.0.

Bench Trials in Days per Month: 1.6, 2.8, 4.7, 4.9, 5.3, 5.4, 7.3, 8.9, 9.5, 19.0.

On the average, jury trials occupy approximately twice as many days per trial month as do bench trials. The reader may recall that the measure of days excludes the durations of judicial or jury deliberations, while the measure of months includes them. The extremely low densities in the bench trials, therefore, reflect very long judicial deliberation times as well as, or instead of, relatively low densities of days per month of testimony and argument.

How should the obvious difference between jury and bench trials be interpreted? To begin, it is the first indication of an important point that will arise several times in this report, namely, *there are many more differences between bench and jury trials than the finder of fact.* Jury trials impose a discipline of timing that is absent from bench trials, which are more easily scheduled to meet the other needs of judges and lawyers. The relatively greater flexibility of bench trial scheduling may allow more settlement negotiation between parties. Further, judges and lawyers can more easily attend to the press of other business. The discipline of jury trial scheduling may, however, move a trial to disposition in less elapsed

TABLE 3
Four Measures of Duration (in months) and Two Measures of Discovery Activity for Bench Trials

	Duration				Discovery	
Case Type	Complaint Filing to Discovery Opening	Discovery Opening to First Trial Day	Judge's Reported Time on Bench (Days)	Complaint Filing to Judgment Entry	Depositions	Motions to Compel Discovery
Antitrust	0.5	36.0	7.5 (40)	44.0	15	4
Contract	1.0	29.0	5.0 (95)	35.0	551	37
Contract	2.0[a]	33.5	8.0 (76)	43.5	75	10[a]
Tort	11.0	57.0	9.5[a] (69)[a]	77.5	217	16
Admiralty	2.0[a]	27.0	12.0 (65)[a]	41.0	41[a]	12[a]
Civil rights	5.0	37.0[a]	20.0 (93)	62.0[a]	57	21
Civil rights	1.5	36.5[a]	6.5 (58)	44.5[a]	16	15
Civil rights	4.0	64.0	30.0 (48)	98.5	29	6
Environment	2.0[a]	54.0	10.5[a] (51)	66.5	30[a]	5
Patent	0.5	67.5	29.0 (82)	97.0	11	6

[a]These values surround the median value for the column.

time than would have been taken had "the same case" been tried to the bench (the quotations express the awareness that lawyers organize bench and jury trials differently). This possibility leads to the second interpretive point, namely, *bench and jury trials may produce different economies of time, and the comparative net benefits to all concerned parties are not easily determined.*

Allocation of Time within the Trial

The first question in the interviews asked about the time taken to proceed through each phase of the trial. The purpose of this question was to determine the portions of the trials in which protraction was most likely.

Jury Trials

The voir dire examinations and challenges were always accomplished rapidly, that is, within a day or two. This was somewhat surprising given the stakes in the cases and given that jurors were being asked to serve for an extended period. In one case, the judge mentioned that he had planned specifically for the long trial by making a special announcement in the juror summons alerting venire persons that they were being called for an extraordinary case. The panel that finally arrived in the courtroom on the first day of trial did not include the numerous jurors who had already requested excuse. The judge stated further that he also excused, without further inquiry, panel members who requested excuse on the grounds that serving for an extended period would impose a hardship on them. Other judges, and lawyers, reported similar practices. The theories of jury selection practiced in these trials are explored further in chapter seven. The primary points to be made here are that voir dire and challenges did not contribute significantly to trial durations and that judges excused venire persons liberally on grounds of hardship of extended duty.

Opening statements by each party were not reported as lengthy. In one jury trial comprising a large number of parties, there was some consolidation of opening statements. In all cases, opening statements were concluded within three days.

Without exception, the bulk of trial time was devoted to the presentation of testimony, whether in person or by depositions. The use of depositions varied greatly. In one case, for example, plaintiff read depositions in open court for two months; in another, almost all the testimony was presented in person. Expert witnesses were particularly important in the antitrust cases, and their testimony

was usually subjected to intense and lengthy cross-examination. Defense lawyers in several cases noted that they were able to set forth some of their major points during cross-examination and thereby take less time during their own presentations. Two judges reported placing absolute limitations on the time allowed each side for its presentations.

Relative to direct examinations and cross-examinations, closing arguments were brief. One judge's decision to allow the jury to have copies of the closing arguments during deliberations led lawyers to compose more complete and detailed written arguments than they might otherwise have done. This practice is discussed further in chapter seven.

Bench Trials

Bench trials proceeded less formally than jury trials. Entering depositions on the trial record was a major potential contributor to trial duration; judges responded to this problem in several different ways. Some read depositions and other documents in chambers or at home. One judge, a speed-reader, read depositions on the bench. In another, relatively unusual instance, lawyers refused the judge's offer to read depositions in the evenings and insisted on reading them into the record during open court. The judge agreed and scheduled these sessions for Sunday afternoons.

Opening statements and closing arguments were less formally presented in bench trials than in jury trials, and colloquy between judges and lawyers was more frequent and intense. Of course, these and other differences between bench and jury trials are not limited to the long or complex case. But when these differences are taken in combination with the opportunities for intermittent trial day scheduling and posttrial examination of the record in bench trials, they again point to the conclusion that the bench trial is, or can be, markedly different from the jury trial as a form of inquiry. When policymakers question the relative competencies of judges and juries as fact finders, they should take into account all the differences between bench and jury trials.

III. THE QUANTITY AND QUALITY OF EVIDENCE AT TRIAL

Judges and lawyers responded to these two questions about the facts at issue in their cases:

Were difficult economic or scientific facts at issue in the trial? If yes, would you provide an example of one of the difficult facts at issue?

Was the trial made complicated by the need to introduce large amounts of information or data as evidence? If yes, please elaborate.

The purpose of these questions was to distinguish disputed facts that are conceptually difficult for the nonspecialist from disputed facts made difficult by the bulk of evidentiary material required to establish them. Both kinds of disputed facts are contributors to complexity, and the second contributes particularly to extended trial duration and increased risk of protraction.

Table 4 presents judges' and lawyers' responses to the first question. The interviews revealed agreement among respondents in ten out of seventeen cases. In nine of these, all agreed that difficult scientific or economic facts had been at issue, and in one, all agreed that there had been no such difficult facts. There was also agreement on what kinds of facts were difficult in each trial, whether they were facts of physical science and engineering (five cases), of business and accounting (four cases), or of social science and statistical methodology (one case). This point is important because in several cases difficult scientific and commercial facts were potentially triable, but the lawyers chose, as a trial tactic, to concentrate on the commercial matters and avoid the scientific issues.

The one trial that all respondents agreed was without difficult facts was an antitrust case involving forty-two lawyers representing numerous parties and tried to the bench in forty trial days. The duration of the trial was occasioned by the large number of witnesses as well as the large amount of deposition testimony read into the record. Although this case establishes that there may be long trials about relatively simple facts, it stands alone among the seventeen cases about which lawyers and judges were interviewed. Of the five cases described by the four additional judges, four con-

TABLE 4
Were There Difficult Facts at Trial?
Judges' and Lawyers' Responses

Type of Trial	Cases of Agreement		Cases of Disagreement	Total
	Yes	*No*		
Bench	8	0	2	10
Jury	1	1	5	7
Total	9	1	7	17

NOTE: Agreement is defined as a case in which all participants in a group responded either "yes" or "no"; disagreement is defined as a case in which the participants in a group disagreed among themselves as to the answer.

tained numerous difficult facts. We do not know what the lawyers in those cases would have reported.

Respondents disagreed among themselves about the difficulty of the facts in seven cases. Several points about these disagreements are particularly worth noting. First, five of the seven disputed cases were jury trials. Thus, approximately 70 percent (5/7) of the jury trials generated disagreement about the difficulty of the disputed facts, while only 20 percent (2/10) of the bench trials did so. Moreover, of the five disputed jury cases, plaintiff's lawyer denied the existence of difficult factual issues in four but defense counsel in only one. And finally, when judges disagreed with lawyers, the judges invariably said the facts were difficult. Together, these points lead to the tentative generalization that plaintiff's lawyers deny the relative complexity of facts for jury trials in the face of disagreements from defense counsel and the bench. The generalization is particularly apt for antitrust cases and stems from the kind of case plaintiff is likely to present to the jury. This point is raised again in chapter six, in the discussion of factors contributing to lawyers' requesting jury trials.

Almost all interviewees agreed, in response to our second question, that complications at trial resulted from the presentation of voluminous evidence. Indeed, it is the sheer bulk of testimony that defines these cases most clearly. The discussion in chapter two showed that evidentiary presentations and cross-examinations, whether in person or by deposition, are the major contributors to trial duration. Responses to the second question reinforce that description and extend it with virtually unanimous assertions that long trials are hard trials, in important part just because of the amount of material that the fact finder must grasp and examine. And the difficulties are compounded when the testimony demands specialized knowledge for full comprehension.

Four lawyers from four separate cases expressed various forms of disagreement on this question, however. In the first case, the lawyer said that there were no complications in the trial because the case had been thoroughly pretried and because there were no arguments about document admissibility at trial. His opponent and the judge, in contrast, stated that the relatively large number of plaintiffs, and the need for each to establish a slightly different case, created a complex fact pattern. Thus, the disagreement among respondents arose from a concentration on different aspects of the process of getting evidence admitted into the trial.

In the second case, the disagreement revolved around the strategy of defense counsel to challenge plaintiff's transformations of defendant's records into a computerized data base. Not surprisingly in this context, defense counsel denied any complications stemming from the challenge, while plaintiff's counsel complained that the challenge had made the trial unnecessarily complicated. The judge remarked that the lawyers were very contentious at trial, adding that this contributed significantly to trial duration.

Differences of opinion about the third case seemed to be merely semantic. The lawyers agreed about what had happened in the trial and were not unduly contentious, disagreeing only about the appropriate threshold standard for establishing factual complexity.

In the fourth case of disagreement, the judge and two of the three lawyers interviewed referred to the large number of depositions and witnesses, and the communications among defendants over a period of years, as complicating factors. The third lawyer, not disputing the amount of material, stated that the lack of contentiousness over the admissibility of these materials created a trial situation of relative simplicity. As in the third case, the disagreement appeared to come from differing thresholds for labeling trial events as complicated.

All four additional judges interviewed stated that their trials had been complicated by the amounts of evidence introduced.

In summary, the hallmark of long civil trials is the presentation of massive amounts of evidence concerning facts that are usually, but not always, relatively specialized or difficult. Disagreement about the difficulty of the facts is more likely when the case has been tried before a jury. Cooperation among lawyers is seen as simplifying the trial, while contentiousness is perceived as a complicating and protracting factor.

IV. THE DIFFICULTY OF THE LEGAL ISSUES

Judges and lawyers responded to these two questions about the legal issues in their cases:

Were difficult or complex legal issues at stake in the case? Can you provide an example?

Was the complexity or duration of the case increased by problems arising from applying the law to the facts at issue? Please provide examples.

The first question was a complement to the previous question on the difficulty of the facts at issue in the trial. The second question was intended to probe the difficulties involved in applying various legal standards to complicated or highly technical facts. In some cases this question was not a useful one, while in others it occasioned interesting responses. The answers to both questions are summarized together in the following discussion.

As was true for judgments about the presence of difficult facts, the respondents did not always agree about the presence of difficult legal issues. There was complete agreement among all respondents in nine of the seventeen cases (compared with ten cases of agreement in response to the question about difficult facts). In eight of these nine cases, respondents agreed on the existence of difficult legal issues, and in the ninth they agreed there had been none. Seven of the nine were bench trials and two were jury trials. These findings are summarized in table 5.

Some of the issues unanimously agreed upon as difficult are listed below:

1. Applicability of contract red-letter clause
2. Subcontractor's responsibility to perform beyond contract specification to achieve product safety
3. Choice of governing law in a contract dispute under diversity jurisdiction
4. Liability of successor owners for tort claims against a corporation
5. Preemption of federal common law by subsequent federal statute

6. Relevance of international or foreign national law to dispute among American corporations
7. The constitutional standard for a civil rights violation
8. Burden of proof under Title VII of the 1964 Civil Rights Act
9. Requirements for successful claims under the Federal Tort Claims Act.

Apparent disagreement about the presence of difficult legal issues arose in five jury trials and three bench trials. Because several kinds of difficult legal issues can be distinguished, respondents from a single case may not have been attending to the same issues. In a jury trial, for example, a judge may need to rule on a close or ambiguous question of law; however, once the issue is decided, the jury can use the judge's ruling without difficulty. In other instances, the judge may disagree with one or more lawyers that a question needs to be resolved. From the lawyer's perspective, the judge's refusal to rule forces the jury to work with difficult, ambiguous legal language, which protracts and reduces the quality of its deliberations.

TABLE 5
Were There Difficult Legal Issues at Trial?
Judges' and Lawyers' Responses

Type of Trial	Cases of Agreement		Cases of Disagreement	Total
	Yes	*No*		
Bench	7	0	3	10
Jury	1	1	5	7
Total	8	1	8	17

NOTE: Agreement is defined as a case in which all participants in a group responded either "yes" or "no"; disagreement is defined as a case in which the participants in a group disagreed among themselves as to the answer.

Almost without exception, respondents who acknowledged the existence of difficult issues in their jury trials also mentioned explicitly that the jury had made the correct decision or that the jury had had no difficulty applying the legal standards to the facts. One notable exception was a judge who directed a verdict for the defendant at the conclusion of the plaintiff's case. For no jury trial did a judge answer either of the two questions to suggest that his instructions had been insufficient to clarify difficult legal issues for the jury. This finding is hardly surprising, for one expects judges to be confident in the adequacy of their instructions. But it does emphasize that for judges, a "difficult legal issue" contains two sources of difficulty: first, whether a particular decision raises close

questions of legal interpretation; and second, whether the judge can correctly communicate the law to the jury. These two sources of difficulty can arise separately or together, and the judge is vulnerable to reversible error in both instances. Lawyers, in contrast, may approach the legal issues from their adversary positions and thus face a less complicated task than the judge faces.

Of the four additional judges interviewed, only one affirmed the existence of difficult legal issues for the case he chose to discuss; this judge referred to problems of defining the meanings of "scienter" and "established accounting practice" for a jury charged with deciding the liability of an accounting firm for the losses of investors who had relied on the firm's reports. We do not know how the lawyers in any of these cases would have responded.

