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MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION

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There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management.

This Manual consists of the following parts:

FOREWORD

PART I:

SUGGESTED PROCEDURES FOR PRETRIAL AND TRIAL OF COMPLEX AND MULTIDISTRICT LITIGATION

PART II:

APPENDIX OF MATERIALS FOR PRETRIAL AND TRIAL OF COMPLEX AND MULTIDISTRICT LITIGATION

FOREWORD

In the last twenty years every successful profession and business has been compelled to develop and employ revolutionary methods of research, planning and operations to serve an increasing population and the current revolution in science, technology, transportation, communications, education and industry.

In this revolutionary age the rising flood of litigation in the courts of the United States and of the several states has nearly overwhelmed the Bench and Bar. Civil findings in the federal courts have increased rapidly; and despite recent additions to the number of federal judges the backlog of pending cases has continued to grow. The following numbers of civil cases filed, terminated and pending June 30, fiscal years 1960 through 1968, appear in the Annual Reports of the Director of the Administrative Office of the United States Courts:

Fiscal Year	Filed		Terminated		Pending	
	Number	Percentage change over 1960	Number	Percentage change over 1960	Number	Percentage change over 1960
1960	57,791	....	57,579	....	61,251	....
1961	58,293	0.9	55,416	−3.8	64,128	4.7
1962	61,836	7.0	57,996	0.7	67,968	11.0
1963	63,630	10.1	62,379	8.0	69,219	13.0
1964	66,930	15.8	63,954	11.1	72,195	17.9
1965	67,678	17.1	65,478	13.7	74,395	21.2
1966	70,906	22.7	66,184	14.9	79,117	29.2
1967	70,961	22.8	70,172	21.9	79,906	30.5
1968	71,449	23.6	68,873	19.6	82,482	34.7

At the same time the increasing burden of preconviction and postconviction criminal proceedings has required an increasing expenditure of judicial time on various cases.

It is certain that complex and multidistrict litigation will increase. Therefore, if the administration of justice by the courts is to endure, the Bench and Bar must devise and employ new procedures which will increase the efficiency and improve the quality of justice without increasing the burden on litigants.

The creation in 1968 of a Federal Judicial Center was a recognition by Congress of the acute need for a modern program of long range research and planning for the courts. This research and planning will require time before it affects the operations of the courts. In the meantime, procedures must be employed to meet current needs. This *Manual* is designed to meet some of the current needs of the courts.

This *Manual* is a product of a number of successful responses of the Federal Courts to the challenge of an unprecedented mass of multidistrict litigation, the first of which was the electrical equipment civil antitrust litigation.* The first response was described by the Chief Justice of the United States in his address on May 16, 1967, at the annual meeting of the American Law Institute as follows:

> "And now I turn to some highly dramatic developments in administration in the federal courts. When I addressed the American Law Institute in 1962, I called to your attention the appearance the year before of unprecedented multidistrict litigation arising out of antitrust suits in the electrical equipment industry.

* A description of the procedures utilized in the more than 1900 related treble damage electrical equipment antitrust cases is found in Neal and Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration,* 50 A.B.A.J. 621 (1964).

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, as I reported, this unprecedented multi-district 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 to the Institute at this meeting 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.

"Now, this is history—stimulating and useful history. This remarkable result was achieved by the foresight and organizing ability of a committee of the Judicial Conference of the United States, with Chief Judge Alfred P. Murrah of the Tenth Circuit as its chairman and with Judge Edwin A. Robson of the Northern District of Illinois and Chief Judge William H. Becker of the Western District of Missouri as successive chairmen of its principal subcommittee. These judges, without a chart and without the power to change the rules of procedure created for less demanding tasks, secured the full cooperation of all the district judges to whom these cases were assigned. They were assisted by a small, temporary staff, provided by the Administrative Office on an emergency basis, and now have succeeded in terminating these 1,912 antitrust cases in a period of six years and two months, which would not be regarded as an unusual length of time for the processing of a single complex antitrust case. If it had not been for the monumental effort of the nine

> judges on this committee of the Judicial Conference and the remarkable cooperation of the 35 district judges before whom these cases were pending, the district court calendars throughout the country could well have broken down."

This tribute by the Chief Justice is a recognition of the extraordinary efforts of the following judges who have volunteered for the demanding and extraordinary work necessary to process masses of multidistrict litigation:

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This *Manual* was prepared by a subcommittee of the Co-Ordinating Committee for Multiple Litigation composed of the following members:

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Drafting Subcommittee

The tireless efforts of the members of the past and present staffs of the Co-Ordinating Committee are gratefully acknowledged. The interest and valuable assistance of many members of the Bench and of the Bar, to whom the drafts of the *Manual* (formerly the *Outline*) were submitted for suggestion, comment and constructive criticism, are also acknowledged.

Finally the expeditious, extremely helpful and sympathetic assistance of the following legal scholars and representatives of the organized Bar are acknowledged:

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To assist in the continuous review and periodic revision of the Manual the American Trial Lawyers Association has appointed the following committee:

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To Cyrus V. Anderson, Esquire, and Whitney North Seymour, Esquire, Co-Chairman of the American Bar Association's Special Committee on Complex and Multi-District Litigation, and the members of that Committee, the draftsmen of this *Manual* and the federal judiciary are deeply indebted. In response to an urgent request of the Co-Ordinating Committee for Multiple Litigation, Mr. Anderson and Mr. Seymour effectively accelerated and co-ordinated the constructive criticism of the earlier drafts of this work in reports and oral arguments of committees of the American Bar Association, the American College of Trial Lawyers and the International Academy of Trial Lawyers during the spring and summer of 1968. Assisting in this service and in the final drafting processes, Mr. Anderson and Arthur R. Miller, Esquire, Professor of Law of the University of Michigan Law School, rendered valuable and skillful special assistance. Professor Miller's excellent suggestions on the revision and supplement of the original draft of the *Manual* on computer-derived evidence were invaluable.

On recommendation of interested members and officers, the American Bar Association gave the bill creating Section 1407, Title 28, U.S.C., decisive support in the Congress, for which the judiciary is truly grateful.

The Co-Ordinating Committee for Multiple Litigation owes a special debt to its Executive Secretary and Consultant Phil C. Neal, Dean of the Chicago University School of Law. Dean Neal furnished invaluable advice and services in developing and implementing the program for disposition of multidistrict litigation, and in drafting and securing the passage of Section 1407, Title 28, U.S.C.

The Co-Ordinating Committee for Multiple Litigation acknowledges with warmth and unusual gratitude the de-

voted, loyal, intelligent, industrious and determined services of William G. Levi, Esquire, now of the Kansas City, Missouri Bar. Mr. Levi served the Committee as legal assistant sometimes with, and sometimes without, portfolio and with great personal sacrifice. His performance was consistently brilliant.

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

During the preparation and consideration of this *Manual,* Section 1407 of Title 28 of the United States Code was enacted to provide for the temporary transfer of multidistrict litigation to a single district for pretrial proceedings.* This legislation was the result of a Judicial Conference recommendation to Congress. As so proposed and as amended in the Senate, it provides for a Judicial Panel on Multidistrict Litigation and for transfers on the Panel's initiative or on the motion of any party, when such transfers "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." As stated by the Senate Judiciary Committee in recommending passage of the bill, it is contemplated that the Panel will use:

> ". . . sound judicial discretion to select (1) the cases to be transferred and (2) the district to which they will be transferred is essential to assure just results. If only one question of fact is common to two or three cases pending in different districts there probably will be no order for transfer, since it is doubtful that transfer would enhance the convenience of parties and witnesses, or promote judicial efficiency."

Following passage of Section 1407, the Chief Justice of the United States, as empowered by the bill, appointed to the Panel:

HONORABLE ALFRED P. MURRAH, *Chairman*
Chief Judge
United States Court of Appeals
Tenth Judicial Circuit
Oklahoma City, Oklahoma

---

* The text of § 1407 is set forth in Section 5.32 of the *Appendix* to this *Manual.* Dean Phil C. Neal of the University of Chicago Law School, Consultant to the Co-Ordinating Committee for Multiple Litigation, was one of the authors of the original draft of proposed § 1407.

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United States District Court
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New York, New York

This Panel has adopted Provisional Rules for the conduct of its business in accordance with Subdivision (f) of Section 1407. See *Appendix* 5.33. The Clerk of the Panel is Mrs. Patricia D. Wilt. All correspondence should be addressed to Supreme Court Building, Washington, D.C. 20544. Motions for transfer under Section 1407 may be filed with the Clerk of the Panel.

Purpose and Function of Manual

Like the 1960 *Handbook of Recommended Procedures For The Trial of Protracted Cases,* 25 F.R.D. 351, it is true of this *Manual* that:

> "It contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial and pre-trial procedure must be cast. Rather, it is a collection of procedures which are 'Recommended,' because, as the product of experience and the development of able minds, they are deemed worthy of consideration by all."
>
> (From the "Foreword" by Chief Judge Alfred P. Murrah to the *Handbook*)

This *Manual* is designed also to stimulate the devising of procedures appropriate to new problems as they arise. It is intended to be a living document into which desirable techniques proved by experience will be incorporated in the future. Rarely does either complex or multidistrict litigation follow a set pattern. Accordingly, flexibility should be the keynote in applying the suggestions contained in this *Manual.*

Respectfully Submitted

Board of Editors

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PART I

SUGGESTED PROCEDURES FOR PRETRIAL AND TRIAL OF COMPLEX AND MULTI-DISTRICT LITIGATION

TABLE OF CONTENTS

PAGE

Introduction 5
0.1 Definitions 7
0.2 Identification of Complex and Multidistrict Litigation 8
0.21 Sources of information 8
0.22 Classes of potentially complex cases 8
0.23 Means of identification 9
1. Inspection of complaints by clerk 9
2. Action by judge 9
3. Notice by attorneys to clerk 10

Pretrial Procedures in Complex Civil Cases 11
0.3 Assignment to a Single Judge 11
0.4 The Principal Pretrial Conferences 13
0.5 Sequence of Discovery 14

1.0 *First Principal (Preliminary) Pretrial Conference* 14
1.1 Judicial Control of Complex Cases 16
1.2 Ascertainment of Counsels' Views of the Issues 17
1.3 Establishment of Timetable for Pleadings and Non-Discovery Motions 18
1.4 Notice of Entry of Preclusion Orders 19
1.5 Scheduling of Requests for First Wave of Discovery 19
1.6 Consolidation of Cases, Joinder of Additional Parties, and Class Actions 20
1.7 Discovery on Merits for Emergencies and to Narrow Issues 22