V. MANAGING THE LITIGATION BEFORE TRIAL

The Manual for Complex Litigation

Judges and lawyers were asked several questions about the techniques employed or recommended by the court to manage the litigation before and during trial. One question concerned the *Manual for Complex Litigation.*

Judges were asked, *Did you recommend or require counsel to obtain a copy of the Manual for Complex Litigation? Did you use it yourself?*

Lawyers were asked, *Did you rely on the Manual for Complex Litigation in preparing your case? Please comment.*

Of the seventeen judges interviewed, three stated that they had relied on and explicitly recommended adherence to at least some of the pretrial procedures discussed in the *Manual.* Eight judges responded with what is reasonably characterized as a "No, but . . ." response. Two examples of this form of response are "No, but I should probably have used some of the ideas more; I probably did some of the same things anyway" and "No, but I used the ideas without stating them in terms of the *Manual.* The lawyers may not have noticed the connection."[17] The six remaining judges stated that they had not used the *Manual* and, with one exception, explained why. Their comments are described below:

Judge 1 remarked, "Complex cases are not special. [I am] not a supporter of the *Manual.*"

Judge 2 stated, "I thought about it and decided against it. I needed to get a lot of stuff on the record."

Judge 3 explained that he had used the *Manual* as a general reference but that the parties had been so cooperative during discovery that strict adherence to the *Manual* had been unnecessary.

Judge 4 said that the case was simple and did not require use of the *Manual.*

17. None of the interviews were tape-recorded; quotations are based on written notes only.

Judge 5 responded only that he did not use the *Manual* very often.

Judge 6 had not pretried the case and implied that he would not have used it anyway, based on his belief that "rigid adherence" to the *Manual* produces an overelaboration of pretrial work and "may guarantee a complex case."

In ten of the thirty-nine interviews, lawyers said they had used the *Manual* during the case, in eight they gave "No, but . . ." responses of various sorts, and in twenty-one they stated they had not used the *Manual.*

Some of the lawyers' comments are particularly interesting in light of what the judge in each case reported about use of the *Manual.* The attorneys interviewed in one case said they had used the *Manual* and had found it helpful, while the judge said he had not used it. This discrepancy reflects what was apparently a "hands-off" approach to discovery and other pretrial management by the judge. These attorneys, aided in part by a magistrate appointed to oversee pretrial activity, relied on some of the procedures recommended in the *Manual,* in particular the development of pretrial briefs (section 3.30), the stipulation of facts (section 3.60), and the procedure for designating depositions (section 4.21).[18] Further comments by the attorneys about the judge's availability during pretrial activity (a topic discussed again in chapter nine) revealed considerable differences of opinion about the effectiveness of the judge's laissez-faire style.

In a second case, a judge who denied the usefulness of the *Manual* was criticized by one of the lawyers for not having used it. This lawyer maintained that the motions practice and discovery would have been substantially improved had the judge followed the *Manual*'s recommendations. When the lawyer had suggested this to the judge early in the case, the judge had rejected the recommendation, maintaining that the case was in fact simple. The opposing attorney seemed to agree with the judge, but perhaps for different reasons, when he asserted that the *Manual* would have been inappropriate for this case because the case did not have multiple parties.

It is worth noting that the attorney requesting use of the *Manual* in this case represented the defense. Another attorney remarked that the *Manual* is "a defendant's tool" and that its recommendations, particularly what he described as an "insistence on formal waves of discovery," inevitably slow the pace of litigation, thus benefiting the defense at the expense of the plaintiff. This ad-

18. None of the lawyers made explicit reference to *Manual* section numbers; we include them as guides to what section the attorneys were apparently discussing.

vantage is particularly great when the defense is a corporation or other large organization sued by an individual or other relatively small party. Since this opinion was expressed relatively late in the interviewing schedule, we did not have the opportunity to determine how many other advocates would have agreed with it. No consistent difference was found between plaintiff's lawyers and defendant's lawyers in regard to general opinions expressed about the *Manual.* Another defense lawyer commented that the *Manual*'s greatest value is as a "club" that the judge can use to impel greater cooperation between otherwise extremely adversary lawyers. In general, lawyers' opinions about the value of the *Manual* ranged widely on both sides of the bar, with the strongest positive and strongest negative comments coming from lawyers representing plaintiffs in the cases under consideration. In only one case did the two lawyers involved report that they had specifically been required to follow provisions in the *Manual.* Both believed that use of the *Manual* had been counterproductive, and both were definite that their multivolume offers of proof (section 4.20) had been a "complete waste of time" because they were never again referred to or otherwise used in any way. Unfortunately, the judge in the case was unavailable for interview.

The question about the *Manual* elicited as many strongly worded responses, both positive and negative, as did any other single topic. Putting aside the extreme responses, and accepting the remainder without analysis as to the form in which they were made, there were fairly frequent middle-of-the-road responses that credited the *Manual*'s spirit, intent, and general thrust without embracing its specific recommendations.

Other Pretrial Management Questions

In addition to the query about the *Manual,* lawyers were asked to specify methods that had been used to shorten the duration of the trial. In particular, they were asked to comment on the use of stipulations of facts and documents; pretrial resolution of evidentiary issues; agreements on the order, nature, or quantum of proof; limitations on the amount, duration, and nature of evidence; and court-appointed experts to enhance the fact finder's understanding of specialized facts or claims. Although the substance of these methods is included in the recommendations of the *Manual,* these questions were not redundant because the form in which they were asked tended to elicit more detailed responses about judicial man-

agement techniques and the effect of contentiousness between parties on the conduct of pretrial and trial activities.

As might be expected from cases dissimilar in so many ways, no single picture of management technique emerged. There was elaborate pretrial preparation in a few cases, including the development of numbered facts, agreed upon in advance, that could be admitted without objection at any point in the trial. A more common occurrence, however, was pretrial agreement on admission of documents or depositions. In a case that included elected and appointed officials as parties, the judge was sensitive to the political importance of allowing a full statement of positions, including the reading of depositions into the record. As a result, he made no particular effort to speed this part of the trial. In three cases, attorneys on both sides complained, with varying degrees of intensity, about the opposing side's refusal to cooperate in achieving pretrial agreements about documents and depositions. It was in this context that comments about adversary contentiousness emerged most often.

Jury trials presented additional problems of management. Attorneys were very sensitive to the problem of achieving a balance between boring jurors by presenting too much material and misinforming them by presenting too little. As is discussed further in chapter six, some attorneys believed that jury trials of very large suits motivate the advocate to hone the case for most effective presentation and thereby save time—this, however, was a minority view.

The appointment of an expert by the court, under Federal Rule of Evidence 706, was a rarity among these cases, even when substantially technical matters were at issue. In one of the two cases in which an expert was appointed, one lawyer explicitly complained to us about the expert's qualifications, claiming that the expert did not in fact know enough about the field in question to serve the required role for the court. Several lawyers based their comments about court-appointed experts on general opinion or experience in other cases. One lawyer in particular was quite firm in the view that experts are "a terrible idea" for trials pertaining to an industry that has been dominated by one major corporation because virtually everyone in the field has been trained either to accept the dominant approach to practice in that field or to reject it in favor of some competitive view. In other words, according to the lawyer, in this area there are no neutral experts.

Masters appointed under Federal Rule of Civil Procedure 53 were more common than were court-appointed experts. The masters were most often brought in before trial as settlement officers.

In summary, the use of expediting procedures seems to hinge on the willingness of parties to cooperate and of the court to become sufficiently involved before trial to facilitate parties' efforts. When there is sufficient interest all around in saving time, the details of procedure do not seem to impede the trial. In the face of hostility between parties or steadfast determination by the court not to involve itself in pretrial activities, the details of procedure cannot, by themselves, create a climate conducive to expedited trial practice.

Instructional Aids

These questions about instructional aids were put to the judges: *Would you find it practical and valuable to require counsel to view an instructional video cassette on the handling of protracted trials early in the trial preparation stages? Would you welcome such materials? Would similar materials be useful for instruction about the trial itself? If a similar video cassette directed primarily at the education of judges were available, would you take advantage of it?*

Judges' opinions varied on this matter. In regard to asking lawyers to watch a videotape, slightly less than half the judges believed it would be useful or appropriate. The judges who objected to the idea did so on one or more of these grounds: (1) Continuing education for lawyers is the responsibility and prerogative of the bar; the court should not engage in it. (2) If useful at all, such a tape would serve only the least experienced lawyers. (3) The educational material would be of no use in the bitterly contested litigation that produces protracted trials. (4) Current materials, the *Manual for Complex Litigation* in particular, are sufficient. (5) There is a need for more education, but video is an inappropriate medium for it.

In regard to the usefulness of a videotape for themselves, the judges seemed somewhat more positively disposed. It was difficult for us to discern the extent to which judicial skepticism about the usefulness of instructional material was conditioned by its packaging in the video format; in several instances judges' negative reaction seemed directed more at the medium than at the message.

VI. SELECTING THE FINDER OF FACT

Lawyers and judges were asked to review their decisions about the choice of jury trial. Lawyers were asked whether they had discussed available alternatives with their clients and the judge and whether the complexity of the case, and the likely length of the trial, figured in their decisions. All attorneys responded to this question except one, who declined because of an appeal pending in the case. When time permitted, all interviewees were encouraged to comment more generally on how decisions about jury trial are made.

The Seven Jury Trials

Case 1

The plaintiff filed for jury trial immediately upon learning of the assigned judge's identity. Plaintiff's lawyer, who believed the judge would favor the defendant, said that had he drawn another judge (he named two in the district), he would not have requested a jury. The defense attorney said he would have been satisfied with a bench trial. (A motion to strike the jury request was denied.) He noted that in state court systems which retain master calendars, a party is wise to request jury trial to ensure having that option if the trial judge is not satisfactory as the fact finder. This attorney prefers bench trials when his case is strong and jury trials when his case is weak. The judge offered no opinion on the rationale for the choice of jury trial in this case.

Case 2

The defense requested jury trial, and two of the defense lawyers emphasized different reasons for the choice. One stressed the identity of the judge, saying that the judge might not be sympathetic to his client. The other, in a separate interview, emphasized the tactical advantage he believed his client would have with a jury because of the nature of the issue involved (fair competition) and the client's good public image. Plaintiff's lawyer said that he had wanted a bench trial because he believed he had the stronger case.

This lawyer indicated a fairly straightforward preference for bench trials when his cases are strong and for jury trials when they are weak. He apparently determines the relative strength or weakness of a case by reference to both the facts involved and the legal positions available for the case. This lawyer also expressed the opinions that juries tend to award more damage money than do judges and that the unanimity requirement (unless parties stipulate otherwise) for jury decisions in federal civil trials makes jury trials relatively attractive for defendants. The judge in this case remarked that the defense had chosen jury trial to increase the likelihood that the judge would commit reversible error.

Case 3

The defense opted for jury trial, but declined to discuss the reasons. Plaintiff's attorney, who would have preferred a bench trial, reasoned that defendant had requested a jury in order to capitalize on its good reputation and the public sympathy for its position. The judge in the case offered three speculative reasons for the defendant's choice: First, defendant may have believed a jury would be very responsive to the free-enterprise kind of case defendant would present. Second, perhaps defendant was concerned that the judge would be disposed to the plaintiff. The judge was relatively new to the bench when the case began and had no track record on which the parties could base any estimates of his predispositions. Third, the defense may have preferred a jury trial because of the greater probability of reversible error in the judge's instructions to the jury resulting from the complexity of the case. (See the section on scope of review later in this chapter for further discussion of the relative likelihood of error in bench and jury trials.)

Case 4

Plaintiff's counsel opted for jury trial primarily because he believed the assigned judge was predisposed in favor of the defense. His choice was reinforced by the judge's rulings during pretrial proceedings. The lawyer was not specific as to how he had come to form his initial opinion of the judge. Defense counsel had considered filing a motion to deny the jury trial, but decided against it on the grounds that the judges in the district to which the case had been assigned would not grant the motion and that the client did not wish to pursue an appeal. The judge declined to be interviewed.

Case 5

Plaintiffs' lawyers chose jury trial for two independent, but equally important, reasons. First, they believed the judge was predisposed in favor of the defendant. Second, they believed their clients would present favorable public images to the jury. Counsel for the primary defendant was unavailable for interview. But the attorney for a third-party defendant, most of whose clients are financial institutions, suggested that commercial banks in particular have a difficult time gaining sympathy from juries because "no juror ever gets good news from his bank." This lawyer expressed a general "big guy vs. little guy" theory about jury trials, indicating that juries tend to favor the apparently smaller party over the larger one. The judge, indicating he did not know how plaintiffs had reached the decision of jury trial, speculated that the favorable public images of some of the plaintiffs may have been a factor, consonant with the second reason given by plaintiffs' lawyers.

Case 6

In this case, one of several third-party defendants requested jury trial over the objections of plaintiff and primary defendant. Plaintiff's lawyers reported that subsequent efforts failed to separate this third-party defendant from the others; as one lawyer put it, "everyone was saddled" with the jury trial. Defense counsel, initially opposed to a jury on the tactical ground that his client would not be attractive to a jury, changed his mind as a result of the trial's outcome and indicated he would be more likely to request juries in the future. The judge speculated that the third-party defendant had opted for the jury on the theory that the jury would be more likely than the judge to limit liability and to become confused by the evidence, both of which would benefit the defendant.

Case 7

This case was the only one in which both parties actively chose jury trial. Plaintiff opted for jury trial because he had greater confidence in the favorable outcome of such a trial. He stated, "Judges are so opinionated that juries resolve [cases] in less biased fashion." Defense counsel preferred jury trial for the tactical reason that in the district in question civil juries comprise twelve persons. The lawyer believed that the jury size and unanimity requirement gave the defense an advantage. He also stated that he preferred a jury to the particular judge sitting in this case. The judge declined to be interviewed.

The Four Optional Bench Trials

Case 1

A single plaintiff brought suit against six major corporate defendants, charging them with violations of the Sherman Antitrust and Wilson Tariff Acts. More than forty attorneys represented the parties throughout the litigation, and no one filed for a jury trial. Plaintiff's attorney stated that a jury could have understood the facts without undue difficulty but that two factors contributed to plaintiff's decision to opt for bench trial. First, plaintiff and counsel considered the judge to be fair and effective. Second, counsel was concerned that the plaintiff's witnesses would not be attractive before a jury. An attorney for one defendant stated that he had desired a jury trial but did not push for it because lawyers for other defendants believed their clients had relatively poor public images that would work against them in front of a jury. The lawyer for one of the other defendants stated that the identity of the judge was a major factor in opting for bench trial. This lawyer, like plaintiff's counsel, noted that the issues could readily have been comprehended by a jury but that high regard for the judge lent preference to a bench trial.