PAGE

1.8 Early Determination of Special Legal Questions 22
1.9 Liaison Counsel 23
1.10 Cooperation of Counsel 24

2.0 *Second Principal Pretrial Conference* 25
2.1 Determination of the Class Action Issue and of Preliminary Legal Questions 26
2.11 Summary judgments in civil antitrust cases 27
2.2 Ruling on Requests for First Wave of Discovery 27
2.3 Completion of First Wave of Discovery and Scheduling Requests for Discovery on Merits.. 27
2.4 Limiting Time and Subject Matter of Discovery on Merits 28
2.5 Document Depositories 28
2.6 Early Inquiry Into Possible Expert Opinion, Computer, Samples, Polls, and Survey Evidence 30
2.61 Proof of facts in complex cases 31
2.7 Exchange of Estimated Trial Dates 52

3.0 *Third Principal Pretrial Conference* 53
3.1 Scheduling Subsequent Steps in Case 53
3.2 Considering the Appointment of a Special Master 54
3.21 General considerations 54
3.22 Appointing a master to supervise discovery 56
3.3 Schedules for Filing Final Pretrial Briefs; Lists of Witnesses and Exhibits; Deposition Designations; and Written Offers of Proof of Technical and Scientific Opinions 58
3.4 Fixing the Dates for Final Pretrial Conference and Trial 63
3.5 Additional Steps to be Considered Prior to the Fourth (Final) Principal Pretrial Conference 64

PAGE

3.51 The court-appointed expert 64
3.52 Polls, samples, surveys, summaries and computer runs 66
3.53 Stipulations of fact 67

4.0 *Fourth Principal (Final) Pretrial Conference* .. 69
4.1 Deposition Designations, Offers and Rulings With "Marginal" Indications 70
4.2 Preclusion Orders 70
4.3 Trial of Separate Issues 71
4.4 The Jury Demand Problem and the Order of Proof 74
4.5 Limiting Time Period of Proof 75
4.6 Use of Deposition Summaries 76
4.7 Schedule of Days and Hours of Trial 77
4.8 Special Timesaving Trial Orders 77
4.9 Alternate Jurors 77
4.10 Number and Use of Peremptory Challenges .. 78
4.11 Manner of *Voir Dire* Examination 78
4.12 Control of Opening Statements 78
4.13 Request for Instructions and Proposed Findings and Conclusions in Nonjury Cases 79

Pretrial Procedures in Multiple and Multidistrict Civil Litigation 81
5.1 Related Cases Which Are Pending in One Division of a Single District (Intradivision Multiple Litigation) 81
5.11 Assignment to a single judge 81
5.12 Consolidation of cases 81
5.13 Continue as in complex litigation 83
5.2 Related Cases Which Are Pending in Two or More Divisions of One District (Interdivision Multiple Litigation) 83
5.21 Transfer to single division 83
5.22 Consolidate and continue as in complex litigation 85

PAGE

5.3 Related Cases Which Are Pending in Two or More Districts of One Circuit (Intracircuit Multidistrict Litigation) 85
5.31 Intradistrict transfers and consolidation of cases in each district 85
5.32 Alternatives for coordinated or centralized management of cases 85
1. Coordinated discovery and pretrial program 86
2. Transfer of cases under § 1404(a), Title 28, U.S.C., to a single district for all purposes 86
3. Assignment of one judge to the districts concerned 88
4. Transfer of cases under § 1407, Title 28, U.S.C., to a single district for pretrial purposes only 88
5.4 Related Cases Which Are Pending in Two or More Circuits (Intercircuit Multidistrict Litigation) 89
5.5 Use of Class Actions in Multidistrict Litigation; The Problem of Conflicting Class Actions 90
Pretrial Procedures in Complex Criminal Cases 93
6.1 Pretrial Conference 93
6.2 Discovery of Documentary Evidence 97

SUGGESTED PROCEDURES FOR PRETRIAL AND TRIAL OF COMPLEX AND MULTIDISTRICT LITIGATION

INTRODUCTION

This work is a *Manual* of procedures and materials prepared for use in the pretrial and trial of complex and multidistrict litigation.

The first draft of this work was known as the *Outline of Suggested Procedures and Materials for Pre-Trial and Trial of Complex and Multiple Litigation.* It contained nearly 120 pages of specific recommendations and detailed discussion, followed by more than 80 pages entitled *Appendix of Suggested Local Rules, Sample Forms, and Materials for Pre-Trial and Trial of Complex and Multiple Litigation.*

The present work consists of two parts:

Part I. *Suggested Procedures for Pretrial and Trial of Complex and Multidistrict Litigation,* containing a condensed version of the entire program of procedures recommended for pretrial and trial of complex and multidistrict litigation.

Part II. An *Appendix of Materials for Pretrial and Trial of Complex and Multidistrict Litigation,*[1] keyed by decimal system to the *Suggested Procedures* and containing a continually revised and supplemented collection of legal essays, briefs, documents, forms, sample orders, and suggested local rules for use in implementing the *Suggested Procedures.*

[1] Members of the judiciary are encouraged to document all important rulings on procedural and evidentiary matters arising in complex and multidistrict litigation so that Part II, constructed as a loose-leaf, up-to-date service, can readily be supplemented with useful materials.

Portions of this work are based upon the well known *Handbook of Recommended Procedures for the Trial of Protracted Cases* (hereinafter the "*Handbook*").[2] The *Manual* supersedes the *Handbook*. Many new and useful techniques in the processing of complex and multidistrict litigation have been devised and successfully employed since the publication of the *Handbook*. The contents of this *Manual* represent the continuing development of procedures designed and tested by successful use to accomplish the speedy, efficient and just disposition of this type of litigation. Therefore, the suggested procedures appearing in the *Manual* include some procedures suggested in the *Handbook*, and some devised since publication of the *Handbook;* however, some practices developed in use of the *Handbook* are no longer recommended.[3]

The work is intended to assist judges and lawyers in handling complex and multidistrict litigation. To facilitate

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[2] 25 F.R.D. 351, adopted by the Judicial Conference of the United States, March, 1960; see also, *Report of the Judicial Conference of the United States on Procedure in Anti-Trust and Other Protracted Cases,* dated September 26, 1951, 13 F.R.D. 62 (hereinafter referred to as the *Prettyman Report*); *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges* held at New York University Law Center August 26–30, 1957, 21 F.R.D. 395 (hereinafter referred to as *1957 New York Seminar*); *Proceedings of the Seminar on Protracted Cases for United States Judges held at The School of Law Stanford University* August 25–30, 1958, 23 F.R.D. 319 (hereinafter referred to as *1958 Palo Alto Seminar*); *Proceedings of a seminar held at the University of Colorado School of Law,* July 13–15, 1959 (unpublished); *Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases of the Section of Antitrust Law of the American Bar Association* May 1, 1954 (hereinafter referred to as the *1954 ABA Committee Report*); *Streamlining the Big Case, Report of Special Committee of the Section of Antitrust Law of the American Bar Association* September 15, 1958, 13 ABA Antitrust Sec. Rep. 183 (1958) (hereinafter referred to as *1958 Streamlining Report*).

[3] E.g., the use of general stay orders unaccompanied by a schedule for the early commencement and completion of discovery; or the staying of discovery until the issues are formed.

continuous revision and to reflect the rapidly changing nature of the problems and the accumulation of new experience, this work is being published in a loose-leaf form susceptible to continuous supplementation.

All of the suggested procedures are not suitable for every complex case; nor are they the best that can be devised. Judges and lawyers, therefore, are encouraged to improve them and to adapt them to the particular case being processed. Nevertheless, these suggested procedures, used in appropriate cases, are the most efficient and just which up to this time have been devised and employed.

0.1 Definitions.

"Complex litigation," as used in this Manual, includes one or more related cases which present unusual problems and which require extraordinary treatment, including but not limited to the cases designated as "protracted" and "big."

"Multiple litigation," as used herein, is two or more complex civil cases with one or more common questions of fact pending in one district.

"Multidistrict litigation," as used herein, is two or more civil cases with one or more common questions of fact pending in more than one federal district. Multidistrict litigation may consist of (a) simple cases, or (b) complex cases, in which a special need for or desirability of central or coordinated judicial management exists.

"Judicial Panel," as used herein, is the Judicial Panel on Multidistrict Litigation created by § 1407, Title 28, U.S.C.

"Class actions" are actions on behalf of or against a class under Rule 23, F.R.Civ.P.

"First wave of discovery," as used herein, is discovery designed to disclose (1) the names and location of wit-

nesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits, and (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits. In appropriate cases, the first wave of discovery may also include discovery of information concerning the transactions upon which the claims for relief are based.

"Second wave of discovery," as used herein, is discovery on the merits of the litigation based upon the information disclosed from the first wave of discovery.

0.2 Identification of Complex and Multidistrict Litigation.

The first problem encountered in processing complex and multidistrict litigation is prompt identification thereof. To identify litigation as complex or multidistrict, resort must be had to the available administrative information. Early identification requires that efficient means of classification and reporting of complex and multidistrict litigation must be developed and employed. To these ends the following suggestions are made:

0.21 Sources of information.

Early identification of complex and multidistrict litigation is essential if the court is to develop and employ effective pretrial techniques. The court should adopt routine procedures calculated to secure knowledge from all potential sources, including: (a) counsel; (b) district court clerks; (c) other judges; (d) the Administrative Office of the United States Courts; (e) the Co-Ordinating Committee for Multiple Litigation; and (f) other sources of information.

0.22 Classes of potentially complex cases.

Cases in the following classification may require special treatment in accordance with the procedures in this *Manual*:

(a) anti-trust cases; (b) cases involving a large number of parties or an unincorporated association of large membership; (c) cases involving requests for injunctive relief affecting the operations of a large business entity; (d) patent, copyright, and trademark cases; (e) common disaster cases; (f) individual stockholders', stockholders' derivative, and stockholders' representative actions; (g) products liability cases; (h) cases arising as a result of prior or pending Government litigation; (i) multiple or multidistrict litigation; (j) class actions or potential class actions; or (k) other cases involving unusual multiplicity or complexity of factual issues.

0.23 Means of identification.

The following means of identification of complex and multidistrict litigation should be employed:

1. *Inspection of complaints by clerk:* The clerk of each district court should inspect each initial pleading filed and should report those cases which fall within the categories listed above to the judge to whom each such case is assigned (in districts where individual calendars are maintained), to the Chief District Judge, and to the Administrative Office of the United States Courts.[4] In potential multidistrict litigation the Chief Circuit Judge should be notified of the filing of the action or actions.

2. *Action by judge:* Where an action is based on or arises from a prior Government action, the judge to whom the case is assigned (in districts where individual calendars are maintained) or the Chief District Judge (in central calendar districts) should immediately consult counsel and, if appropriate, the relevant Government agency for assistance in determining whether the case is likely to be complex or a portion of multidistrict litigation.

[4] See Suggested Local Rules 1 and 3, *Appendix* 0.2 and 6.1 respectively.

3. *Notice by attorneys to clerk:* Every attorney filing a complaint, answer or other pleading in a civil case should be required by local rule (or general order) to give separate written notice to the clerk of the district court stating the full title of the case, its nature, the details of the case, whether any other action which is or which may be related to such case (i.e., involving a common or similar issue or issues of fact, or common parties or witnesses) has been filed in the district court, in any other federal court, or in any state court. For each such related case, the notice should further state: (i) its full title; (ii) its docket number; and (iii) the court in which such related case is pending.[5]

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[5] See Suggested Local Rule 2 in *Appendix* 0.2.

PRETRIAL PROCEDURES IN COMPLEX CIVIL CASES

As soon as a complex case has been identified, special pretrial procedures should be considered. The special procedures suggested in this *Manual* include:

Assignment of the case to a single judge.

Four principal pretrial conferences, as follows:

(1) First principal (preliminary) pretrial conference to be held promptly at which judicial control of the case should be assumed by the judge.

(2) Second principal pretrial conference at which the scheduled discovery should be planned.

(3) Third principal pretrial conference at which timetables are established for all subsequent steps in the case including the completion of discovery and the filing of final pretrial briefs.

(4) The fourth (final) principal pretrial conference at which a comprehensive plan for the conduct of all phases of the trial is established.

A detailed discussion of these special procedures follows.

0.3 Assignment to a Single Judge.

First Recommendation: Each complex case should be assigned in its entirety to one judge for all purposes, including all pretrial proceedings. In districts where actions are not automatically assigned on filing to a single judge, such assignment should be made as soon as the case has been identified as a complex case.

That complex cases can most efficiently be processed by their early assignment to one judge for all purposes seems to be accepted with substantial unanimity. In a majority of districts, all civil cases are assigned as a matter of course to one judge for all purposes. (Those districts which assign civil cases to one judge for all purposes should do the same with complex criminal cases.)

Some districts employ the master or central calendar system and, hence, do not assign cases automatically to a single judge. In certain of these districts it is the practice to have one judge handle a complex case for all purposes.[6]

> *Second Recommendation:* The maximum benefits from visiting and senior judges ordinarily will be achieved through assignment to them of cases which are not complex cases. An exception to this generalization may be warranted in the case of a senior judge who is sitting at the place of his residence or who has some special competence in complex cases.

An active judge, 28 U.S.C. §§ 291–293, or a senior judge who has requested his name be placed on the Roster of Senior Judges, 28 U.S.C. § 294, may be assigned temporarily as a visiting judge in another district in his own or a different circuit (in accord with statutory procedures and subject to the limitations therein).

If, as suggested above, each complex case is assigned from the outset to a single judge, it follows that complex cases should not normally be assigned to visiting or senior judges. The trial of the complex case imposes strain upon both court and counsel. The basic purpose of assigning such a case to a single judge is to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings.

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[6] See, e.g., first two paragraphs of Local Rule 12(d) in Eastern District of Pennsylvania (12/19/61) quoted in *Appendix,* 0.3.

0.4 The Principal Pretrial Conferences.

In this work there are suggested four principal pretrial conferences. These principal conferences represent stages of the pretrial processing of complex litigation each of which may be accomplished in more than one pretrial conference. The suggestions are made in this manner because this program has proven to be an efficient and convenient approach to the pretrial preparation of complex litigation.[7] In suggesting four principal conferences the suggested procedures of a principal pretrial conference should be accomplished before undertaking the next principal pretrial conference. The operations to be accomplished at each of these pretrial conferences constitute a substantial completion of a phase of the pretrial preparation which should be accomplished before beginning the next phase.

It is not intended, however, to recommend an inflexible program of holding only four principal pretrial conferences. The suggestions made herein are subject always to the discretion of each judge to adapt the procedures to the particular case or to deviate and innovate where necessary or desirable.[8] *However, the first principal (preliminary) and final pretrial conferences ordinarily should be held.* The

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[7] In many respects the pretrial proceedings in multidistrict litigation will be the same as the pretrial proceedings in complex cases. To avoid repetition much of the discussion of pretrial proceedings in complex cases will be incorporated by reference in Sections 5.1–5.5 of the *Manual* which deal with pretrial procedures in multidistrict litigation.

[8] Thus, in some cases the court will find it necessary to hold many more informal and formal pretrial conferences than the four principal pretrial conferences discussed herein; in other cases, it will be desirable to hold less than four principal pretrial conferences. And in many instances the operations within each phase of pretrial preparation may be altered to fit the circumstances of a given case. It is important to the Bar that each judge does not employ unpredictable and constantly varying procedures.

first principal pretrial conference is ordinarily necessary to determine the nature and problems of the case and to assure that the necessary and desirable pretrial procedures are timely initiated. The final principal pretrial conference is ordinarily necessary to determine that all problems solvable in pretrial have been solved, and that all necessary and desirable pretrial procedures have been completed.

0.5 Sequence of Discovery.

In the interests of fairness and efficiency, and in the absence of rare and exceptional circumstances, all parties should proceed simultaneously with discovery in the separate stages, namely the first wave, second wave and special issue discovery. Any other course will ordinarily prolong the discovery processes and may prejudice the party first to make discovery or the party whose discovery is deferred. (In the electrical equipment litigation exceptional circumstances of novelty, magnitude, and shortage of judicial and legal personnel compelled the partial deviation from this principle. This deviation should not ordinarily be repeated.)

1.0 First Principal (Preliminary) Pretrial Conference.

Recommendation: Promptly after assignment of the complex case, the judge to whom the case is assigned should hold a preliminary pretrial conference. The notice for this conference shall request counsel for the parties to meet and confer in advance in an effort to present a suggested program for accomplishment of the steps necessary to frame and develop the issues and expeditiously make the case ready for trial. In the event that counsel are unable to agree upon a suggested program, or to the extent that they are in disagreement, each counsel shall be requested to present

an individual suggested plan. At this conference the court should:

(a) assume special judicial control of the case;

(b) ascertain counsels' current views of the issues and of the pretrial procedures necessary and desirable to prepare the case for trial or other disposition;

(c) establish a timetable for filing pleadings and motions other than discovery motions;

(d) give notice that preclusion orders will be entered if warranted;

(e) establish a schedule for requests for a first wave of discovery designed to secure the names and location of witnesses and the production of documents and other physical evidence and information which will be required at a later stage for discovery on the merits;

(f) consider the possibility of consolidation of cases and joinder of additional parties;

(g) permit discovery on the merits for emergencies and to narrow the issues;

(h) provide a method and schedule for submission of preliminary legal questions when desirable to expedite the disposition of the cause;

(i) consider appointment of liaison counsel;

(j) urge counsel to cooperate in eliminating unnecessary objections and motions; and

(k) in potential class actions under Rule 23, F.R. Civ.P., establish a schedule for early determina-

tion of the class action questions including a schedule for prompt completion of discovery relevant to the class action issue.

1.1 Judicial Control of Complex Cases.

The essence of the program suggested herein is the exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation.

The Federal Rules of Civil Procedure contemplate that discovery in the ordinary case will be directed by counsel with infrequent intervention by the court when counsel are unable to agree.[9] This usual pattern, however, may be ineffective in complex cases if they are to be processed expeditiously.

The trial court has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case the court must assume an active role in managing all steps of the proceedings. Firm control must be exercised over a complex case from the time of its filing to its disposition.[10]

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[9] ". . . Pre-trial sparring between the parties is onerous on the court as well as litigants, and frequently unnecessary and unwise. Furthermore, it is contrary to the spirit of the discovery Rules which were intended to operate on the initiative of the parties and, where possible, without court intervention. Judge Kaufman has recently observed: 'The whole discovery procedure contemplates an absence of judicial intervention in the run-of-the-mill discovery attempt.'" 4 *Moore's Federal Practice* ¶ 26.02[5] (2d. ed).

[10] In order to permit such judicial control, adjustment should be made, when necessary, in the normal case load of the assigned judge so that he will have time to handle the complex case. This is customary in the Northern District of California. See *1957 New York Seminar,* 21 F.R.D. 395, 490–493. In districts where there is one judge, it is recommended that

A crucial step in the first phase of judicial management of complex cases is the prompt entry of an order staying all pretrial proceedings until an initial schedule of discovery is approved.[11] *Caveat:* Except in rare cases for good cause appearing, there should, however, be no stay of discovery which is not accompanied by a positive plan for the expeditious accomplishment of discovery or disposition of the litigation without discovery.

1.2 Ascertainment of Counsels' Views of the Issues.

At the first principal (preliminary) pretrial conference in a complex case the court should ascertain counsels' current views of the issues involved in the case.[12] It may also expedite the preparation of a plan for orderly pretrial procedure if counsel will state their opinions on special problems which are likely to arise later and disrupt the orderly conduct of discovery or the trial such as the possible destruction of important documents, the possible unavailability of witnesses, or major anticipated questions of immunity from discovery.

Some courts have followed the practice of obtaining counsels' views of the case by requiring the filing before discovery of initial pretrial briefs containing all the legal and factual contentions of the parties.[13] Since discovery and

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the district judge advise the chief judge of the circuit of the complex case and of the approximate period required for trial so necessary designations can be made to take care of his normal case load.

[11] See Sample Pretrial Order No. 1, *Appendix* 1.1.