Case 2

This suit set many plaintiffs against a single defendant. According to plaintiffs' liaison counsel, only a few plaintiffs wanted a jury trial. The motion was made and was maintained until approximately three months before trial, at which time it was dropped, according to counsel, for fear that a jury trial would lead to a costly and time-consuming retrial. Defense counsel painted a slightly different picture. Some of the plaintiffs and the defendant had initially desired jury trial. When the plaintiffs' cases were subsequently consolidated and discovery was nearly complete, however, the defendant decided that the case was too complex for jury trial and therefore waived his jury trial right. Most, but not all, of the plaintiffs also accepted the bench trial at that point. The judge separated the three plaintiffs who sustained their jury demand and proceeded with the bench trial. After lengthy trial, the judge found in favor of the plaintiffs, at which point the remaining plaintiffs came forward and volunteered to drop their jury trial request. Defendant's attorney, on the tactical ground that the jury would do his client no more damage than the judge had, refused to relinquish the jury trial right. He referred to this as "sandbagging" the holdouts. The remaining plaintiffs and defendant settled the case less

than three days before jury trial was scheduled to begin. The judge's perspective on these events concurred with the report of the defense attorney.

Case 3

A local government brought suit in state court against an out-of-state contractor for failure to perform as agreed in work on a large public building. Defendant removed the suit to federal court under diversity jurisdiction. Neither party requested jury trial. At a certain point early in the litigation, but after plaintiff's first set of lawyers had waived jury trial right, plaintiff retained private counsel to continue the litigation. This attorney stated he would have preferred a jury trial (even though a large number of engineering and construction facts were at issue) because he generally favors such trials. He expressed high regard for the judge in the case, but emphasized his preference for jury trial even in the face of admittedly detailed and complicated facts. Defense counsel also expressed preference for jury trial in this case, asserting that jurors would be more receptive learners than the judge of the kinds of facts that were at issue. In this case, however, his client rejected the recommendation for jury trial, arguing that unfavorable publicity in the local press would lead to a hostile jury. The judge was unavailable for interview.

Case 4

This case had numerous parties, including counterclaimants and third parties. A third-party plaintiff requested jury trial and sustained this request throughout most of the pretrial period. According to one defense attorney, the jury trial request was used as a bargaining chip in settlement negotiations with other parties. Many of the claims were in fact settled before trial, and the third-party plaintiff dropped the request. One plaintiff's attorney said he favored a bench trial because of his respect for the judge, whom the lawyer believed to be "very rigorous" on matters of law and as fair as a jury on damages. Attorneys for two defendants independently concurred in the positive evaluation of the judge; one remarked that he looked at jury trials as "buffers against incompetent judges," and the other noted that a jury trial of this issue would have protracted the trial. The judge in this case indicated that a jury trial would have required separation of issues and considerably more time to complete.

Comments by Lawyers in the Remaining Bench Trials

The remaining four cases were tried either in admiralty or in equity. In addition to discussing their general approach to decisions about jury trial, the lawyers in these cases stressed in particular the judge's likely predisposition toward the liability or damage questions involved and the strength of the party's case as two important factors in their decisions.

Comments by Additional Judges

None of the four additional judges interviewed had direct information about the decision to use the jury in the cases on which they focused their comments. In one case, the judge speculated that the defendant, a local company, had requested a jury in the belief that the company would receive preferential treatment from the jury. Another judge speculated that plaintiff had requested a jury because of a belief that the jury would be freer than the judge with damage awards.

Influence of Scope of Review

Lawyers were asked, *Was your decision about the jury influenced by consideration of the scope of judicial review if the decision were appealed? If so, could you elaborate on your reasoning?*

Special emphasis on the scope of appellate review resulted from a recognition that the "clearly erroneous" standard for setting aside a judge's findings under Federal Rule of Civil Procedure 52(a) makes the findings more susceptible to reversal than jury findings, which are subject to a relatively limited standard of review,[19] and a recognition that lawyers might consider this difference when determining their trial strategies.

Compared with the immediate tactical considerations lawyers brought to bear on their decisions, their concern with differences in scope of review seemed subtle or remote. Nevertheless, upon reflection, most lawyers agreed that jury findings are more likely than bench findings to be reversed, primarily because of reversible error in the jury charge or in evidentiary rulings during the trial. Two lawyers disagreed with the prevailing opinion, but with qualifications. One stated that if he won in a jury trial with what he la-

19. *See, e.g.*, Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950).

beled a "bad" case, he would be less likely to be overturned than would a judge who had come to the same result. The other stated that cases with "thin" law are more secure against reversal if tried before a jury, while cases with "thin" facts but "strong" law are more secure if tried before the bench. The nature of the problem is seen more clearly when these last two responses are contrasted with a third lawyer's comment that "dynamic, strong" cases (implying both facts and law) are best tried to the bench because jury trial presents the lawyer with "unnecessary risks." Several lawyers noted that any difference in vulnerability on appeal is reduced when juries give special verdicts (see chapter seven). And finally, one lawyer dismissed this problem altogether, asserting that the question is "academic because appeals courts override the distinction and sit as fact finders de novo."

To shed some empirical light on the matter, we traced the appellate histories of a large number of civil cases, using data collected by the Administrative Office of the United States Courts. For present purposes we limit our attention to 18,528 cases terminating after full trial in district court between July 1, 1976, and December 31, 1978. These cases were traced for possible appellate activity in the three-year period from July 1, 1976, to June 30, 1979. All the case types represented permitted jury trial.

Table 6 shows the rates of filings for appeal after bench and jury trials for each circuit. The national rate of appeals for both types of trial combined was slightly less than one in four (24 percent).

TABLE 6
Percentages of Cases Appealed after Bench or Jury Trials for Each Circuit

Circuit	Bench Trial		Jury Trial		Total	
First	19%	(91/483)	31%	(56/183)	22%	(147/666)
Second	26	(223/856)	23	(109/481)	25	(332/1,337)
Third	21	(258/1,233)	21	(147/694)	21	(405/1,927)
Fourth	23	(243/1,065)	21	(137/668)	22	(380/1,733)
Fifth	21	(746/3,508)	22	(394/1,777)	22	(1,140/5,285)
Sixth	23	(262/1,155)	17	(117/678)	21	(379/1,833)
Seventh	29	(197/673)	26	(94/361)	28	(291/1,034)
Eighth	30	(277/930)	21	(104/497)	27	(381/1,427)
Ninth	29	(371/1,283)	26	(121/471)	28	(492/1,754)
Tenth	29	(249/853)	25	(101/403)	28	(350/1,256)
D.C.	32	(62/194)	20	(16/82)	28	(78/276)
Total	24%	(2,979/12,233)	22%	(1,396/6,295)	24%	(4,375/18,528)

When the trial types are analyzed separately, the national rates for bench and jury trials differentiate slightly: 2,979 appeals were filed for 12,233 bench trials (24 percent), as compared with 1,396 appeals filed for 6,295 jury trials (22 percent).

Thus, on a national basis, the rates of appeals after bench and jury trials are practically identical. Not considered here are filings after directed verdicts and judgments n.o.v. These rulings are rare: There were only 228 reported filings, nationwide, during the three-year period of our study. Our neglecting them here is not likely to produce a misleading result.

On a circuit-by-circuit basis, there is a general tendency for rates of appeals to be somewhat higher after bench trials—this is the case in all but the First, Third, and Fifth Circuits. The First Circuit showed the largest percentage of cases appealed in jury trials, and the D.C. Circuit showed the largest percentage of cases appealed in bench trials.

TABLE 7
Percentages of Appeals Concluding with Reversal or Remand for Each Circuit

Circuit	Bench Trial		Jury Trial		Total	
First	24%	(22/91)	25%	(14/56)	24%	(36/147)
Second	18	(41/223)	22	(24/109)	20	(65/332)
Third	16	(41/258)	12	(17/147)	14	(58/405)
Fourth	16	(39/243)	16	(22/137)	16	(61/380)
Fifth	20	(149/746)	18	(71/394)	19	(220/1,140)
Sixth	17	(45/262)	15	(17/117)	16	(62/379)
Seventh	23	(45/197)	29	(27/94)	25	(72/291)
Eighth	22	(62/277)	21	(22/104)	22	(84/381)
Ninth	15	(56/371)	10	(12/121)	14	(68/492)
Tenth	20	(50/249)	13	(13/101)	18	(63/350)
D.C.	13	(8/62)	19	(3/16)	14	(11/78)
Total	19%	(558/2,979)	17%	(242/1,396)	18%	(800/4,375)

Table 7 presents the percentages of appeals in each circuit that led to reversals (in whole or in part) or remands to the district court. On a national basis, irrespective of trial type, approximately 18 percent of all appeals concluded with reversal or remand. Appeals after bench trials were successful (if reversal or remand is defined as a "success") slightly more often than were appeals after jury trials (19 percent vs. 17 percent, respectively). The national figure of 18 percent, however, is a composite of circuit patterns that vary from a 7 percent difference in favor of bench trials in the

Tenth Circuit to 6 percent differences in favor of jury trials in the Seventh and D.C. Circuits. Further analysis—for example, of the relative frequencies of different case types in the circuits—would be required to explain circuit differences.

Table 8 combines the information on district court terminations and rates of reversal or remand to show percentages of civil bench and jury trials that result in being appealed successfully. On a national basis, irrespective of trial type, approximately one in twenty-five trial outcomes is successfully appealed. The figure for bench trials is approximately 5 percent and for jury trials, approximately 4 percent. Only the Eighth and Tenth Circuits show as much as a 3 percent difference between trial types.

TABLE 8
Percentages of Civil Trials Reversed or Remanded

Circuit	Bench Trial		Jury Trial		Total	
First	5%	(22/483)	7%	(14/183)	5%	(36/666)
Second	5	(41/856)	5	(24/481)	5	(65/1,337)
Third	3	(41/1,233)	2	(17/694)	3	(58/1,927)
Fourth	4	(39/1,065)	3	(22/668)	4	(61/1,733)
Fifth	4	(149/3,508)	4	(71/1,777)	4	(220/5,285)
Sixth	4	(45/1,155)	3	(17/678)	3	(62/1,833)
Seventh	7	(45/673)	8	(27/361)	7	(72/1,034)
Eighth	7	(62/930)	4	(22/497)	6	(84/1,427)
Ninth	4	(56/1,283)	3	(12/471)	4	(68/1,754)
Tenth	6	(50/853)	3	(13/403)	5	(63/1,256)
D.C.	4	(8/194)	4	(3/82)	4	(11/276)
Total	5%	(558/12,233)	4%	(242/6,295)	4%	(800/18,528)

From the preceding analyses we conclude that there is no national tendency for bench or jury trial outcomes to be reversed or remanded at different rates. Differences within the circuits, to the extent they reflect lasting tendencies, do not sum to a national pattern.

The Relative Speeds of Bench and Jury Trials

As the third and final approach to eliciting strategies and opinions relevant to the distinction between bench and jury trials, we asked judges and lawyers to respond to a hypothetical question about trying their cases before the alternative fact finder.

If the actual trial had been before a jury, judges and lawyers were asked, *Would this case have been more, or less, time-consuming and expensive to try without a jury? What factors contribute to this difference?*

In the converse situation, judges and lawyers were asked, *Could this case have been successfully tried before a jury? If not, what factors militated against a successful jury trial? How would its duration have been affected?*

The spread of opinions about relative trial duration is summarized in table 9. Slightly over 60 percent of the respondents (33/54) believed bench trials to be faster than jury trials of the same issues, while the remaining respondents (21/54) believed bench trials to be as slow as, or slower than, jury trials. Judges were more consistent than lawyers in asserting the comparative rapidity of bench trials, by a measure of 79 percent to 51 percent. In short, while almost 80 percent of the judges stated that bench trials were, or would have been, faster than jury trials of the same issues, lawyers split evenly on the question.

TABLE 9
Judges' and Lawyers' Views of the Relative Durations of Bench and Jury Trials

	Which Forum Is Faster?		
Actual Trial	Bench	No Difference	Jury
Bench	22 (71%)	2 (6%)	7 (23%)
Jury	11 (48%)	6 (26%)	6 (26%)

How should these responses be interpreted? Note that the apparent difference of opinion between judges and lawyers can be understood in terms of the different controls judges and lawyers have over the trial process. In a jury trial, duration is greatly dependent on the lawyers' control of testimony; within broad limits, the judge will not intervene to control the trial's duration once it has begun. Many lawyers are sensitive to the risks of overwhelming jurors with facts and thereby losing their attention. Several lawyers emphasized the great care with which they manage the flow of testimony to the jury, stating specifically that they would not present as much information to the jury as they would present to the judge. The jury trial is, from the lawyer's perspective, a presentation more directly under the advocate's control. Thus, the lawyers who stated that a jury trial was, or would have been, shorter are reflecting, in part, a tactical consideration (the necessity to keep the jury's interest) that is theirs to make. Lawyers who stated that

bench trials were, or would have been, faster may not have had this consideration in mind.

Judges, on the other hand, can maintain firmer, more subtle control over bench trials. They can request elaboration, clarification, or truncation of testimony and argument; they can tailor trial hours efficiently; and they can read depositions and other documents on the bench, in chambers, or at home. Thus, when asked to make a hypothetical comparison, judges, as one would expect, emphasized the greater efficiencies of bench trials.

Judges and lawyers who claimed that jury trials are faster agreed on one source of protraction in bench trials: an extended period between the end of the trial and the issuance of a written opinion. Several respondents noted that the economies of bench trials do not always compensate for the difference in duration between a jury's deliberations and a judge's drafting of the findings and conclusions. In two of the bench trials considered in this research, judges and lawyers emphasized that the judge had announced a decision immediately after closing arguments and had delivered a written opinion later. This procedure was applauded by the lawyers in one case and criticized by those in the other. A few lawyers noted another source of protraction in bench trials: the irregular or discontinuous scheduling of trial dates to meet the convenience of the judge but not the lawyers. These lawyers complained that the absence of a jury allows judges to start and stop the proceedings too easily.