[12] For instance, it may be important to know at the outset whether an antitrust counterclaim with a demand for a jury will dictate the order of trial under *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed.2d 988 (1959).

amendments to pleadings are liberally allowed under the Federal Rules of Civil Procedure, definitive initial pretrial briefs are considered herein to be of little value before an opportunity to complete discovery has been given. Further, it is now established that ordinarily in a complex case no summary judgment may be rendered on a genuine issue in the absence of a fair opportunity to complete discovery on that issue.[14] Therefore, the practice of requiring before completion of discovery a definitive initial brief containing all the factual and legal contentions of a party or of the parties is not recommended.[15]

1.3 Establishment of Timetable for Pleadings and Non-Discovery Motions.

After ascertaining counsels' current views of the real problems involved in the case, the court should establish a timetable for filing all pleadings and motions other than discovery motions. This step is basic to any delineation of the currently permissible areas of discovery. Sometimes in complex cases the discovery which is permitted is too broad. In such cases the problem is to prevent uncontrolled discovery on immaterial or irrelevant issues which would otherwise waste the time, resources and energies of the litigants and the judge. Nevertheless, it is important to remember that the issues made by the initial pleadings may be expanded or restricted as a result of future discovery and

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[13] See, e.g., *Prettyman Report,* 13 F.R.D. 62, 68; *1954 ABA Committee Report,* p. 19; *1959 New York Seminar,* 21 F.R.D. 395, 520 *et seq.; 1958 Palo Alto Seminar,* 23 F.R.D. 319, 407, 414.

[14] *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); cf. *First National Bank of Arizona v. Cities Services Co.,* 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

[15] Cf. *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 13, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

liberally allowed amendments. For this reason the beginning of discovery ordinarily should not be deferred until the issues are framed by the pleadings.

1.4 Notice of Entry of Preclusion Orders.

The court should announce to counsel at an early stage in the pretrial proceedings of a complex case that except for good cause appearing, (1) preclusion orders will be entered, or other sanctions be applied, where a party has not complied with discovery obligations and orders,[16] and (2) the parties will be precluded from offering in evidence or otherwise raising any legal or factual matters not included in the final pretrial brief.

1.5 Scheduling of Requests for First Wave of Discovery.

The main objective to be accomplished in the early stages of the recommended program is the completion of a first wave of discovery to be followed in the later phases by a second wave of discovery on the merits. The first wave of discovery should be designed to disclose as far as possible (1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits; and (3)

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[16] See generally Barron and Holtzoff, *Federal Practice and Procedure,* Vol. 2A, pp. 524–559; see also Waterman, *1961 Seminar on Procedures for Effective Judicial Administration,* 29 F.R.D. 191, 420–426 (1961); *Developments in the Law-Discovery,* 71 Harv. L. Rev. 940, 985–991 (1961); *Comment, Recent Innovations to Pretrial Discovery Sanctions: Rule 37 Reinterpreted,* 1959 Duke L.J. 278; Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Colum. L. Rev. 480 (1958).

information concerning the transactions upon which the claims for relief are based.[17]

At this preliminary pretrial conference the judge should initiate the first wave of discovery by establishing a schedule for counsel to submit requests for leave to propound written interrogatories, for leave to schedule depositions upon oral interrogatories, and for orders for production of documents all to ascertain only the information listed in (1), (2) and (3) above,[18] with the exceptions discussed hereinafter in paragraph 1.7.

1.6 Consolidation of Cases, Joinder of Additional Parties, and Class Actions.

In complex litigation, the questions of possible consolidation of cases under Rule 42(b), joinder of additional parties under Rules 13(h), 14 and 19–22, and determination of class actions under Rule 23, F.R.Civ.P., should be raised at the preliminary pretrial conference. Early inquiry into and solution of these problems may avoid many major difficulties which would arise later if not given early attention. The use of local rules such as Suggested Local Rules 1 and 2 set forth in the *Appendix* will provide information on the

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[17] See footnote 26, page 23.

[18] See Sample Pretrial Order No. 1, *Appendix* 1.1, for a form of agenda for the preliminary pretrial conference. See Sample Pretrial Order No. 2, *Appendix* 1.5, for a form of pretrial order to be developed at the preliminary pretrial conference. See also Sample Pretrial Order No. 3, *Appendix* 1.5, for forms of transaction interrogatories and discovery designed to yield the names of potential witnesses and the location of documents. This sample form is based on discovery orders which were approved in the electrical equipment antitrust litigation. The transaction information, although basic information on the merits, is desirable at this preliminary stage of discovery to narrow the issues and permit determination of legal questions such as the application of the statute of limitations.

existence of related cases.[19] Recommendations concerning the consolidation of cases appear in Section 5.12 of these suggested procedures.

A civil action may be brought as or converted into a class action by the parties under amended Rule 23, F.R.Civ.P., or the court may *sua sponte* initiate the conversion of an action into a class action. In this manner, a simple civil action may become quite complex.

A rule or practice requiring early notice to the court of a potential class action is absolutely necessary.[20] The court should explore at an early stage in the pretrial preparation whether the action is brought as (or may develop into) a class action; if so, the court must make a determination "as soon as practicable . . . whether it is to be so maintained." Rule 23(c)(1).[21] Under the recent decision in *Eisen v. Carlisle & Jacquelin,* the determination that the action is or is not maintainable as a class action cannot ordinarily be made without affording the parties:

> ". . . a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequacy of representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper."[22]

A separate schedule for discovery on the class action issue should be established if it appears that discovery will be required to provide a basis for the determination of the

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[19] See Suggested Local Rules 1 and 2, *Appendix* 0.2.

[20] See the Proposed Local Rule in the Southern District of New York on class actions, *Appendix* 1.6.

[21] "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained . . ."

[22] 391 F.2d 555, 570 (C.A. 2 1968).

class action issue. Ordinarily it will not be necessary or desirable for such discovery to be conducted at the same time discovery is scheduled on the merits of the case.[23]

If class action proceedings are initiated by the court *sua sponte,* the court should make tentative written determination including the requisite findings of fact under subdivisions (a) and (b) of Rule 23 and should, in an evidentiary hearing, afford the opposing party or parties an opportunity to refute such findings.[24]

1.7 Discovery on Merits for Emergencies and to Narrow Issues.

To provide for emergencies and to permit narrowing of the issues, the court should at this preliminary stage of discovery permit and schedule carefully controlled but liberal discovery on the merits, e.g., where a witness is aged or infirm or where there is a narrow issue which may be decisive on the merits, such as the statute of limitations, *res judicata,* accord and satisfaction, and the like.[25] But experience has demonstrated that in a complex case orderly discovery requires that this first wave of discovery be accompanied by plans for full discovery in two successive waves as recommended herein.

1.8 Early Determination of Special Legal Questions.

In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the

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[23] Some highly useful insights into these and other matters relevant to the maintenance of class actions are found in Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39.

[24] See Second Amended Class Action Memorandum and Order in *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.,* Civil No. 62 C 1761 and related cases, 285 F.Supp. 714 (N.D. Ill. February 28, 1968).

[25] See Sample Pretrial Order No. 2, *Appendix* 1.5.

determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions in the case. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time, and a summary judgment on some or all issues could be rendered in many cases. A method and schedule for submission of this preliminary legal question to the court of appeals was provided in several circuits in order that the nature and scope of discovery could be defined early in the pretrial proceedings.[26] Similar questions may become apparent at the preliminary pretrial conference. When desirable to expedite the cause, the court should provide an efficient method including discovery if desirable, and a time schedule for submission and determination of such preliminary legal questions.

1.9 Liaison Counsel.

When there are several parties on one or both sides of the case represented by different counsel, the court is confronted with a problem in communicating with counsel and

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[26] Information regarding the transactions upon which claims for relief are based will aid in determining the time scope of discovery, and whether fraudulent concealment is an issue. For this reason, as well as for settlement purposes, the early production of transaction information is made a part of the first wave of discovery. See Sample Pretrial Order No. 3, *Appendix* 1.5.

in securing responses from counsel on procedural questions. If these circumstances appear at the preliminary pretrial conference, the court should consider requesting counsel for the parties on each side to select one or more of their number as liaison counsel.[27] If such counsel is selected he may be authorized by stipulation to receive notices on behalf of all counsel, to act as their spokesman at pretrial conferences, and should have the responsibility for calling meetings of counsel. These meetings may be for the purpose of agreeing upon responses to questions and suggestions of the court and for the purpose of initiating proposals, suggestions, proposed orders, proposed schedules, joint briefs and joint schedules during the pretrial proceedings, among other things.

Many conditions, including conflict of interests and of theories, may make it unwise or undesirable that counsel be compelled to delegate authority to counsel who represents another party. In these circumstances consideration should be given to appointment of more than one liaison counsel or to limitation of the authority of liaison counsel, especially where conflicting interests appear. The court should not compel a party to authorize counsel other than his own to make admissions by stipulations in matters of substance.

1.10 Cooperation of Counsel.

The court should urge counsel to cooperate to eliminate unnecessary motions, objections or other actions which

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[27] If the parties cannot agree upon liaison counsel, the court has the power to make an appointment. See *Rando, et al. v. Luckenbach Steamship Company, Inc., et al.,* 25 F.R.D. 483 (E.D. N.Y. 1960), (involving more than 300 actions, approximately 500 plaintiffs and over 200 counsel), in which the court held that it was proper to appoint general counsel to supervise discovery proceedings. Caution should be observed in appointing liaison counsel over objection of one or more parties.

would delay the discovery that will ultimately be required. To this end counsel should be urged to meet and confer freely to resolve differences over forms and areas of discovery without the presence and intervention of the court.[28] Skilled and experienced counsel recognize the importance and efficiency of encouraging voluntary agreements among the parties to make discovery which may be compelled under the rules. A local rule requiring such a practice before the court is required to rule is in force in several districts and has proven useful and efficient.[29]

2.0 Second Principal Pretrial Conference.

Recommendation: At the second principal pretrial conference the court should:

(a) determine the class action issue;

(b) determine preliminary legal questions;

(c) rule on the requests for discovery scheduled by the first pretrial conference (first wave of discovery);

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[28] Attention of counsel may be invited to the excellent article on *Tactical Advantages from the Use of Discovery,* 27 Tenn. L. Rev. 323, 331, where Dean Wicker states:

> ". . . There is usually no point in objecting to a failure of the other lawyer to give the required type of notice, when you know that he is legally entitled to the requested information and is determined to get it. One of the earmarks of a lawyer who gets along well with his fellow lawyers and his clients is that he courteously complies with all requests for the doing of acts which he knows that ultimately he can be compelled to do. . . . One of the by-products of the procedural system of full disclosure . . . is that attorneys become accustomed to showing their hands to their adversaries, and eventually take pride in using that kind of machinery for arriving at settlements or trying cases on the merits."

[29] See Suggested Local Rule 6, *Appendix* 1.10.

(d) fix time for completion of first wave of discovery and establish a schedule for discovery requests designed to secure the production of documents, evidence and information which will be required for completion of discovery on the merits (second wave of discovery);

(e) fix a date in the past prior to which no information will be discoverable, and limit subject matter on which discovery will be permitted;

(f) explore requiring the deposit of documents in a centralized depository;

(g) inquire concerning expert evidence which may be offered and request written pretrial offers of proof;

(h) explore the possibility of use of computer evidence, surveys, samples and polls; and

(i) consider requesting the parties to exchange estimated trial dates.

2.1 Determination of the Class Action Issue and of Preliminary Legal Questions.

Before proceeding to plan the completion of discovery, the court should whenever feasible, determine the class action issue, if any, and the preliminary legal questions the determination of which will fix the scope of discovery. If it is determined that there is to be a class action, an opportunity should be given to potential additional parties to participate if they are to be bound by discovery. Rule 23, F.R.Civ.P. After these preliminary matters have been determined, planning the completion of discovery can proceed. See ¶ 1.6 *supra* for practice and procedure. See ¶ 5.5 for problems arising in multidistrict litigation.

2.11 Summary judgments in civil antitrust cases.

Ordinarily a motion for summary judgment should not be granted until a reasonable opportunity to complete discovery has been afforded, on this issue or issues material to the summary judgment.[30]

2.2 Ruling on Requests for First Wave of Discovery.

The second principal pretrial conference is critical in organizing further pretrial procedures. Here the court should outline the tentative plans for the timing, scope and general sequence of all discovery. In planning the scope of discovery immediate attention should be given to the claims of immunity from discovery which can be anticipated (e.g., privilege and work product claims). Rulings on these claims of immunity should be made promptly in order that discovery may proceed without suspension or interruption.

Ordinarily the first wave (and second wave) of discovery should proceed simultaneously for all parties. Prolonging time required for the pretrial processes by requiring or permitting one party to conduct or complete discovery before another party begins, should be avoided whenever possible. See ¶ 0.5 *supra*.

2.3 Completion of First Wave of Discovery and Scheduling Requests for Discovery on Merits.

The discovery permitted in the first wave should ordinarily be concluded prior to the deadline for filing the remaining requests for discovery on the merits (second wave of discovery). Therefore, a date in the future should be fixed

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[30] *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); cf. *First National Bank of Arizona, et al. v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Perma Life Mufflers, Inc., et al. v. International Parts Corp., et al.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

at this time for completion of the first wave of discovery. The time period allowed for completing the first wave of discovery should be limited to the minimum reasonably necessary. Having fixed a time for completion of the first wave of discovery, the court should then fix a schedule for submitting thereafter requests for discovery on the merits. In scheduling the second wave of discovery (on the merits of the litigation) the court should make a tentative listing of all further desirable pretrial procedures and should establish tentative schedules for their accomplishment.[31]

2.4 Limiting Time and Subject Matter of Discovery on Merits.

To keep discovery within bounds of reason and relevancy, the court should explore the desirability of establishing limits of time and subject matter for the remaining discovery on the merits. If appropriate, the court should fix a date in the past and should order that matters occurring prior thereto may not be discovered. Further, in accordance with the provisions of Rule 26, F.R.Civ.P., the court should order that no discovery be permitted on irrelevant matters and on stipulated or uncontroverted facts.

2.5 Document Depositories.

The Federal Rules of Civil Procedure provide for inspection and copying of documents and other physical evidence at such time, place and in such manner as provided by the order of the court. In the ordinary case, documents are inspected at the office of the custodian or his counsel. When voluminous documents may be inspected and copied by

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[31] Sample Pretrial Order No. 3, *Appendix* 1.5, contains a schedule for discovery requests on the merits of the litigation. Note the provisions for confidential treatment of certain discoverable business information, and for filing under seal of documents claimed to be privileged, paragraph E. of Sample Pretrial Order No. 3.

many parties, the development of centralized depositories is a major step forward in the orderly, efficient and economical processing of the complex case. Depositing the documents at one or more convenient locations in the custody of the parties or of an officer of the court does much to eliminate expensive, burdensome, time-consuming and wasteful efforts by many parties to study, copy and analyze documents in widely separated locations. Central depositories for documents are especially useful in massive multidistrict litigation.

Control of the documents in a central depository makes readily available information on compliance with orders for document deposits and of utilization by the parties. This information is useful for shaping and planning subsequent discovery.[32] The existence of a document depository enables the court and the parties quickly and precisely to determine what documents have been produced, and what information is in the documents, for rulings on motions for discovery and preclusion, and to compel compliance with discovery orders.

In multidistrict litigation in which the establishment of a document depository is not agreeable to the parties possessing the documents and is not clearly required, the court may provide that parties produce the documents or establish a central depository at the election of the parties.[33]

The expense of the document depository should ordinarily be borne by the party who maintains the depository and who benefits by being relieved of the obligation of making multi-

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[32] See Sample Pretrial Orders Nos. 3A and 3B, *Appendix* 2.5. Sample Order No. 3A, which provides for the parties to retain custody of the documents, is based on orders approved in the electrical equipment cases. Court custody is provided by Sample Order No. 3B.

[33] See Sample Pretrial Order No. 3C, *Appendix* 2.5, providing for an optional document depository.

ple production of the same documents, particularly in multidistrict cases.

2.6 Early Inquiry Into Possible Expert Opinion, Computer, Samples, Polls and Survey Evidence.

The court should inquire into the areas in which the parties intend to offer expert opinion evidence. This inquiry should be made in order to schedule disclosure of the identity and qualifications of experts, of the opinions to be expressed by the experts and of the underlying data on which the opinions will be based. This information may be valuable in determining whether and when an expert should be appointed by the court.

The spectacular developments in the use of computers including electronic data processors in the fields of science, industry, government and the professions have created unanticipated problems in the discovery and reception in evidence of computer processed data. Because of the manner in which this data is recorded, processed and employed, it is important that the possibility of use of computer evidence be known to the court and counsel at the earliest possible moment. This knowledge must be acquired early because electronically recorded and processed data must be given special treatment far in advance of trial in order to insure fairness in its use, to permit ascertainment of its reliability, and to avoid surprise and delay. Therefore, at this stage of the pretrial preparation the court should, on the record, explore the possibility of the use of electronically processed evidence at the trial, in order that efficient and just pretrial orders concerning its discovery and use at pretrial and trial may be entered. See the immediately following discussion, in ¶ 2.61 to ¶ 2.617, of "Proof of Facts in Complex Cases," including a discussion of computer evidence.

2.61 Proof of facts in complex cases.

Introduction

This section of the *Manual* contains a discussion of some of the more difficult problems of proof in complex cases. The solutions of some of these problems are found both in proven techniques of long standing and in recently evolved techniques and procedures which have been devised to solve the new problems created by revolutionary developments of knowledge and technology.

The employment by businesses and professions of electronic means of recording and retrieving large masses of data, of summarizing and drawing conclusions from such masses of data and the employment by businesses and professions of samples, polls, surveys and sophisticated statistical analyses to ascertain facts have resulted in novel problems of proof in complex cases, as well as in some simple cases. For instance, electronically processed data may be offered to prove the state of accounts, the existence of material economic conditions in a major business or industry, and material conclusions in a relevant field of business or science. Further, the results of recognized methods of employing samples, polls and surveys, accepted as reliable in business and in science may be offered in evidence as proof of substantially reliable facts concerning the whole of the universe to which they relate.

Skilled witnesses qualified to offer opinions upon material matters in controversy employing these new and the other older proven methods of ascertaining facts and arriving at conclusions present new as well as old problems of proof.

The gap between the competence of the juror, the bench and the bar and the competence of the men and machines employed by business and science to ascertain facts and draw conclusions has been growing wider. The purpose of the discussion in this section of this work is to recount

old and new ideas and techniques and procedures designed to assist in narrowing these gaps in the interest of efficient administration of justice.

Proof of facts requiring resort to bulk underlying documents or to numerous witnesses; written or oral summaries, tabulations, charts, graphs or extracts.

2.611 *First Recommendation:* Voluminous or complicated data of an admissible character should be presented whenever possible through written or oral summaries, tabulations, charts, graphs or extracts. The underlying data, together with the proposed exhibits or summary testimony, should be made available to opposing counsel sufficiently in advance of the time they are to be offered to permit all objections to be raised and, if possible, resolved prior to the offer. Underlying data should not in the ordinary case be placed in evidence.

It is often possible to eliminate bulk documentary evidence from the record by utilizing oral or written summaries, tabulations, charts, graphs or extracts. The judge and counsel should be alert for areas where such summarization is possible, if the opposing parties have had adequate reasonable opportunity to test the authenticity of the underlying data and the fairness and accuracy of the summary and have raised no objection on these grounds. If objections are made, they should, whenever possible, be disposed of prior to the time when the summarization is offered into evidence. Only such of the underlying documents necessary to preserve the objections raised should be made part of the record.[34]

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[34] *Prettyman Report,* 13 F.R.D. 62, 77–78. A more comprehensive statement on this subject is found in the *1958 Streamlining Report,* 13 A.B.A. Antitrust Sec. Rep. 183, 208–211 (1958).

2.612 *Second Recommendation:* Scientifically designed samples and polls, meeting the tests of necessity and trustworthiness, are useful adjuncts to conventional methods of proof and may contribute materially to shortening the trial of the complex case.[35]

Both samples and polls are methods of survey research designed to obtain a result applicable to the entire universe by examining representative portions thereof and projecting the results.[36] For clarity of discussion "sample" is used herein to designate the physical examination of parts to establish the character of the whole, i.e., personal examination by the sampler of objectively observable facts such as, for example, a count of units or the results of test borings.[37] On the other hand, a "poll" (or opinion survey), as used herein, refers to the interrogation of part of the population whose views or attitudes are deemed relevant to the litigation.

Thus, for present purposes a sample is confined to observable facts, whereas a poll may involve the reporting by

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[35] The proper use of samples and polls as a means of facilitating proof in protracted litigation is receiving increased attention and has great potentiality. Because there are a number of critical factors that must be considered in determining the propriety of a sample or poll in a given case, this *Manual* treats the subject in some detail.

[36] "The universe or population—the terms are used synonymously—is defined as the aggregate of all elements whose characteristics are to be estimated." Barksdale, *The Use of Survey Research Findings as Legal Evidence* 17 (1957).