Only one judge stated unequivocally that his case (patent interference with multiple parties) could not have been tried successfully before a jury. Both lawyers interviewed for this case agreed with the judge. Four other lawyers, from four separate bench trials, also stated that their cases could not have been successful as jury trials. The judges and other lawyers in these cases disagreed or were uncertain.

In summary, the balance of opinion is that bench trials terminate faster than do jury trials of the same cases, unless counsel decide to present much less testimony to the jury than they would present to a judge, or the judge takes much more time making and announcing the decision than the jury would. Another source of possible protraction in bench trials is irregular scheduling (low trial density); whether this is an efficiency or a protraction may depend on whose interests are being considered. The differences of opinion between bench and bar probably reflect emphasis on different points of control over trial durations.

VII. CONDUCTING THE JURY TRIAL

The judges and lawyers who had participated in jury trials answered several questions about their policies and strategies in voir dire and challenges, preparation and presentation of evidence, permission for jurors to take notes, and organization of jury instructions and verdicts.

Special Assistance

Lawyers were asked, *Did you seek special assistance (e.g., from psychologists or others specializing in jury selection) for the voir dire and challenges? What characteristics of potential jurors were most important to you?*

Lawyers on both sides of two very large antitrust cases, and on one side of a third antitrust case, employed well-known jury selection experts. Their comments about the experts ranged from neutral to negative (for example, "usefulness unclear," "useless," "I was not impressed," "I doubt they helped," and "The voir dire was so quick, the experts turned out to be unnecessary"). Lawyers in the other jury trials stated that they believed their own judgment to be sufficient to the task. A few lawyers also noted that the judge's control over voir dire removed the opportunity to probe the attitudes of potential jurors very deeply. This factor may have contributed to the opinions expressed about jury selection experts.

The characteristics of jurors named as important tended to be general (for example, "intelligent, not too conservative," "not a proponent of big business," "not stubborn," "younger, less prosperous people," "bright," "lack of bias," "commonsense," "high IQ and a business orientation," "common people, no one with a college education"). When specific characteristics were mentioned, they usually covered attitudes about the parties and their reputations or a particular fact in the case (for example, "anti-[Company X] bias," "not offended by [Company Y's] profits," or "smart enough to understand a check-kiting scheme").

Our general impression from the interviews is that jury selection was not an overwhelmingly important feature of these lawyers'

trial strategies. Jury selection experts were employed for cases in which the amounts at stake were so large that the lawyers would, in any event, have left no stone unturned in trial preparation. The close control of voir dire questions exercised by the judges in these cases may have diminished the usefulness of experts' advice on jury selection. As noted in chapter two, juries were seated rapidly in all these cases. In only one case was a juror seated who, both sides subsequently agreed, should have been removed during the challenges. In one interview, plaintiffs' lawyers stated that the jury had misunderstood, and incorrectly decided, one part of the case. The judge and opposing counsel disagreed.

Lawyers were asked, *Did you seek assistance from nonlawyers in determining how to make your evidence most comprehensible?*

Some lawyers who employed jury selection experts also solicited advice about preparing evidence and testimony for effective presentation to the jury. Most of the lawyers, however, did not think such advice would be helpful. A major exception to this generalization involved the use of graphic aids, as illustrated in the responses to the next question.

Visual Aids

Lawyers were asked, *Did you, your opposing counsel, or witnesses use charts, diagrams, or other visual or audio aids during presentations? Do you believe the use of aids helped the jury comprehend complex facts?* (Judges were also asked to comment on the use of charts, diagrams, etc.)

Lawyers used visual aids in all jury trials, although in one trial only one side employed them. In many cases, the presentation of complex fact situations involved elaborate and elegant charts or diagrams. In one case, visual displays were attached to the courtroom walls for the periods they were relevant to the testimony. Lawyers were, almost without exception, very enthusiastic about the value of these devices, both in aiding juror comprehension and in enhancing the jury's sense of the lawyers' preparedness and organization. The one lawyer who did not use such materials said he preferred passing documents to the jury for their inspection, one juror at a time.

The judges were also generally positive about the use of visual aids. In only one case did the displays become the subject of dispute, forcing the judge to rule on their admissibility.

Special Organization

Lawyers were asked, *Did you organize your case in ways that took special account of the complexity of the facts or law in the case? If yes, could you explain what you did?* (Judges were asked a similar question about their management of the trial.)

The complexities of these cases usually demanded special organization or accommodations. Two cases required considerable testimony from persons living abroad. In one of these, the judge traveled abroad to be present at depositions; in the other, counsel developed a procedure to "pre-rebut" testimony of witnesses who could not be recalled from abroad. In several other cases, judge and counsel worked out plans for separating issues and presenting them to the jury one at a time. One attorney likened this process to staging a play. Another approach mentioned by an attorney was to move from the simplest issues to the most complex, on the theory that the jury would become more sophisticated with progressive exposure to the issues. In still another case, although the judge stated that he had asked the parties to organize the case around the logic of the legal issues, one of the attorneys indicated that he had organized his presentation according to the chronology in which the several claims had arisen. In general, most of the special or extraordinary measures taken by judges and lawyers in these cases seemed to originate from the size of the cases rather than from particular attention to the needs and abilities of juries or judges as fact finders. Many of the most interesting and innovative procedures that judges described were instituted during bench trials, in which the judges had more leeway in tailoring the presentations of evidence and argument. Of particular interest for the management of jury trials was a procedure, described by one judge, in which successive drafts of proposed special verdict forms were used by the judge and lawyers, in chambers conferences, as the focus of discussion about how to manage and limit testimony during the subsequent phase of the trial. More information on jury instructions and special verdicts is presented in a later section of this chapter.

Juror Note Taking

Judges and lawyers were asked, *Were the jurors allowed to take notes during the trial? If not, what disadvantages do you believe arise from jurors taking notes?*

Note taking was prohibited by judges in three jury trials. One judge stated that he wished to prevent some jurors from becoming unduly influential through their note-taking abilities. A second judge was ambivalent on the matter and suggested that he might change his policy on note taking; he also pointed out that he allowed jurors to take transcripts and copies of his charge to the deliberations. The third judge was unavailable for interview.

Other judges were uniformly positive about the benefits of note taking in relation to the risks. One judge noted, however, that the jurors in his case did not take notes even though they were permitted to. Another judge supplied the jurors with identical note pads, which were collected at the end of each day. When the trial was over, the judge ordered the pads destroyed. Lawyers were also generally positive about note taking.

Charge to the Jury

Judges were asked, *Was the jury given a preliminary charge at the beginning of the trial? What purposes did you wish to achieve with the charge? Did you organize your final charge in ways that took special account of the complexity of the facts or law in the case? If so, could you explain what you did? Did you provide the jury with copies of your final charge? If not, what disadvantages do you believe there are in that practice?*

All judges but one presented the jury with a preliminary charge. A few judges stressed the importance of this charge in a long trial, stating that it provides an essential framework. One judge emphasized that a preliminary charge should be made in all jury trials; if the judge does this routinely, he or she will be particularly well prepared to develop the charge for a complex case. Another judge stated that he worked on the preliminary charge with the lawyers in advance, as a means of fostering agreement on the substance of the case.

The form of judges' final charges to the jury was closely related, of course, to the form in which the jury had been asked to report its decision or decisions. The question of special and general verdicts is addressed below.

Most of the judges indicated that they provide jurors with copies of the final charge. Three judges do not follow this practice. One of these judges explained that he prefers to deliver the charge in conversational tone, using notes rather than text; the other two judges gave us no specific rationale for their practice. These three judges also do not allow jurors to take notes.

General or Special Verdicts

Judges and lawyers were asked, *Was the jury requested to return a general verdict or special verdicts? What was the reasoning for this decision, in either case?*

These questions seemed to get close to the core of key issues in jury trials of complex cases. In no case was the jury asked for a single general verdict. At a minimum, there were several general verdicts for each defendant or claim. In some cases, there was dispute about the distinction between general verdicts on individual claims and special verdicts; this distinction was raised and decided on appeal in one case. At the other extreme, one jury was presented with a book containing dozens of special interrogatories arranged in branching, hierarchical order. Some judges and lawyers expressed preference for detailed special verdicts as a means to reduce the likelihood that the entire case would have to be retried following a successful appeal. Other attorneys expressed concern about the adverse effects of special verdicts in collateral actions against their clients. One judge asserted that long lists of special interrogatories inevitably confuse the jury, while another judge stated, with equal emphasis, that special interrogatories allow the jury to concentrate clearly on specific issues. A few respondents noted that interrogatories facilitate the precision of appellate review and minimize the distinction between scopes of review for bench and jury trials.

Jury instructions were tailored to the form of the verdicts. In the case with the extensive set of interrogatories mentioned above, the judge provided each juror with a copy of his instructions: 373 triple-spaced pages in a loose-leaf binder. In another case, the judge permitted the jurors to take copies of the lawyers' closing arguments into the jury room, along with a complete transcript; plaintiff's lawyer keyed his argument to page numbers in the transcript. In a poll taken by the attorneys after trial, jurors reported that they had used this lawyer's text as the basis for organizing their deliberations.

Sequestration

Judges and lawyers were asked, *Was the jury sequestered? On what grounds was this decision reached? Have you any advice about how to approach this problem?*

No jury was sequestered for the duration of the trial, but two juries were sequestered during their deliberations. Lawyers disa-

greed about the effects of sequestration, with some stating that sequestration increases the chances of a hung jury and others stating the opposite. Juries in the cases discussed hung with and without sequestration.

Mistrial or Judgment N.O.V.

Judges and lawyers were asked, *Did counsel request [or did the judge consider] granting a mistrial or judgment n.o.v.? If so, what were the circumstances?*

Motions for mistrial or judgment n.o.v. were filed in several cases. One lawyer stated that n.o.v. motions are often filed "more or less as a matter of form." Another lawyer said that he would have filed for judgment n.o.v. if he had been required to do so to keep the case alive on appeal. Judgments n.o.v. were entered on two occasions to change juries' damage awards. All the lawyers in one case prepared mistrial motions after the jury had been out for seven days. The judge gave the jury a dynamite charge, the jury reported, and the lawyers dropped their motions. A lawyer in another case moved for a mistrial, "for the record," when the marshal reported overhearing a juror say, midway through the trial, that she had already made up her mind. The other lawyer in that case moved for judgment n.o.v. when the jury's verdict went against his client. There has been, or will be, at least some appellate review of almost all the cases in the present sample. In two exceptions, lawyers stated that the costs of appeal would be greater than the amounts they could recover for their clients. Estimated costs of appellate litigation also fostered posttrial settlement negotiations. For the remainder of the cases, the amounts of money at stake apparently warranted the legal expenses of pursuing an appeal. One lawyer reported that the fees due his firm, should his client prevail, would total between $40 million and $60 million.

Other Comments

Judges and lawyers were asked, *Do you have any other comments or opinions about how the jury system functioned in this case? Do you have any recommendations for how the procedures might have been improved?*

Judges and lawyers were uniformly complimentary of the diligence of the juries in these cases; with slightly less unanimity, they also affirmed the validity of the juries' deliberative processes. Two

lawyers stressed the particular difficulty juries face in deciding complicated factual questions when the law to guide their decisions is unclear or undeveloped, leading to problems in the instructions from the judge; antitrust law was singled out as an example. The jury system was lauded as a safeguard of important values.

Criticism of jury trials centered on distinct issues. One lawyer criticized the system as it works in fact while defending it in principle. He observed that the extended duration of major trials renders impossible the selection of a representative cross section of jurors. In the lawyer's words, "No one who earns a decent living could afford to be on this jury." Presumably, this lawyer would be in favor of making jury duty more affordable. In a more specific complaint, judge and lawyers agreed that the hung jury in their case was a "fluke" produced by an aberrant, obsessive juror who should have been removed during challenges. The judge and lawyers would presumably approve of jury selection procedures that would reduce the risk of such an event, if the costs in time and juror privacy were not excessive. One group of lawyers expressed concern about six-member juries, believing them too small to be reliable.

Finally, one judge affirmed the quality of service the jury provides the system, but queried whether the system treats the juror fairly. This judge's position was similar to that of the lawyer who worried about jury representativeness, but went beyond it to consider the general obligations of the citizen to serve as a juror. This concern was echoed, to one degree or another, by several other respondents.

VIII. AFTERTHOUGHTS ABOUT THE LITIGATION

Judges and lawyers were asked for any additional or general comments they might wish to make about how the litigation was pursued and what changes they might make if faced with the prospect of another case of the same magnitude. Their responses may be organized into two categories, one for changes in the trial itself, the other for changes in pretrial organization.

Changes in the Trial

Many of the lawyers who discussed jury trials prefaced their comments by avowing the value of the jury; no lawyer stated that he would avoid a jury in the future for complex or lengthy trials. Two lawyers who had waived jury requests, however, remarked that they should not have done so and would not again under analogous circumstances; both had lost their cases in bench trials. One of these lawyers also stated that he should not have removed the case from state court.

Two lawyers would have worked harder to separate multiple parties into two or more suits. They believed that some of the complexities in their trials stemmed from the differing claims and strengths of the multiple plaintiffs (in one case) or of the multiple defendants (in the other), and that their clients' cases were not made most effectively in that context. Three lawyers wished they had been more adversary, particularly in objecting to the admission of documents. Another attorney, in contrast, said he would have toned down the combativeness he demonstrated (which his opponent and the judge commented on during interviews) because he believed it had alienated the judge. A plaintiff's lawyer in a jury trial stated that he would have decreased the amount of time each of his witnesses spent on the stand; he would also have tried to obtain more stipulations to facts from his opponent. A defense attorney who won his case suggested that he should have perhaps rested his case after plaintiff's case-in-chief was completed; he did not because of the defendant's large investment in case develop-

ment, which would not have reached the public's eye had he rested the case. The defendant had strong political reasons to publicize its case as much as possible.

No easy generalizations emerge from this list of lawyers' reflections. They all share one characteristic, however, which is their relevance to control of the duration of trial. Reasons given for changes made in the trial never included a concern with protraction per se, except as duration may have had an adverse tactical consequence. The clearest example is the lawyer who would have made his presentations briefer because he thought he might have bored the jury in the actual trial. Lawyers' concerns with change focused on trial tactics and adversary advantage, not on systemic problems as independent entities.