[37] Cf., *United States v. Aluminum Co. of America,* 35 F.Supp. 820, 824 (S.D. N.Y. 1940). Research practitioners define sampling more broadly: "A sample survey, as the term is used in this study, refers to a systematic process of collecting information about a small group of elements (human beings or inanimate objects) chosen from a larger group of elements, or universe, for the purpose of estimating particular characteristics of the universe. . . . A census survey is a complete enumeration of all the elements in the universe." Barksdale, *supra,* footnote 36.

interviewees of (1) what they have seen, think, do or believe, or (2) why they think, act or believe in a certain way.

Scientifically designed samples and polls have received increasing acceptance in recent years in government and in industry.[38] The important question to be considered in a given case is whether the contemplated or proffered sample or poll is admissible under existing rules of evidence.

The principal objection to the admission of both samples and polls has been such evidence is hearsay. Courts now admit samples and polls over the hearsay objection on the grounds that surveys are not hearsay,[39] or on the grounds that surveys are within a recognized exception to the hearsay rule.[40]

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[38] See, e.g., U.S. Board of Governors of the Federal Reserve System, *Consumer Instalment Credit, Part IV, Financing New Car Purchases* (1957). Such surveys usually are based upon "probability sampling," a system under which every unit or person in the universe has a known chance of being included. In this type of survey the results, by application of statistical principles, may be projected to the universe with a known margin of "sampling error." This kind of error is to be distinguished from "error in sampling" which is caused by improper, i.e., biased, selection of the sample (see Barksdale, *supra,* footnote 36, at 24–25, 33, 153).

[39] *United States v. 88 Cases, More or Less,* 187 F.2d 967, 974 (C.A. 3 1951), *cert. den.,* 342 U.S. 861, 72 S.Ct 88, 96 L.Ed. 648 (1951); *Household Finance Corp. v. Federal Finance Corp., et al.,* 105 F.Supp. 164 (D. Ariz. 1952); *People v. Franklin National Bank,* 200 Misc. 557, 105 N.Y.S.2d 81 (Sup. Ct. 1951), *rev'd* on other grounds, 281 App. Div. 757, *modified,* 305 N.Y. 453, 113 N.E.2d 796 (1953), *rev'd* on other grounds, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954); *Zippo Mfg. Co. v. Rogers Imports* (S.D. N.Y.) 216 F.Supp. 670, a scholarly opinion by Feinberg, J.

[40] *Miles Laboratories, Inc. v. Frolich,* 195 F.Supp. 256 (S.D. Cal. 1961), *aff'd per curiam,* 296 F.2d 740 (C.A. 9 1961), *cert. den.,* 369 U.S. 865, 82 S.Ct. 1030, 8 L.Ed.2d 84 (1962); *Marcalus Manufacturing Co. v. Watson,* 156 F.Supp. 161 (D. D.C. 1957), *aff'd,* 103 U.S. App. D.C. 299, 258 F.2d 151 (1958). Other cases have admitted survey evidence without stating the grounds on which it is admitted. See, e.g. *Sunbeam Corpora-*

(a) *Samples.* When a sample is offered through the testimony of the sampler, the report on the sample examined (i.e., on the count of units or the test borings in the examples noted above) usually does not involve hearsay.[41] In order to project this report, however, the burden of proof rests upon the offeror to show that the sample was selected in accordance with accepted principles of sampling so that it properly represents the universe.[42] Once this is established, there remain only questions of relevancy, materiality and weight.

The same reasoning applies to the type of survey in which a series of witnesses are chosen from selected portions of the universe to testify as to the particular facts in issue with which each is familiar.[43] An important question is whether

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tion v. Sunbeam Furniture Corp., 134 F.Supp. 614 (N.D. Ill. 1955); *Zippo Mfg. Co. v. Rogers Imports, supra,* Note 39.

[41] Whenever documents are examined to determine the truth of assertions made outside of court, the hearsay problem is raised. In most instances these documents will probably fall within one of the recognized exceptions to the hearsay rule (e.g., business records). However, where they do not, the situation is analogous to that of hearsay polls which are considered below. See Sprowls, *The Admissibility of Sample Data into a Court of Law: A Case History,* 4 U.C.L.A. L.Rev. 222 (1957); McCoid, *The Admissibility of Sample Data into a Court of Law: Some Further Thoughts,* 4 U.C.L.A. L.Rev. 233, 236 (1957).

[42] Standards for probability samples have been established by the Munitions Board Standards Agency of the Department of Defense and by the American Society for Testing Materials, Barksdale, *supra,* footnote 3, at 122. In at least two unusual situations the subsequent taking of a complete census of the previously sampled or polled universe has afforded an opportunity to check the accuracy of the earlier sample or poll. In both instances the results were within one per cent of the sample or poll results. See Sprowls, *supra,* footnote 41, at 229; and *National Dairy Products Corp.,* F.T.C. Dkt. No. 6175, Record, pp. 6591–6593.

[43] This was the type of survey approved by Judge Wyzanski in *United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295, 305–307 (D. Mass. 1953), *aff'd,* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed 910 (1954).

the selected witnesses collectively have been chosen by proper sampling methods so as to justify the inference that their testimony accurately reflects the testimony which would have been given by the universe as a whole.

(b) *Polls.* As noted above, polling, unlike sampling, involves the ascertainment of facts by interrogating others on their observations, actions, motivations or beliefs.[44] Sometimes, as a matter of substantive law, what is said by an interviewee may be relevant and admissible not for the truth of the statement but as evidence of a state of mind, such as the reaction of members of the public to a particular product. Thus, polls have been held admissible to prove statements of interviewees as evidence of state of mind in unfair competition,[45] and antitrust cases.[46] This kind of

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[44] The poll, like the sample, is an attempt to derive from a part of the universe facts which are properly projectable to the entire universe. However, for the purposes of this report, the basic differences between the two lie in the methods by which the desired information is obtained.

[45] See *United States v. 88 Cases, More or Less,* 187 F.2d 967 (C.A. 3 1951), *cert. den.,* 342 U.S. 861, 72 S.Ct. 88, 96 L.Ed. 648 (1951); *American Cooperative Serum Ass'n v. Anchor Serum Co.,* 153 F.2d 907 (C.A. 7 1946), *cert. den.,* 329 U.S. 721, 67 S.Ct. 57, 91 L.Ed. 625 (1946), *rehearing den.,* 329 U.S. 826, 67 S.Ct. 182, 183, 91 L.Ed. 701, 702 (1946); and *Landstrom v. Thorpe,* 189 F.2d 46, 26 A.L.R.2d 1170 (C.A. 8 1951), *cert. den.,* 342 U.S. 819, 72 S.Ct. 37, 96 L.Ed. 620 (1951). *Contra, Elgin Nat. Watch Co. v. Elgin Clock Co.,* 26 F.2d 376 (D. Del. 1928); *John B. Stetson Co. v. Stephen L. Stetson Co.,* 85 F.2d 586 (C.A. 2 1963), *cert. den.,* 299 U.S. 605, 57 S.Ct. 232, 81 L.Ed. 446 (1936); *Tri-State Broadcasting Co. v. Federal Communications Comm'n.,* 68 U.S. App. D.C. 292, 96 F.2d 564 (D. C.C. 1938), 71 U.S. App. D.C. 156, 107 F.2d 956 (D. C.C. 1939); and Pattishall, *Reactions Test Evidence in Trade Identity Cases,* 49 Tr. Rep. 145 (1959). Where sample-polls are held non-hearsay, the propriety of the polling techniques employed must, of course, still be adequately demonstrated to justify their admission; *Zippo Mfg. Co. v. Rogers Imports, supra,* Note 39.

"poll" is actually a "sampling," for the outward manifestation of the "physical fact" to be proved, state of mind, has been personally observed by the sampler-witness.

On the other hand, polls may also be offered to prove the truth of the assertions made by the interviewees and thus are hearsay, admissible only if they fall within an exception to the hearsay rule. It is not recommended that there be created a general exception to this rule which would allow the admission of all polls into evidence. However, in a given case the factors of necessity and the circumstantial guarantee of trustworthiness may be such that a particular opinion survey could properly be admitted to prove the truth of the facts reported within recognized principles of evidence.

Proof of necessity does not require a showing of total inaccessibility to proof of the facts desired to be shown, but the offeror must show the impracticability of making his proof by conventional methods.[47]

In evaluating the trustworthiness of a particular opinion survey attention should be centered on the nature of the fact

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[46] See, e.g., *State Wholesale Grocers, et al. v. The Great Atlantic & Pacific Tea Co., et al.,* 154 F.Supp. 471, 498–499 (N.D. Ill. 1957), *rev'd.* in part, 258 F.2d 831 (C.A. 7 1958), where both a shopping survey (poll) and a price survey (sample) were received in evidence in a private action under the antitrust laws.

[47] See *United States v. E.I. DuPont DeNemours and Company,* 177 F.Supp. 1, 18–19 (N.D. Ill. 1959); *Eighth Avenue Coach Corp. v. City of New York,* 170 Misc. 243, 250–251, 10 N.Y.S.2d 170 (S.Ct. 1939), *aff'd,* 286 N.Y. 84, 35 N.E.2d 907 (1941); *United States v. Aluminum Co. of America,* 35 F.Supp. 820, 823 (S.D. N.Y. 1940); *Westinghouse Radio Stations, Inc.,* 10 Pike & Fischer, *Radio Regulation* 878 (Docket No. 9138, F.C.C., June 29, 1955) (the survey was "the most probative evidence practicable under an issue which, as to Westinghouse, permitted of no absolute proof . . .").

or facts to be proved thereby, and the manner of conducting the survey. If a poll records the interviewees' observations or knowledge of objective facts such as color, number, size, etc., it may, if properly conducted, possess the elements of trustworthiness sufficient to be admitted. If, on the other hand, a poll records subjective data such as the beliefs, opinions or motivations of the interviewees, its trustworthiness may well be less; the showing of necessity in such case should be stronger, and the question of trustworthiness should be more closely scrutinized.[48]

The offeror has the burden of establishing that a proffered poll was conducted in accordance with accepted principles of survey research, i.e., that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognized experts; the data gathered was accurately reported; and the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey.[49]

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[48] The testimony of the statistical expert has only limited bearing on the issue of the trustworthiness of the poll. In the case of a sample-poll, he can and must establish that the answers of the interviewees can be projected on statistical principles, within a predictable and inconsequential margin of error, to those which would have been given by the entire universe had they been similarly interviewed. But this does not go to the question of whether the interviewees have given—or that the universe would give—factually correct answers.