Some judges, in contrast, addressed the problems of trial duration directly. Two stated that in the future they would set firm and absolute limits, in advance, on duration of the total trial or of segments of the trial. One judge elaborated on this, stating that time limits are fairer means of protecting against trial protraction than is the closer control gained through rulings on smaller individual issues. The judge believed time limits to be especially pertinent to the control of exhibits in jury trials. The judge should not have to intervene repeatedly to forestall redundant or irrelevant evidentiary displays. By setting time limits, the judge allows counsel to establish their own priorities within a predetermined time frame.

Several judges described the help they had or had not been given for other cases on their calendars during these long trials. Some expressed pride at having managed the massive trial while disposing of all their regular cases without falling behind. Others expressed gratitude that their chief judges had arranged for some redistribution of their caseloads. Still other judges said nothing about this matter. Thus, we do not have systematic information about the effect these long trials had on the caseloads of other judges in the district.

Changes before Trial

Judges and lawyers seemed to agree on one change that would be beneficial in the management of cases as large as these: greater judicial involvement in the framing and control of discovery, including resolution of discovery disputes. The most emphatic response given to this question came from judges who stated that trial protraction resulted from inadequate pretrial preparation. In their comments on this topic, lawyers distinguished effective judicial con-

trol from the requirement to produce certain lengthy documents (for example, offer of proof) by certain dates. In general, the concern was rather to have more definitive judicial decisions early in the litigation. Partial summary judgments were also mentioned as useful devices to reduce the subsequent trial burdens. There were several examples of summary judgment in these cases, and lawyers on both sides seemed to agree that, for better or worse, the judgments reduced the number of issues litigated at trial. One judge was called "heroic" by a lawyer for his willingness to make an important ruling based only on the pleadings, whereas another judge was criticized, by lawyers on both sides, for refusal to rule on an interpretation of the Uniform Commerical Code before trial, thereby protracting the trial's duration. In the extreme, an ebullient plaintiff's antitrust lawyer pleaded for a "Genghis Khan on the bench" during the pretrial period.

IX. RELATIONS BETWEEN BENCH AND BAR AND THE SELECTION OF JUDGES FOR TRIAL

Judges were asked to evaluate the lawyers in their cases on a seven-category scale, used previously in a national survey of federal judges' opinions about lawyers' courtroom performances.[20] This question was intended to set the stage for a discussion of the lawyers' role in trial protraction. (Judges were also queried about the role that visiting judges might play in aiding the management of lengthy, complex litigation.)

Lawyer Adequacy

Judges were asked, *Which of the following statements best describes your judgment of the quality of the lawyers' performances in this case? Categories include first-rate, about as good a job as could have been done; very good; good; adequate but no better; not quite adequate; poor; very poor.*

With very few exceptions, judges praised the lawyers who had appeared before them in these cases, offering such remarks as "top lawyers in the country," "the finest young lawyer I have ever seen," and so on. Judges often followed these comments with assurances that the lawyers had prevented the trial from becoming protracted.

In exceptions to the evaluations of counsel as first-rate, judges pointed to lawyers' excessive contentiousness. One judge described the defense team as "gung ho lawyers," whose wholehearted adversariness had extended the trial's duration unnecessarily. A second judge stated that lawyers on both sides "overtried" the case and were needlessly contentious, thereby lengthening the trial "considerably."

20. A. Partridge & G. Bermant, The Quality of Advocacy in the Federal Courts (Federal Judicial Center 1978).

It should be noted that some judges who were unavailable for interview may hold views of trial counsel that are less positive than those reported here (see lawyers' comments later in this chapter).

Visiting Judges

Judges were asked, *Could this case have been tried successfully by a visiting judge? Would it have been feasible to separate pretrial from trial work, with a separation of responsibility between local and visiting judges? If not, might a visiting judge have been asked to handle routine matters on your docket while you attended to this case?*

Judges expressed a considerable range of opinion about the efficiencies of assigning large cases to visitors. Two of the judges interviewed had pretried and tried their cases as visitors. Neither complained of experiencing any hardship, although this was mentioned by others as a disadvantage of assigning big cases to visitors. One judge noted that if a visiting judge tries the case (or, more generally, if the pretrial and trial judges are not the same), the task is made easier by jury trial because the judge can be educated about the issues at the same time as the jury.

Although many judges allowed that a split between pretrial and trial responsibilities was possible, several among them expressed reservations about its advisability. These judges argued that the form of the trial and its efficient operation depend on arrangements and agreements reached during discovery and pretrial conferences; the new judge is relatively at a loss to manage the trial efficiently without firsthand knowledge of these matters.

One judge whose case involved many parties observed that successful management of the case resulted in part from the judge's insistence on appointment of local liaison counsel. Good working arrangements between these lawyers and the judge facilitated pretrial and trial work considerably. A visitor would not have had the advantage of long association with these lawyers.

Several judges were enthusiastic about assigning other cases to a visitor, thus allowing the local judge to pursue the big case without neglecting others. In contrast, one judge stated emphatically that no other judge could handle cases, particularly civil ones, already under way on his calendar.

In a parallel set of questions, lawyers were asked to evaluate the judge's handling of the case. Lawyers who had participated in jury trials were asked, in addition, for their views about the peremptory challenge of assigned judges.

Judicial Style

Lawyers were asked, *Was the judge helpful in expediting the trial? Did he provide all required help during trial preparation? Was he sufficiently accessible during depositions? Did he rule on discovery requests promptly? If the judge worked through a magistrate or master, was this effective? Did you make suggestions to the judge to improve pretrial or trial procedures? How were these received? Would you be prepared to make such suggestions in the future?*

Lawyers' responses to this set of questions may be grouped into three categories that merge at their borders: First, both sides evaluated the judge positively overall; second, one side was positive, the other negative, about the judge's management of the case; third, both sides evaluated the judge negatively overall.

Lawyers in four cases gave uniformly positive ratings to their judges. It is perhaps significant that the judges for whom lawyers had the greatest praise had, with one exception, involved themselves directly and in detail with discovery issues. Lawyers in two cases made the observation, in virtually identical terms, that "the judge worked harder than the lawyers" all through the case. The single exception to this generality was one judge whose resolution of a difficult question during the pleadings (issuing partial summary judgment) was viewed as simplifying subsequent pretrial organization, even though he remained distant from discovery disputes because he preferred instead to work through a magistrate. The work of the magistrate received mixed evaluation, while the judge received only praise. One attorney commented that this judge had such a good reputation that lawyers did their best work in his court even without his direct involvement during discovery. Two other highly rated judges served in relatively small districts; the lawyers stated that they had tried many cases before these judges and that the judges' reputations were uniformly excellent.

Lawyers' comments in five other cases are best described as uniform between opposing sides and relatively neutral; the criticisms of the judges were mild and almost without exception concerned judges' unavailability during discovery and overly permissive attitudes about evidence admissibility at trial. From the lawyers' perspective, these judicial attributes contributed to protraction of the cases both before and during trial. Another example of relatively mild criticism was a lawyer's observation that the judge had so greatly stressed pretrial settlement conferences and negotiations that opportunities for trial preparation had been inadequate, thus leading to trial protraction.

Advocates expressed strongly divided opinions about judges' management of three cases. A defense attorney in one case reported concern that the judge was biased in favor of plaintiff. He also complained that the judge's subsequent handling of discovery was unnecessarily cumbersome. The attorney on the other side of this case, which had prevailed at trial, made none of these complaints. In a second case, plaintiff's attorney credited the judge with responsive management before and during trial; his positive evaluations extended to the magistrate appointed by the judge to assist in pretrial work. One defense attorney in this case stated that the judge had been insufficiently involved early in discovery but that good work by the magistrate had compensated for this lack. A second defense attorney, in contrast, faulted the judge for his inaccessibility and the magistrate for ineffective though well-intentioned management. This attorney criticized the court's lack of responsiveness to suggestions for limiting the massive discovery demanded by both sides. In this case, plaintiff prevailed in the district court. In a third case, the plaintiff, who prevailed in district court, credited the judge with being "about average." The defense attorney, by his own admission, had had bad relations with the judge almost from the beginning of the case. He took a very contentious posture because he believed the judge would not otherwise be fair to his client; relations between the judge and this lawyer deteriorated steadily. The judge in the case was not available for interview.

Four judges received generally negative evaluations from lawyers on both or all sides of their cases. In all cases the criticisms concerned delayed decisions on pretrial motions, resistance to lawyers' suggestions for limiting or organizing discovery practices, and unwillingness to limit admission of evidence at trial. The lawyers believed that these judicial characteristics contributed to trial protraction.

Peremptory Challenges

Lawyers were asked, *Some states allow counsel to challenge a judge peremptorily. If you had been able to do that in this case, would you still have requested a jury? If so, why? If not, why not?*

Lawyers in seventeen interviews responded to this question. One said that he would have challenged the assigned judge and then would almost certainly have waived his jury motion. Ten lawyers said that they would not have used a peremptory challenge. Even though the judge's identity was often an important factor in their

choosing jury trial, they nevertheless believed that the disadvantages of exercising the peremptory outweighed the benefits. One lawyer put the matter simply: "Why trade the known for the unknown?" Some of these lawyers, as well as some of the remaining six who responded only indirectly to the question, expressed opinions about peremptory challenge rules as they worked in the states in which they practiced; these opinions ranged from strong approval to strong disapproval of the concept and the rules under which it operates. Given the variation of opinion over a small number of respondents, no reliable generalizations can be drawn.[21]

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21. *See* A. Chaset, Disqualification of Federal Judges by Peremptory Challenge (Federal Judicial Center 1981).

X. ALTERNATIVE FORUMS

We asked judges and lawyers to give their opinions about alternative forums for the trial of complex or massive lawsuits. In addition to the traditional bench trial, we suggested three permutations of new and old procedures: (1) trial before one or more judges preceded by a fact-finding process under the control of judges, magistrates, or masters; (2) trial to a jury (lay or expert) preceded by a fact-finding process under the control of judges, magistrates, or masters; (3) traditional bench or jury trials of each of several smaller sets of separated issues.

Our lack of further specification of any of these alternatives made concrete responses difficult for the judges and lawyers. Moreover, neither judges nor lawyers addressed, in any detail, the doctrinal issues surrounding the right to civil jury trial or exceptions to it.

Judges

All but three judges stated that the traditional bench trial is the best alternative to jury trial. These judges either reserved comment on the other alternatives or reacted unfavorably to them. Several were critical of the delegation of too much judicial authority to magistrates or masters; one judge called much of this delegation a waste of time because disputed findings are inevitably appealed to an Article III judge. Although these judges preferred traditional bench trials, several of them also made suggestions for how bench trials could be improved to deal with the complex case. One judge emphasized the need for extensive judicial involvement during the early stages of the case; he believed this would make the trial shorter and more manageable. Another judge recommended the greater use of expert "elbow helpers." And two judges described quite detailed plans for separation of issues and organization of testimony for the bench trials of massive suits.

Two judges were relatively well disposed to some form of the other alternatives listed. One approved of a European inquisitorial model with experts acting, in tandem, as fact finders and decision

makers. The other saw merit in a panel of specialized judges who would be called on, individually, to serve in cases for which they were specially qualified.

One judge backed away from the premise of necessary alternatives and argued that juries should be chosen as fact finders whenever they are legally available. Problems of size or complexity in a lawsuit could be handled, at trial, by the separation of issues for separate trial or separate verdicts by the same jury. (It should be emphasized that this opinion was not expressed by this judge alone. Other judges also expressed strong preferences for juries, but then referred to the hardships of extended jury duty as a bar to total reliance on jury trials.) The positive evaluation of separation of issues was not shared by all judges. One judge affirmed the effectiveness of bifurcating liability and damage decisions, while another stated that the interrelatedness of issues, even in big cases, too often makes separation infeasible.

Lawyers

Thirty attorneys expressed opinions on these questions. Thirteen stated that traditional bench trial is the best, or the only reasonable, alternative to jury trial. Several lawyers conditioned their approval of bench trials by stressing the importance of active judicial participation in the litigation. Some of these lawyers also concluded, as did eight other attorneys who refused to accept the premise that alternatives to jury trial are required, that competent advocacy and sound judicial management before and during trial can make any issue adequately susceptible to trial by lay jury. Lawyers elaborated on this theme in interesting ways. Some favored bifurcation or separation procedures, while others thought these maneuvers bias trial outcomes. One lawyer believed that only the presence of multiple parties would take a case beyond a lay jury's capacity to keep issues straight, while another stated that a jury's opinion is preferable unless a judge's decision would have precedential value. A plaintiff's antitrust lawyer maintained that civil trials almost always are, or should be cast as, questions of defendant's intent and that the jury is, therefore, the proper fact finder in all these cases.

The remaining nine lawyers expressed preference for several alternative forums, not all of which had been included in our question. Their preferred alternatives are:

1. Specialized tribunals with expert juries; masters prepare a notebook of facts for decision making

2. Three-judge panels for complex cases
3. Expert or blue-ribbon juries
4. Increased use of advisory juries for judges
5. Development of administrative law judge models for some cases now brought in district court
6. Arbitration on the model of the American Arbitration Association.

Some lawyers had relatively firm and detailed proposals to back their preferences, while others admitted to thinking about these questions for the first time during the interview. They presented these proposals as alternatives to jury trial when jury trial is legally unavailable. They did not always inform us as to whether their preferences would change if jury trial was available.

XI. QUANTITATIVE ANALYSES OF DURATION AND COMPLEXITY

The data for these quantitative analyses of duration and complexity were obtained from Administrative Office records (based on form JS-10) of all civil trials terminating in fiscal 1977-1979.[22] This population of trials includes all hearings on contested issues at which evidence was produced, excluding only preliminary hearings on land condemnation issues and hearings before a three-judge panel. The case type designations are aggregations based on the nature of the suit indicated by the filing attorney on form JS-44.

Extensive, generalized data description and verification efforts were required to produce a data set free from obvious errors and inconsistencies. Other errors probably remain in the data set despite these efforts. It is unlikely, however, that they markedly affect the analyses presented here.

Two closely related attributes of civil trials are explored in this chapter, namely, duration and complexity. We have adopted a reasonable, though arbitrary, distinction between trials that are long and those that are not: A long trial lasts at least 20 trial days or 100 trial hours. As explained in chapter one, we do not beg the question that relates duration to protraction. Later in this chapter, we explore the concept of complexity by means of weighting formulas and discovery volumes. Weighting schemes are based on measurements of time, but they are not identical to measurements of case duration. This means that cases can be long without being complex, and vice versa.

Trial Duration

The information necessary to identify long trials was readily available from Administrative Office records.[23] These data reported two measures of trial length: the traditional measure of trial days and the less familiar measure of trial hours. Both measures cover the actual bench time of judges and specifically exclude jury

22. *See* note 1 *supra.*
23. *Id.*

deliberation or opinion-writing time. The Administrative Office considers trials lasting twenty days or more to be notably long. Because the "average trial day" conventionally lasts 5 hours, we set the "long trial" criterion at greater than 100 trial hours.

Trial days and trial hours reflect two different, equally important burdens of long trials. For jurors, the number of trial days seems to be the more sensitive measure of burden. Whether the trial day lasts two hours or six hours, the juror loses a full day in terms of his or her ability to work or conduct personal affairs in the usual manner. On the other hand, the number of trial hours more accurately reflects the burden of trial on judicial resources and personnel. A judge can usually move easily between courtroom and chambers; thus, a short trial day permits the judge to work on other judicial business.

Among the 32,023 civil trials terminating in federal district courts during the three fiscal years investigated, 159 trials (.5 percent) lasted longer than nineteen days. In the same trial population, 275 trials (.9 percent) posted trial times longer than 100 hours. Although these long trials are few in number, their impact on total trial time is considerable. Over the three fiscal years, they account for 7.0 percent of the total trial days and 11.7 percent of the total trial hours. It is not an exaggeration, then, to claim that protracted civil trials should be a matter of concern to the judiciary.

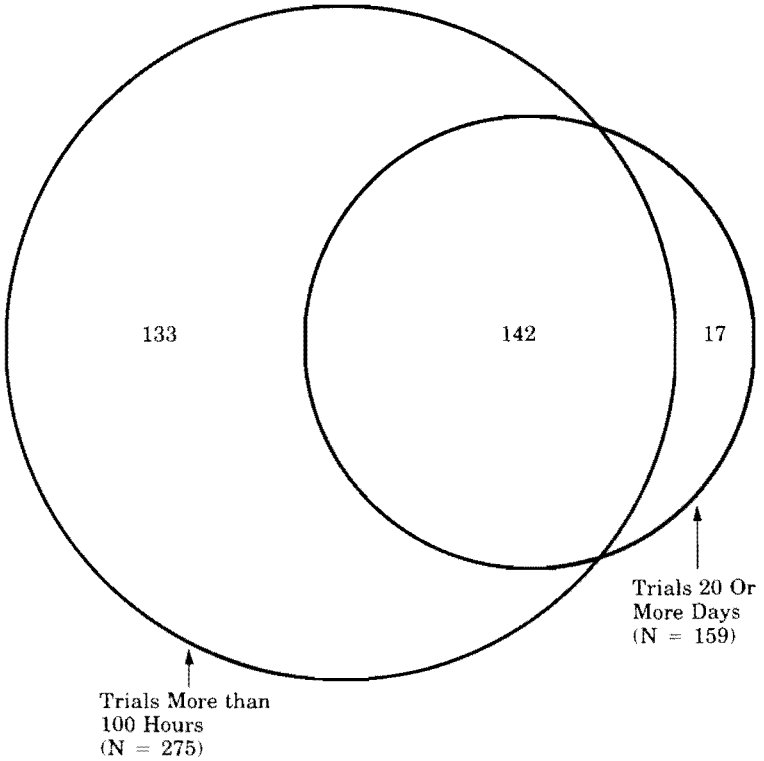
The two subgroups (more than 19 days, more than 100 hours) overlap for 142 cases (89.3 percent of the "days" group and 51.6 percent of the "hours" group; see figure 1). Because the threshold criterion of 100 hours was initially constructed from the 20-day threshold defined by the Administrative Office, a high percentage of overlap was expected. Indeed, we were somewhat surprised by the large number of cases (133) lasting more than 100 hours but requiring fewer than 20 trial days. The lack of overlap indicates that a considerable number of long trials are conducted in excess of five hours per trial day.

Long Trials: Days

Consider, first, the inventory of case types for trials lasting twenty days or longer. Figure 2 depicts this inventory[24] along with information on the proportion of jury trials. The figure shows, as expected, that the bulk of the cases are concentrated in just a few case types. Federal Question: Antitrust, Federal Question: Civil

24. If a case type was represented by fewer than three trials, it was included in the Miscellaneous or Various categories. For a full listing of these cases see the appendix *infra*.

FIGURE 1
The Intersection of Trials Lasting 20 or More Trial Days and More Than 100 Trial Hours

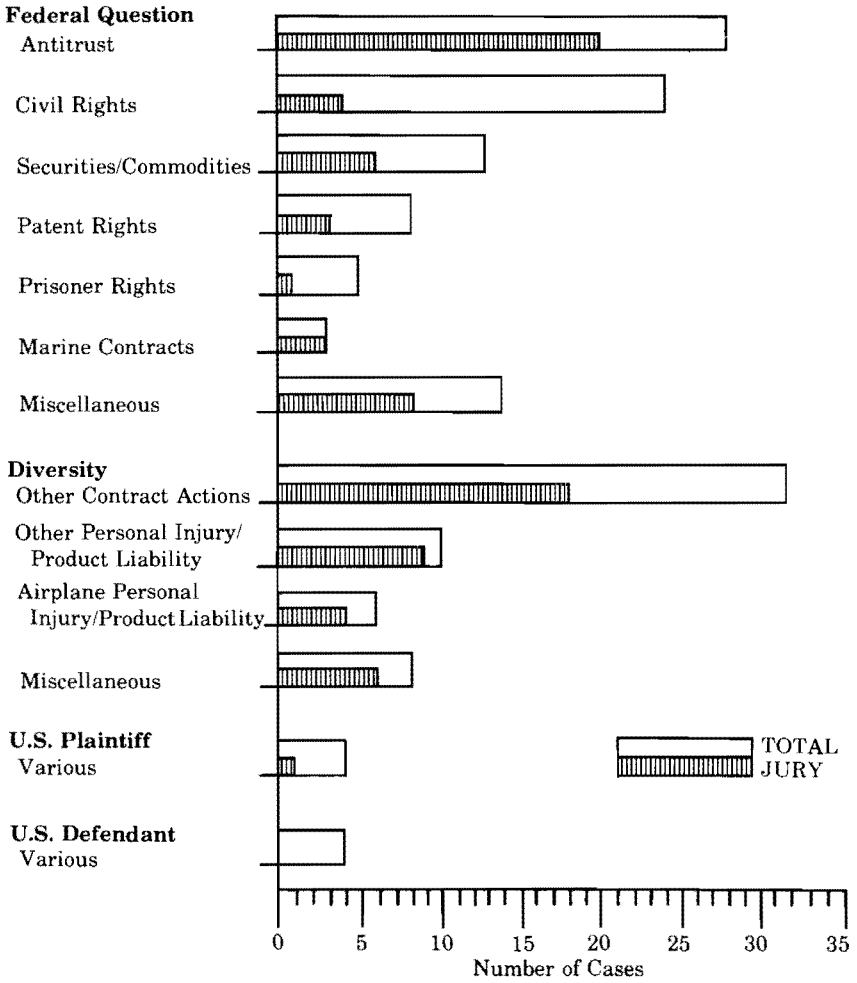


Rights, and Diversity: Other Contract Action are the most prominent categories, accounting for eighty-four trials (52.8 percent). Also note that, combined, the various personal injury/product liability case types account for another 10 percent of the trials and that their proportion of jury trials (81.3 percent) is notably higher than the overall group proportion of 52.2 percent.

Long Trials: Hours

Figure 3 presents a comparable breakdown for the subgroup of trials lasting more than 100 trial hours; the patterns are very simi-

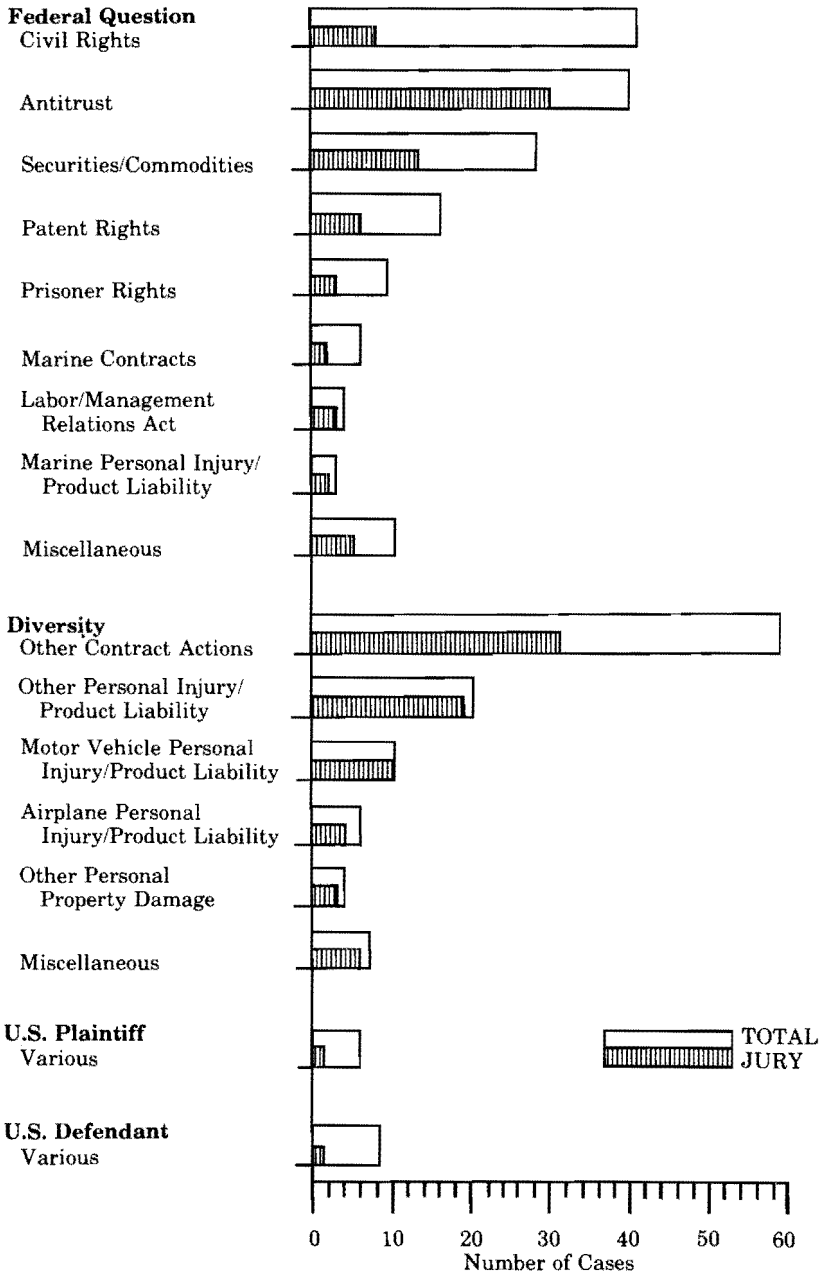
FIGURE 2
Civil Trials Lasting Twenty or More Trial Days in Fiscal 1977-1979 (N = 159)



lar but not identical.[25] Three case types (Federal Question: Antitrust, Federal Question: Civil Rights, and Diversity: Other Contract Action) again account for more than half of the trials (140, or 50.9 percent). The combined personal injury/product liability cases filed

25. See the appendix *infra* for a full listing of miscellaneous case types.

FIGURE 3
Civil Trials Lasting More Than 100 Trial Hours in Fiscal 1977-1979 (N = 275)



under diversity jurisdiction again produce a noteworthy block of trials (36, or 13.1 percent), with an exceptionally high percentage of jury trials (91.7 percent). Although not quite as prominent as the categories just mentioned, two other case types (Federal Question: Securities/Commodities and Federal Question: Patent Rights) also stand out in this case inventory.

Complexity

Chapter one presented a conceptual analysis of case complexity. This section approaches complexity from several quantitative perspectives, examining first the outcomes of different weighting formulas applied to cases grouped according to their case types.

In weighting schemes such as these, the difficulty or complexity of a case type is reflected in its weight. The weight of a case type, in turn, is based on the amount of judge time taken to process the average case of that type through a designated procedure (for example, from filing through disposition or from the initiation of trial through judgment) relative to the amount of judge time taken to move the average case of *all* case types through the same procedure. A weight close to 1.0 describes a case type of average difficulty. The further the value gets from 1.0 in either direction, the easier or more difficult cases in that category are estimated to be relative to the average. One can choose a particular weight as the threshold for defining a case type as "complex." In this analysis, for example, we chose a weight of 2.0 to describe complex case types, that is, case types on which double the average amount of judge time is expended.

It may seem, from the above description, that these measures of complexity are very close to the previously reported measures of trial duration. The thrusts of the two analyses are very different, however. In the earlier section, we were concerned with trials whose durations deviated substantially even from the average durations of trials of their own case types. In this section, we focus on case types that demonstrate longer than average processing times relative to all case types. The present measures thus indicate a level of difficulty that is characteristic of the category as a whole and that remains identifiable even, as one sees later, when the influence of extreme cases is removed.

Trial length is not only a convenient attribute to measure when working on the aggregated, national level, it is also sensitive to the presence of complexity. In the introduction, three different sources of complexity were mentioned (managerial, factual, legal), and it is

reasonable to expect that the existence of such complexity could lead to longer processing times even in the most tightly managed cases. It is the magnitude of this deviation from average processing time that the weights are meant to reveal. In the following analysis, two different weights are examined: trial weights and case weights.

Trial Weights

Using the two trial length measures available in the data set, we generated trial weights for all case types according to this formula:

$$\text{WEIGHT}_{\text{case type}} = \frac{\text{PERCENTAGE TOTAL TRIAL TIME}_{\text{case type}}}{\text{PERCENTAGE TOTAL TRIALS}_{\text{case type}}}.$$

In addition to generating separate weights based on trial days and trial hours, we also calculated weights including and excluding the long trials identified earlier in this chapter. This latter exercise was an attempt to control for the direct influence of aberrant examples. Table 10 lists the weights and frequencies for all case types with a trial weight of 2.0 or higher on at least one of the four variations.