[49] The survey may, of course, be tested by cross-examination of the offeror's witnesses prior to its receipt in evidence. Possible shortcomings in the survey method are discussed in Blum and Kalven, *The Art of*

Once the offered poll has passed the test of admissibility, the objections to the manner in which it was conducted go to the weight of the poll as evidence.[50]

2.613 *Third Recommendation:* The underlying data, method of interpretation employed and conclusions reached in polls and samples should be made available to the opposing party far in advance of trial.

It is desirable that questions going to the admissibility of the polls or samples be raised, and if possible, decided prior to the time they are offered in evidence. However, no procedure should be adopted which in effect would place the burden of disproving admissibility on the opposing party. Although making all the data regarding a poll or sample available to the opposing party may alleviate many of the problems, merely making available to the opposing party the documents underlying the poll, and names and addresses of the samplers and interviewees (so that they can be interviewed, cross-examined or the trustworthiness of their

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Opinion Research: A Lawyer's Appraisal of An Emerging Science, 24 U. Chi. L.Rev. 1, 7–15 (1956); see also, Sorensen and Sorensen, *Responding to Objections Against the Use of Opinion Survey Findings in the Courts,* 20 J. of Marketing 133 (1955); Sorensen and Sorensen, *The Admissibility and Use of Opinion Research Evidence,* 28 N.Y.U. L.Rev. 1213 (1953). Proponents of the use of survey data in the courts point out that the substantial guarantee of trustworthiness required for an exception to the hearsay rule is to be found in properly conducted surveys since survey methodology, developed over the years, seeks to avoid the same hazards as does the hearsay rule, and non-sampling errors can be detected and evaluated by competent research technicians. See Barksdale, *supra,* footnote 36, at 155. See also, Zeisel, *The Uniqueness of Survey Evidence,* 45 Cornell L.Q. 322 (1960).

[50] In *United States v. National Homes Corp.,* 196 F.Supp. 370, the court overruled defendant's objection to admissibility of a survey on the ground that the proffered survey did not examine a proper universe, and held that this contention related to the probative value of the evidence rather than to its admissibility.

answers otherwise checked) should not be held to place upon the opposing party the burden of proving the proffered poll or sample untrustworthy.

In certain instances it may be desirable to consider at pretrial a proposed poll so that the flaws in the mechanics may be eliminated, to the extent possible, before the poll is taken.[51]

2.614 *Fourth Recommendation:* Computer maintained records and computer analyses of masses of raw data are becoming increasingly valuable sources of evidence and their use and admissibility should be promoted and facilitated in complex cases.

The legal profession in recent years has been confronted with the continuing problem of accommodating the rules of evidence to technological changes in our society. The difficulties in determining the admissibility of such evidence as x-rays, radar speed tests and lie detector tests are dwarfed by the new problems which have been created by the advent and increased use of electronic data processing and storage machinery. In the short period since its introduction, following the Second World War, the computer has become a pervasive feature of everyday business. The operations of modern manufacturing and service corporations, banks, insurance companies and credit institutions, are dependent on computers to the extent that it is now impossible to imagine such businesses functioning without these electronic aids.

The rapid rate of technological development and the expanding range of applications of computers suggest that the problems are still in their infancy, and that the importance of computer based evidence can only increase with the passage of time. Dr. Jerome B. Wiesner, Dean of Science

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[51] See 66 Harv. L.Rev. 498, 508 (1953).

at the Massachusetts Institute of Technology, and former science advisor to President Kennedy, has said: [52]

> "The computer, with its promise of a million-fold increase in man's capacity to handle information, will undoubtedly have the most far-reaching social consequences of any contemporary technical development. The potential for good in the computer, and the danger inherent in its misuse, exceed our ability to imagine. . . . We have actually entered a new era of evolutionary history, one in which rapid change is a dominant consequence. Our only hope is to understand the forces at work and to take advantage of the knowledge we find to guide the evolutionary process."

The rules of evidence which were evolved in less technologically advanced times must be adapted to meet the evidentiary problems and commercial realities posed by these developments.

2.615 *Fifth Recommendation:* Discovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information.

Machine records are discoverable under Rules 34 and 45, F.R.Civ.P. Rule 34 authorizes orders for the production by the parties of "tangible things, including documents, papers, books, accounts, letters, photographs and objects," while Rule 45 (b) is directed to obtaining the production of "books, papers, documents or tangible things" from non-parties. In the computer context, the basic types of machine records commonly utilized include: (1) punched cards; (2) paper and magnetic tapes; and (3) a variety of

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[52] Quoted in *The New Computerized Age,* a special issue of the Saturday Review, July 23, 1966, at 15–16.

other machine oriented components which record and store data. In the absence of special considerations such privilege, work product immunity, industrial or trade secrets in the machine records, computerized data (including analyses) in any of the above-mentioned forms should be freely discoverable. If the discovering party has data processing equipment that is compatible with that of the owner of the computer records, delivery of the machine-readable version of the information, or a copy thereof, will normally be sufficient. When the discovering party's equipment is not compatible, or he has no computer equipment, delivery of a print-out of the machine-readable records provides a reasonable alternative mode of discovery.

The court, in its discretion, may prescribe that discovery take place in any one of a number of other ways. For example, it may be that the information has not been recorded by the computer in a form in which it will be of the greatest utility to the examining party. Accordingly, it may be necessary or appropriate to permit the examining party to develop his own programs for the analysis or reorganization of the machine-readable data so as to convert the information into a form that is more germane to the examiner's defense or prosecution of the action. The court must exercise care in permitting one party to analyze the business data of another party, but as a practical matter the same risks present in discovering computer records are presented by the discovery of more traditional forms of records. Thus, if machine analysis or reorganization of the data will further the discovering party's preparation for trial, it should be facilitated and encouraged by the court. Again, however, the court must be sensitive to problems of trade secrets, privileged information, the work product doctrine and keep in mind that in modern business the methodology of a company's computer system may be a valuable asset that should not be cavalierly handed over to a litigation opponent without good cause.

If print-outs of the information contained on the computer records do not exist, the question is presented whether a party may be required to prepare and produce such print-outs. The decisions are unclear on when a party will be required to process information into the form requested by his opponent.[53] It has been suggested, however, that such processing should be required where programs exist to print out the records in the form desired,[54] or when it would require a minimum of effort to prepare a program to secure the requested information.[55]

In many instances it will be essential for the discovering party to know the underlying theory and the procedures employed in preparing the machine-readable records. When this is true, litigants should be allowed to discover any material relating to the record holder's computer hardware, the programming techniques employed in connection with the relevant data and the operation of his data processing system. When statistical analyses have been developed from more traditional records with the assistance of computer techniques, the underlying data used to compose the statistical computer input, the methods used to select, categorize, and evaluate the data for analysis, and all of the computer outputs normally are proper subjects for discovery.

In the absence of work product immunity litigants should

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[53] In *United States v. United States Alkali Export Assn., Inc.,* 7 F.R.D. 256 (S.D. N.Y. 1946) the court refused to require preparation of certain requested lists revealing location of defendant's operating facilities; which in *Van Wagner v. National Container Corp.,* 16 Fed. Rules Serv. 34.13, Case 3 (S.D. N.Y.) the defendant was directed to prepare a list of its customers.

[54] See Freed, *Evidence and Problems of Proof in a Computerized Society, Modern Uses of Logic in Law* (December 1963) 171, 180.

[55] See Freed, *Computer Print-Outs as Evidence,* in 16 *Proof of Facts,* 273, 324–329.

also be allowed ordinarily to discover written materials relating to the programming and operation of the opponent's data processing system, where in anticipation of litigation statistical analyses have been prepared by computers, the data (inputs), the methods used to prepare the analyses, and all results (outputs) are proper subjects for discovery.

2.616 *Sixth Recommendation:* Computer maintained records kept in the regular course of business should be admitted where it has been shown that the criteria required for the admission of non-computer maintained business records have been met and there is no reason for the court to find the material unreliable or of no substantial probative value.

Prior to the introduction of the data processing machine, business data were recorded in books of account and voluminous filing systems which required extensive time, space and labor to maintain. With the development of economical, efficient computers it has become prevalent to maintain such data on punched or magnetic cards and tapes, discs, drums, cores, and similar media, and on printed materials (print-outs) reflecting the information recorded. Moreover, computer procedures often require that the data be recorded in a machine-readable format or language which is not intelligible to the eye in the manner of more traditional forms of business records. Admissibility of such evidence may depend on the determination of whether the computer records or print-outs are kept in the regular course of business.

This question was considered by the Supreme Court of Nebraska in *Transport Indemnity Company v. Seib*.[56] After a witness for the insurance company had testified that information pertinent to its policies was regularly fed into

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[56] 178 Neb. 253, 259, 132 N.W.2d 871, 875 (1965) (action by insurer to recover earned premiums).

an electronic computer which recorded this data on tapes and calculated the premiums due, the trial court received in evidence as an exhibit a computer print-out of the earned premiums sued upon by plaintiff. In holding that the computer print-out was admissible under the Nebraska business records statute, the Nebraska Supreme Court said:

> "No particular mode or form of record is required. The statute was intended to bring the realities of business and professional practice into the courtroom and the statute should not be interpreted narrowly to destroy its obvious usefulness . . .
>
> "The machine here performs the bookkeeping task in the usual course of business. Instead of on paper, the information and calculations are stored on tape and may be retrieved and printed at any time. The taped record furnished a cumulative record based on information flowing into the office of the plaintiff company day by day and fed into the machine in response to a systematic procedure for processing each insured's account."

The Nebraska statute similar to Title 28, U.S.C., § 1732, the Federal Shop Book Act, which provides that:

> ". . . any writing or record, whether in the form of an entry in a book or otherwise . . . shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business . . ."

To qualify for admission within the meaning of § 1732, a record must have been made pursuant to established procedures for systematic and timely recordation and preservation. The rationale of § 1732 was expressed in *Louisville & Nashville R.R. Co., et al. v. Knox Homes Corp.*[57] as follows:

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[57] 343 F.2d 887 (C.A. 5 1965) (a railroad's suit against a shipper for alleged undercharges).

> ". . . The probative reliability of these papers as proof of the matters reflected therein was established by the system under which they are made. It is the business record in the form regularly kept by the particular business and reliance thereon that gives the trustworthiness and hence legal admissibility to such records . . ."

Sunset Motor Lines, Inc. v. Lu-Tex Packing Company Inc.[58] raised the question of whether a computer record maintained by the United States Department of Agriculture was admissible. The Court of Appeals sustained the trial court's exclusion which was based on a lack of proper foundation for this official document:

> ". . . Assuming *arguendo* that it might have been a record within 28 U.S.C.A. 1731–1745, it was not certified as required, F.R.Civ.P. 44 (a), and nothing brings it within the alternatives of 44 (c)."