A comparison of the Including and Excluding columns for each measure of trial duration reveals the effect of long trials on the calculated weights. The difference in some cases is dramatic, but the largest changes reflect a loss of one case in a very small population. The important changes are in the case types with larger numbers of trials, for which eliminating extremes can bring the weight below the assigned threshold of complexity. Note that the previously identified major case types such as Federal Question: Civil Rights and Federal Question: Securities/Commodities are unexpectedly missing.

Case Weights

Case weights like those currently used by the Administrative Office to estimate court caseloads move the analysis one step further from data based only on trial time. Because these weights reflect overall processing time, they differentiate case types that require above-average judicial attention at any phase of litigation, including pretrial. A new set of weights (called Clark weights, in honor of the contribution of the late Judge Charles E. Clark) de-

TABLE 10
Civil Trial Weights for Case Types Crossing the Selected Complexity Threshold of 2.0

Case Type	Trial Weight: Days				Trial Weight: Hours			
	Including Long Trials		Excluding Long Trials		Including Long Trials		Excluding Long Trials	
Federal Question								
Antitrust	2.6	(502)	1.7	(474)	2.8	(502)	1.7	(461)
Patent	2.2	(290)	1.9	(282)	2.4	(290)	2.0	(274)
Airplane Personal Injury	2.0	(6)	1.7	(5)	3.3	(6)	0.8	(5)
Land Condemnation*	1.9	(5)	2.0	(5)	2.3	(5)	2.6	(5)
Diversity								
Airplane Personal Injury	2.0	(148)	1.8	(142)	2.1	(148)	1.9	(142)
U.S. Defendant								
Marine Contracts*	—	—	—	—	2.2	(4)	2.5	(4)
Airplane Personal Injury	—	—	—	—	2.0	(45)	1.9	(44)

NOTE: The numbers in parentheses are the numbers of cases on which the trial weights were calculated.

*Because there were no long trials in these case types, weights calculated after excluding long trials increased slightly (the numerator of the formula, total trial time, was more affected by the lack of long trials than was the denominator, total number of trials).

rived from a survey of judicial time allocations was used in this analysis.[26] The Clark weight formula is:

$$\text{CLARK WEIGHT}_{\text{case type}} = \frac{\text{PERCENTAGE JUDGE TIME}_{\text{case type}}}{\text{PERCENTAGE 1977-1979 TERMINATIONS}_{\text{case type}}}.$$

A sample of weights calculated from the survey data is listed in table 11. Because, in many instances, the weights were calculated for subgroups of case types differentiated by jurisdiction, it is possible to detect variations in complexity even within major case types.

These variations can lead to subgroups on either side of the complexity threshold (a weight of 2.0), as is shown in the personal injury case type. Even when all subgroups cross the threshold, however, dramatic differences in levels of complexity may remain

26. S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980).

TABLE 11
Sample of Clark Weights Calculated from Survey of Judicial Time Allocations

Case Type	Clark Weight
Federal Question: Antitrust	5.4
U.S. Plaintiff: Antitrust	62.4[a]
Federal Question: Civil Rights	
Jobs	2.6
Voting	2.8
Housing	1.4
Welfare	2.7
Other	2.5
U.S. Defendant: Civil Rights	
Jobs	3.4
Voting	9.6
Housing	0.5
Welfare	0.1
Other	2.5
Federal Question: Prisoner Rights	0.4
Diversity: Contract Action	
Product Liability	3.8
Other	1.4
Diversity: Personal Injury	
Airplane	3.0
Marine	1.0
Motor Vehicle	0.9
Other	1.1

SOURCE: S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980).

[a]The weight for this case type is 13.7 when calculated excluding the survey time for *United States v. IBM*.

(for example, Federal Question: Antitrust with 5.4, but U.S. Plaintiff: Antitrust with 62.4).

When Clark weight values are used to identify the complex case types in the data set,[27] a distribution of 9,291 trials among the case types is obtained, as shown in figure 4.[28] The first obvious difference between this sample of complex trials and the sample of long trials already discussed is size: The present sample is more than

27. We continue to use a weight of 2.0 as the threshold in this analysis; note that the criterion value used in the published survey report was 2.25. *Id.* at table 14, pp. 57-58.

28. If a case type was represented by fewer than 100 trials, it was included in the Miscellaneous or Various categories. For a full listing of these cases see the appendix *infra*.

thirty times larger than the sample of long trials, whether measured in hours or in days.

The second difference lies in the jurisdiction distributions. Seventy-eight percent of the complex trials in the Clark weight sample were filed under federal question jurisdiction, as compared with approximately 60 percent of the long trials (see figures 2 and 3). At the same time, 15 percent of the complex trials were filed under U.S. defendant jurisdiction, as compared with less than 3 percent of each of the duration subgroups. In fact, just the trials in civil rights cases (under either jurisdiction, but excluding actions that did not exceed the threshold weight) account for 65 percent of this sample—a figure very different from the approximate 15 percent figures posted for civil rights cases in each of the duration subgroups. A third and final difference is that the jury trial proportion is much lower for the Clark weight sample (19.5 percent) than it is for the long trials (approximately 50 percent).

In evaluating these results, it is important to remember that the criterion value of 2.0 is only a traditional threshold and that if another value had been chosen the sample of trials would change. For example, if a criterion value of 3.0 is used, the population falls by 82 percent to 1,695 trials and includes only half the number of different case types; the remaining case types are marked with asterisks in figure 4.

Pretrial Discovery

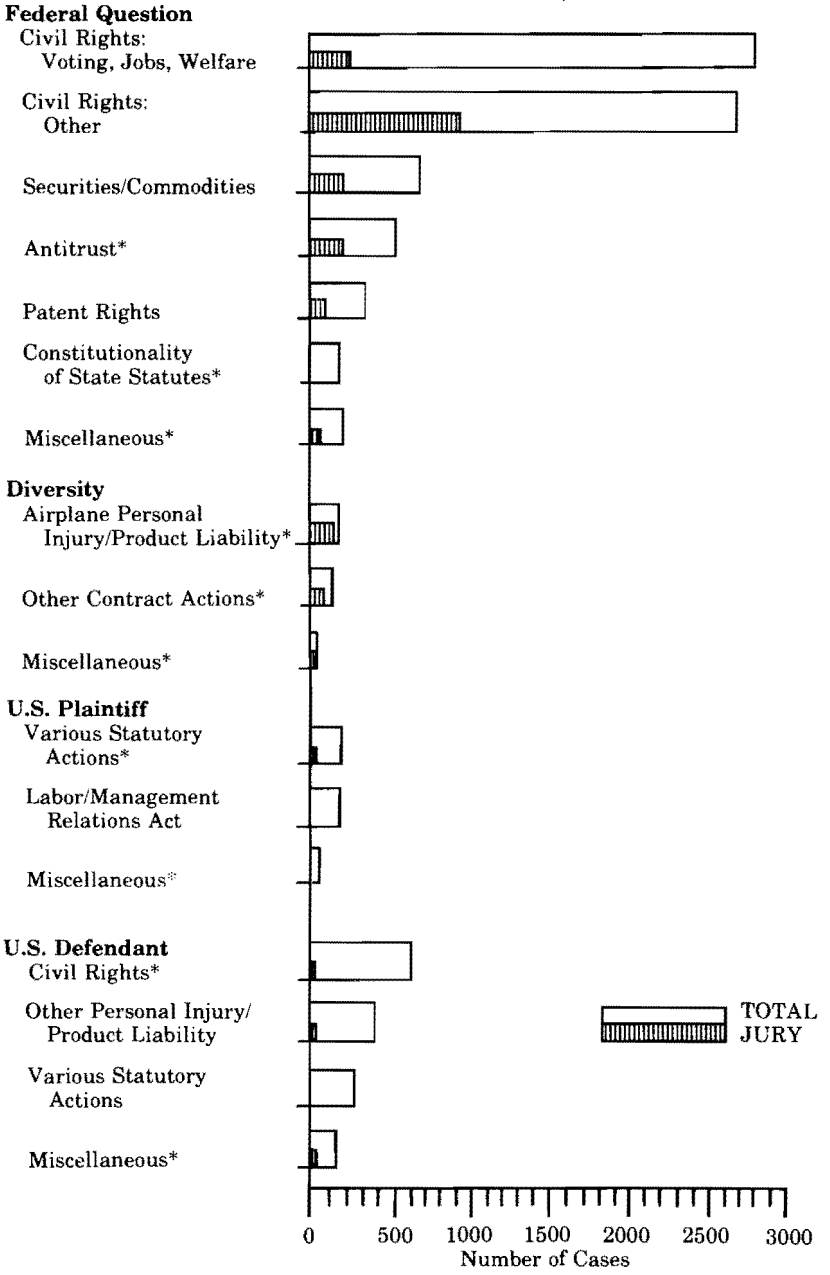
Although weighting schemes can point to case types likely to include very complex cases, the majority of cases in most case types will probably not be complex. As noted clearly by the Court of Appeals for the Third Circuit in *Japanese Electronic Products,*[29] additional methods are needed to differentiate the individual potentially complex case from other nonproblematic instances of the same generic type.

Telltale characteristics of complexity may appear early in a case, during the pleadings and especially in discovery. We investigated the correspondence of discovery activity to trial activity, employing a rich data set from the Center's District Court Studies Project on civil litigation, which provides data on 3,114 civil cases terminated in six metropolitan district courts during fiscal 1975.

In one of the project's reports,[30] higher discovery volume was shown to be associated with several case factors that are known early in litigation, including multiple parties, controverted cross-

29. In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (1980).
30. P. Connolly, E. Holleman, & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978).

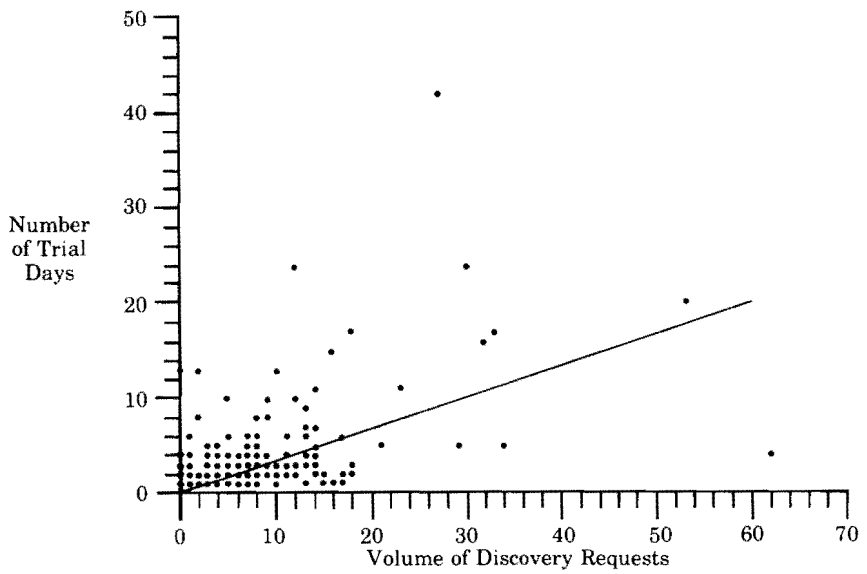
FIGURE 4
Civil Trials in Cases with Clark Weights of 2.0 or More in Fiscal 1977-1979 (N = 9,291)



NOTE: If a criterion value of 3.0 is used instead of the traditional value of 2.0, this sample of 9,291 trials falls by 82 percent to 1,695 trials and includes only half the number of different case types; the remaining case types are marked with asterisks. (Miscellaneous categories marked with asterisks contain at least one case type.)

claims or counterclaims, and large damage requests. Given that a trial commenced, discovery volume also proved to be a good predictor of trial length.[31] Figure 5 relates trial length to discovery volume for 252 cases in the project sample that went to trial.

FIGURE 5
District Court Studies Project Data for Fiscal 1975: Volume of Discovery Requests by Length of Trial in Days (N = 252)



In the aforementioned report, all cases were grouped according to the number of discovery requests filed with the court. Those cases that had more than ten requests (5 percent) constituted the high-volume discovery group, of which 69.4 percent went to trial, as compared with an 8.1 percent figure overall. Adopting the high-volume status as an indicator of complexity, we selected all cases in the District Court Studies Project data set that had eleven or more discovery filings. The case type inventory of these cases is given in figure 6.[32] The most striking feature of this figure is the

31. Trial length, measured in days, was computed by calculating the elapsed time between the dates of the first and last days of trial. Therefore, unlike the "days" measurement used earlier in the duration analysis, this value includes jury deliberation time and nonworking days. The Pearson correlation between trial length and number of docketed discovery events was estimated to be .54.

32. See the appendix *infra* for a full listing of the case types included in the Miscellaneous or Various categories.

FIGURE 6
District Court Studies Project Cases with More Than Ten Discovery Requests: Selected Cases from Six District Courts for Fiscal 1975 (N = 147)

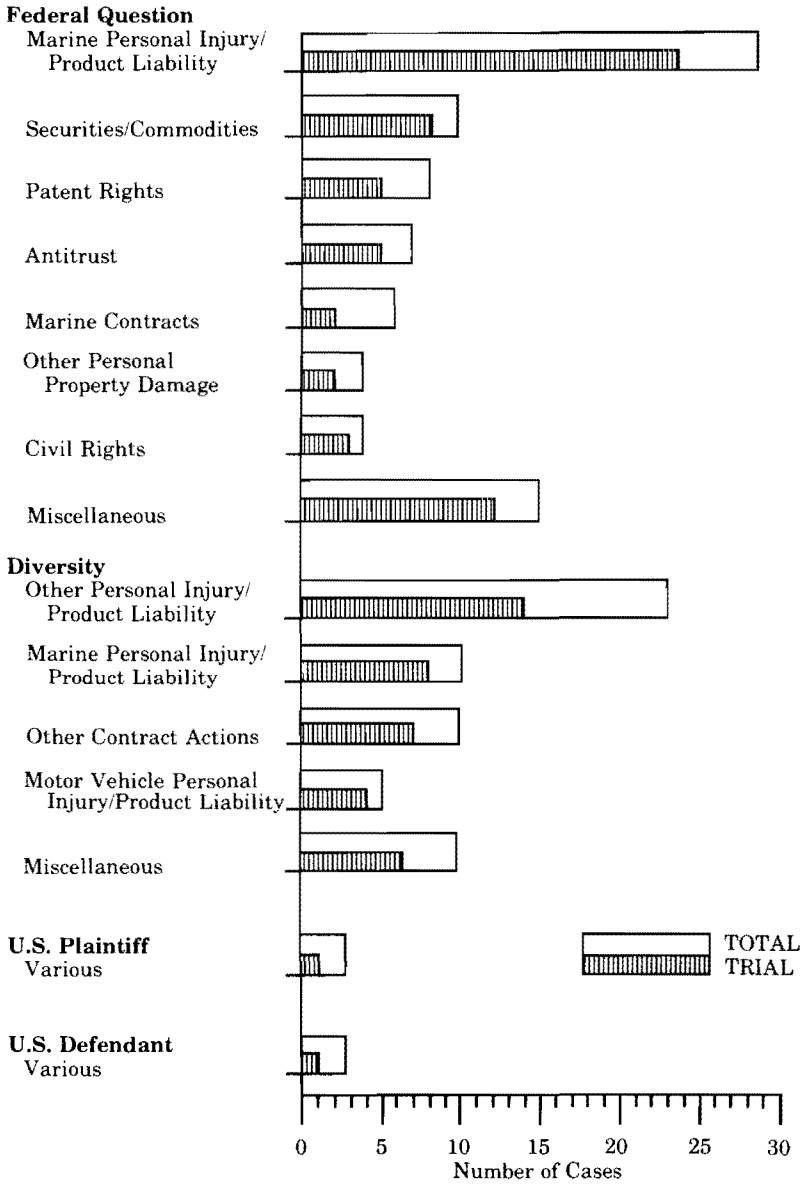


TABLE 12
Correspondence of Major Case Types Identified in Duration and Complexity Analyses

Case Type	Duration: 20 or More Days	Duration: More than 100 Hours
Federal Question		
Antitrust	X	X
Civil Rights	X	X
Securities/Commodities	X	X
Patent Rights	X	X
Prisoner Rights	X	X
Marine Contracts	X	X
Labor/Management Relations Act	M	X
Marine Personal Injury/ Product Liability	M	
Constitutionality of State Statutes	M	
Other Personal Property Damage	M	M
Airplane Personal Injury/ Product Liability	M	M
Land Condemnation		
Diversity		
Other Contract Actions	X	X
Other Personal Injury/ Product Liability	X	X
Airplane Personal Injury/ Product Liability	X	X
Motor Vehicle Personal Injury/Product Liability	M	X
Other Personal Property Damage	M	X
Marine Personal Injury/ Product Liability		M
U.S. Plaintiff		
Various Statutory Actions		M
Labor/Management Relations Act		
U.S. Defendant		
Civil Rights	M	M
Other Personal Injury/ Product Liability	M	M
Various Statutory Actions		M
Marine Contracts		
Airplane Personal Injury/ Product Liability	M	M

NOTE: X = appears as a major category for selected population. M = appears in selected population but only as a member of a Miscellaneous or Various category.

TABLE 12 (Continued)

Case Type	Complexity: Trial Weight of 2.0 or More: Days	Trial Weight of 2.0 or More: Hours	Clark Weight of 2.0 or More	More than 10 Discovery Requests
Federal Question				
Antitrust	X	X	X	X
Civil Rights			X	X
Securities/Commodities			X	X
Patent Rights	X	X	X	X
Prisoner Rights				M
Marine Contracts				X
Labor/Management Relations Act				M
Marine Personal Injury/ Product Liability			X	
Constitutionality of State Statutes			X	
Other Personal Property Damage				X
Airplane Personal Injury/ Product Liability	X	X	M	M
Land Condemnation	X	X		
Diversity				
Other Contract Actions			X	X
Other Personal Injury/ Product Liability				X
Airplane Personal Injury/ Product Liability	X	X	X	M
Motor Vehicle Personal Injury/Product Liability				X
Other Personal Property Damage				M
Marine Personal Injury/ Product Liability				X
U.S. Plaintiff				
Various Statutory Actions			X	
Labor/Management Relations Act			X	
U.S. Defendant				
Civil Rights			X	
Other Personal Injury/ Product Liability			X	M
Various Statutory Actions			X	
Marine Contracts		X		
Airplane Personal Injury/ Product Liability		X	M	M

NOTE: X = appears as a major category for selected population. M = appears in selected population but only as a member of a Miscellaneous or Various category.

large number of personal injury/product liability cases. Combining the various specific case types, these actions account for 48.3 percent of the high-volume cases. Also present, though in smaller blocks, are the expected securities, patent, antitrust, and civil rights cases; the 3 percent level of Federal Question: Civil Rights cases is dramatically different from the 78 percent level established for these cases in the Clark weight analysis.

Correspondence of Duration and Complexity Case Types

Although our analyses of duration and complexity proceeded under the working hypothesis that the two issues are independent, another look at the case types occurring in each area (table 12) shows a great deal of overlap. In fact, very few case types appear only in the complexity analysis and not in the duration analysis (for example, Federal Question: Land Condemnation and U.S. Plaintiff: Labor/Management Relations Act). Among those that do, jurisdictional differences rather than differences in major case types are usually responsible for the uniqueness (for example, U.S. Defendant: Marine Contracts actions in the complexity analysis find counterparts under federal question jurisdiction in the duration analysis). Most often, a case type appears in at least one of the subanalyses of each major analysis area, and some case types appear repeatedly in the subanalyses (for example, Federal Question: Antitrust, Federal Question: Patent Rights, and Diversity: Airplane Personal Injury/Product Liability).

The correspondence between duration and complexity is not unexpected. It is important to remember that we are dealing with duration in this comparison and not with the more difficult concept of protraction. It may be that an analysis of protraction should begin where the complexity and duration measures diverge.

Group Impact and Trends

Thus far our analysis has concentrated on the case type categories that are most likely to produce individual trials defined as long or complex. Now we switch focus and examine the impact of long trials, as a unit, on the operation of the courts and the growth of these trials over the three-year period of analysis.

Table 13 gives an overview of the number of trials that met the criterion of long trials and the proportion of these that were jury

trials, in comparison with the larger sample of all civil trials. An examination of year-to-year differences over such a short time period cannot be expected to yield definitive results, but it can promote a basic understanding of the position of long trials in a changing civil trial pool. For example, the total number of civil trials increased noticeably from 1977 to 1978, but increased very little from 1978 to 1979. During this period (1977-1979), the number of civil trials lasting twenty days or longer followed the same pattern, thereby maintaining a steady .5 percent representation throughout. Although the percentage of trials in the "hours" group starts out slightly higher than the percentage of trials in the "days" group in 1977, it drops back to the same level as the "days" group in the next two years. These figures indicate that the burden of long trials throughout the system is quite small and does not seem to be increasing in proportion to the general case population.

TABLE 13
Numbers and Percentages of Long Jury Trials among the Total Sample of Civil Trials for Fiscal 1977-1979

			20 Days or Longer		More than 100 Hours	
Fiscal Year	Total Trials	Jury Trials (% Total)	Sample (% Total)	Jury (% Sample)	Sample (% Total)	Jury (% Sample)
1977	8,979	3,789	45	25	158	93
		(42.2)	(0.5)	(55.6)	(1.8)	(58.9)
1978	11,389	3,188	57	24	53	23
		(28.0)	(0.5)	(42.1)	(0.5)	(43.4)
1979	11,655	3,415	57	31	64	31
		(29.3)	(0.5)	(54.4)	(0.5)	(48.4)
Total	32,023	10,392	159	80	275	147
		(32.5)	(0.5)	(50.3)	(0.9)	(53.5)

In both subgroups across the three years, the percentage of long jury trials is higher than the percentage of jury trials overall. There are several possible causes for this difference. First, in the civil trial pool, numerous case types exist for which there is no jury trial right; these cases are almost always simple and thus seldom if ever lead to long trials. Second, it may be that for case types in which jury trial is an option, lawyers choose the jury trial for the more difficult, and hence lengthier, instances. Third, it may be that a jury trial takes longer than a bench trial given the same case (see chapter six) and that more jury trials thereby cross the threshold into the category of long trials.

With respect to the last point, the figures in table 14 indicate that jury trials do tend to last longer than bench trials.[33] In fact, the figures reveal not only that jury trials average almost double the durations reported for bench trials but that each jury trial day is longer as well. This difference remains in the overall civil trial pool even when the extreme cases are excluded, but it is not reflected in the sample of long trials alone.

Individual Districts

On the national level, the impact of long trials is muted because of their relatively small representation in the civil trial pool (for example, note the miniscule changes in trial durations caused by the exclusion of long trials from the jury and bench groups in table 14). However, this does not change the fact that the occurrence of even one extremely long trial in any single district can profoundly increase the burden on the judge and jury. Certainly, the degree of impact will vary from court to court and will be heavily dependent on individual court characteristics such as number of judgeships, mix of case types, case management philosophy, and base level of jury use.

TABLE 14
Average Durations of Jury and Bench Trials in Days

	Jury Trials		Bench Trials	
Group	Days	Hours/Day	Days	Hours/Day
All trials	3.5	6.0	1.9	4.1
All trials excluding those lasting 20 days or longer	3.3	6.0	1.8	4.1
Only trials lasting 20 days or longer	34.2	6.4	34.9	6.2

33. For simplicity, the table focuses on trial days. Virtually identical results were obtained from an analysis of hours.

These are intricate and interrelated factors that need to be parceled out and examined separately before an assessment of the local impact of long trials can be attempted. Although work is currently proceeding along these lines, it has not yet reached a level capable of supporting further exposition.

APPENDIX

To retain clarity in the graphs depicted in figures 2, 3, 4, and 6, it was necessary to combine case types that did not contain an arbitrarily established minimum number of trials into representation by a single bar. These combinative bars were labeled either "Miscellaneous," if other case types under the same jurisdiction were individually represented on the graph, or "Various," if no other case types under the same jurisdiction were individually represented.

This appendix identifies the individual case types that were combined into the Miscellaneous or Various categories.

Supplement to Figure 2: Civil Trials Lasting Twenty or More Trial Days

	Number of Trials	Number of Jury Trials
Federal Question: Miscellaneous		
Miller Act	1	1
Airplane Personal Injury	1	1
Marine Personal Injury	1	1
Other Personal Property Damage	1	0
Interstate Commerce	1	1
Fair Labor Standards Act	1	0
Labor/Management Relations Act	2	2
Other Labor Litigation	2	1
Copyright	1	0
Other Statutory Actions	1	0
Environmental Matters	1	0
Constitutionality of State Statutes	1	1
Diversity: Miscellaneous		
Insurance Contracts	2	2
Negotiable Instruments	2	2
Torts to Land	1	0
Motor Vehicle Product Liability	1	0
Other Personal Property Damage	2	1
U.S. Plaintiff: Various		
Recovery of Overpayments/ Enforcement of Judgment	1	0
Other Contract Actions	1	1
Other Real Property Actions	1	0
Civil Rights	1	0
U.S. Defendant: Various		
Airplane Personal Injury	1	0
Other Personal Injury	1	0
Civil Rights	1	0
Habeas Corpus	1	0

NOTE: This list includes case types represented by fewer than three trials.

Supplement to Figure 3: Civil Trials Lasting More Than 100 Trial Hours

	Number of Trials	Number of Jury Trials
Federal Question: Miscellaneous		
Miller Act	2	2
Airplane Personal Injury	1	0
Other Personal Property Damage	1	0
Interstate Commerce	1	1
Fair Labor Standards Act	1	0
Other Labor Litigation	1	1
Trademark Rights	2	0
Environmental Matters	1	0
Diversity: Miscellaneous		
Insurance Contracts	2	2
Negotiable Instruments	1	1
Torts to Land	1	0
Assault, Libel, Slander	1	1
Marine Personal Injury	1	1
U.S. Plaintiff: Various		
Recovery of Overpayments/ Enforcement of Judgment	1	0
Other Contract Actions	1	1
Other Real Property Actions	1	0
Fraud or Truth in Lending	1	0
Civil Rights	1	0
Other Statutory Actions	1	0
U.S. Defendant: Various		
Airplane Personal Injury	1	0
Other Personal Injury	1	0
Civil Rights	1	0
Habeas Corpus	1	0
Social Security Act	1	0
Other Statutory Actions	2	1
Environmental Matters	1	0

NOTE: This list includes case types represented by fewer than three trials.

Supplement to Figure 4:
Civil Trials in Cases with Clark Weights of 2.0 or More

	Number of Trials	Number of Jury Trials
Federal Question: Miscellaneous		
Airplane Personal Injury*	6	5
Banks and Banking Statutes	31	3
Labor/Management Reports and Disclosure*	97	6
Various Statutory Actions	43	5
Diversity: Miscellaneous		
Torts Product Liability	20	17
Constitutionality of State Statutes*	2	0
U.S. Plaintiff: Miscellaneous		
Antitrust*	25	1
Banks and Banking Statutes	5	0
Labor/Management Reports and Disclosure*	16	1
U.S. Defendant: Miscellaneous		
Airplane Personal Injury/ Product Liability*	45	7
Assault, Libel, Slander*	12	3
Marine Personal Injury*	64	2
Antitrust*	4	0
Banks and Banking Statutes	6	1
Patent Rights	12	0
Securities/Commodities	9	1
Constitutionality of State Statutes	5	0

NOTE: This list includes case types represented by fewer than 100 trials.
*These case types have a Clark weight of 3.0 or more.

Supplement to Figure 6: District Court Studies Project Cases with More Than Ten Discovery Requests

	Number of Cases	Number of Cases Tried
Federal Question: Miscellaneous		
Indemnity on Admiralty	1	1
Other Contract Actions	1	0
Federal Employer's Liability	3	2
Fraud or Truth in Lending	1	1
Prisoner Rights	2	1
Trademark Rights	3	3
Airplane Personal Injury	2	2
Labor/Management Relations Act	2	2
Diversity: Miscellaneous		
Insurance Contracts	2	0
Negotiable Instruments	1	1
Rent, Lease, Ejectment	1	1
Torts to Land	1	1
Other Real Property Actions	1	0
Airplane Personal Injury	1	0
Fraud or Truth in Lending	1	1
Other Personal Property Damage	2	2
U.S. Plaintiff: Various		
Other Contract Actions	1	0
Fraud or Truth in Lending	1	0
Securities/Commodities	1	1
U.S. Defendant: Various		
Other Personal Injury	1	0
Other Personal Property Damage	2	1

NOTE: This list includes case types represented by fewer than four cases.

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