Since the court did not reach the question of whether the record would have been admissible as a business record after a proper foundation had been laid, *Sunset* is not a barrier to the admission of computer records under § 1732.

In *Missouri Pacific Railroad Company v. Austin, et al.*[59] the court suggested that § 1732 be liberally interpreted as follows:

> ". . . So long as regard is paid to the indispensible fundamental trustworthiness of the proffered [business] records, the statute [Title 28, U.S.C., § 1732] '. . . should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed . . .' "

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[58] 256 F.2d 495, 499 (C.A. 5 1958) (action against a truck carrier for loss of a meat shipment).

[59] 292 F.2d 415, 422 (C.A. 5 1961).

This liberal policy on admissibility is in accord with the position of the federal courts on records produced by other mechanical means.

For example, an electrocardiogram tape,[60] a tachograph chart [61] and the tape recording of an in-flight conversation between an airplane pilot and the airport [62] have all been held to be admissible business records.

Necessity dictates the same result for computer records. The usefulness of the computer maintained records for evidence purposes is not diminished because they are not visually intelligible or because they are embodied in media like punch cards, magnetic tapes or discs. If the cards, magnetic tapes, discs, and computer component parts are used to keep ordinary business records, the same assurances of trustworthiness normally should be present in these records as are present in visually discernable records. The language of § 1732 indicates it is the nature of the record, not the form of recordation, which is the significant criteria. Judge John R. Brown (C.A. 5) has expressed the view that courts must accommodate the rules of evidence to the computer age or face antiquation: [63]

> ". . . For a machine now capable of making 240,000 additions per second, reading magnetic tape containing 4½ million digits of information on a single reel at a breath-taking speed, to speak of the shop book rule

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[60] *Croll v. John Hancock Mut. Life Insurance Co.,* 198 F.2d 562 (C.A. 3 1952).

[61] *NLRB v. Pacific Intermountain Express Company, et al.,* 228 F.2d 170 (C.A. 8 1955).

[62] *LeRoy, et al. v. Sabena Belgian World Airlines,* 344 F.2d 266 (C.A. 2 1965).

[63] Brown, *Electronic Brains and The Legal Mind: Computing The Data Computer's Collision with Law,* 71 Yale Law Journal 239, 248 (1961).

is, indeed, an anachronism. But we operate more comfortably with familiar concepts. Just as that rule dispensed with the necessity of producing the person who made the entry, the law must find a means of giving judicial currency to that which is reliable and acceptable in the market place. The Federal Business Records Act and the Uniform Business Records as Evidence Act certainly have sufficient intrinsic flexibility to permit their adaptation to this new form and type of business records."

In *Transport*[64] the Supreme Court of Nebraska held that print-outs of records regularly kept in the course of business which have been produced solely for the purpose of the litigation may be admissible:

"Defendant argues exhibit 14 is inadmissible because it was prepared for use in this litigation and trial . . .

"This argument exalts the form over the substance. The retrieval from the taped record . . . was made for the purpose of the trial. But, the taped record and the information and calculations thereon were made in the usual course of business and for the purpose of the business alone. There is no merit to this contention."

None of the foregoing should obscure the fact that computer based record keeping presents a number of special problems that bear on the weight to be given to the data and, in some contexts, should control its admissibility. As time progresses computer based record systems will bear less and less resemblance to traditional means of business record keeping. Even today, electronic data processing and storage systems used by banks, corporations, and credit agencies are not simply electronic versions of double entry

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[64] 178 Neb. 253, 260, 132 N.W.2d 871, 875 (1965); see also, Freed, *supra,* footnote 55 at 316–320.

bookkeeping or accounts. The increased speed of computer input, manipulation and the economies of data storage create qualitative differences between computer and traditional record keeping in many contexts. For example, computer record keeping often does not require an entry for each individual transaction in a chain of transactions. The computer may simply maintain the current balance of an account and eliminate any trace of the intermediate transactions that led to the account's having the particular balance it does at a given moment in time. As a result, the computer's report as to the status of the account may be less informative than the traditional "T" account, which contains an entry of all of the transactions relevant to that account.

On the other hand, it must be kept in mind that the increased efficiency and economies of computer record keeping may motivate business enterprises to gather a wider range of information than they have in the past. Once the cost of data input and storage declines sufficiently, it is probable that corporations will maintain a higher level of information about their employees and activities than they formerly did. Although these records may be "made in the regular course" of business, much of its content may be "softer" than what is found in more typical records. Further there is some concern whether the care that goes into the collection and recordation of new types of data or its significance from an evidentiary perspective will be as great as the more limited records traditionally kept by business enterprises.

Sometimes data are randomly recorded in the computer in the sequence in which they occur rather than as organized bundles relating to specific customers or transactions. When directed to do so, the machine will collect and print out all the data relating to a particular transaction or customer. Such a print-out is not a visual counterpart of

the machine record but a compilation of scattered, related information. This evidence should not be rejected merely because it is not a visual counterpart of the machine record,[65] but the court must consider whether its reliability has been compromised.

These and numerous other problems of computer evidence yet to be perceived mean that courts will have to exercise care that in attempting to permit use by litigants of the benefits of the new technology, they do not abdicate their responsibility to distinguish among various types of computer records, their composition, and the manner in which they were created and have been maintained. In order to exercise a discriminatory judgment the court must be fully informed of the material sought to be discovered and used as evidence.

2.617 *Seventh Recommendation:* Summaries and analyses of masses of data made by a computer should be admitted on the same basis as other summaries or analyses. Computer inputs and outputs, the underlying data and the program method employed should be made available to the opposing party in advance of trial as a condition of admissibility.

Computers perform a useful and often necessary function in summarizing and analyzing great masses of data. Many complex analyses formerly made from visually discernable data by statisticians can now be made more efficiently by a properly programmed computer. The admissibility of a statistician's analysis is based on the reliability of the supporting data and the analytical process utilized.[66]

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[65] See Freed, *supra,* footnote 54 at 173–174.

[66] Sampling methods have frequently been suggested as a tool for shortening protracted cases. See, for example, *U. S. v. Columbia Pictures Corporation, et al.,* 25 F.R.D. 497 (S.D. N.Y. 1960); and *U. S. v. National Homes Corp.,* 196 F.Supp. 370 (N.D. Ind. 1961).

Use of a computer to facilitate preparation of the study should not detract from its admissibility.[67] If anything, the computer's superior ability to handle large quantities of data and do mathematical computations will enhance the probative value of the evidence in many contexts.

Nonetheless, it must always be remembered that although a computer can do mathematical calculations and manipulate bits of information faster and with fewer mechanical mistakes than humans, the machine basically can do only what humans instruct it to do and can operate only on data supplied by humans. Thus, in weighing the value of machine analyses it is essential to evaluate the competence and techniques of the people who have designed the operational methods of the computer and the accuracy and completeness of the data which the computer is directed to manipulate. Moreover, there often is a wide difference in the character and reliability of computer summaries and analyses of different types of data. Data relating to a computer based payroll or employment records are inherently "harder" (more objective) and will produce a more objective analysis or summary than will the information fed into a computer to help develop the legislative reapportionment of a political unit, which is "soft" (less objective) and is bound to yield a more subjective product.

A machine tabulated survey of 4,600 questionnaire answers was admitted by stipulation in *State Wholesale Grocers, et al. v. The Great Atlantic & Pacific Tea Company.*[68] Computer runs of the prices for all transactions in an industry, summarized in the form of an industry price index, have also been admitted by stipulation in the elec-

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[67] Care should be taken to assure that the basic data used were valid and a proper method of compilation was employed. See Freed, *supra,* footnote 55 at 339–350.

[68] 154 F.Supp. 471, 497 (N.D. Ill. 1957).

trical equipment antitrust trials.[69] It is essential that the underlying data used in the analyses, programs and programming method and all relevant computer inputs and outputs be made available to the opposing party far in advance of trial. This procedure is required in the interest of fairness and should facilitate the introduction of admissible computer evidence. Such procedure provides the adverse party and the court with an opportunity to test and examine the inputs, the program and all outputs prior to trial. The pretrial rulings on objections can then be made by the court. Without agreement among the litigants, introduction of the computer outputs should be feasible if the party or parties who supervised the data processing testify to the validity of the methods used, the reliability of the computer, the accuracy of the inputs, the validity of the programming and the accuracy and completeness of the outputs.

2.7 Exchange of Estimated Trial Dates.

It is recommended that the court at this second principal pretrial conference request the parties to exchange estimated trial dates in order to establish target dates for the completion of discovery and for the commencement of trial. It is difficult to schedule tentatively the remaining pretrial procedures until a general understanding on a target date for trial is fixed, for all remaining processes must be completed before the trial date.

After the parties have made their estimates for the target date of trial, the court should fix a target date so that the parties will know the approximate limits of time for scheduling and completing discovery and other pretrial procedures.

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[69] See, e.g., trial transcript of *Philadelphia Electric Company, et al. v. Westinghouse Electric Corporation, et al.* (E.D. Pa. 1964) pp. 2377–2380.

3.0 Third Principal Pretrial Conference.

Recommendation: At the third principal pretrial conference the court should:

(a) establish time schedules for all subsequent steps in the case, including the completion of discovery;

(b) consider possible appointment of a special master, e.g., to supervise discovery;

(c) schedule the filing of final pretrial briefs; lists of trial witnesses and exhibits; designations of deposition evidence and objections thereto; requests for *voir dire* questions; special interrogatories and jury instructions; and written offers of proof;

(d) fix the dates for final pretrial conference and trial; and

(e) explore whether court appointed expert may be desirable.

3.1 Scheduling Subsequent Steps in Case.

Before permitting additional discovery the court should hold a pretrial conference at which time schedules are established for all subsequent steps in the case, including the completion of discovery. At the second principal pretrial conference a schedule for filing all remaining discovery requests should have been established. The third principal pretrial conference should be held after these discovery requests have been filed. Prior to ruling on discovery requests, the court should require the parties to confer in a good faith effort to resolve any objections which may exist. The court should intervene wherever necessary to encourage agreement among the parties. Rulings should be made only when the parties, after good faith efforts, are unable to

resolve their disputes or where the agreements are not in keeping with the schedule of the court. The discovery requests should be promptly ruled on and dates for their completion scheduled.[70] Extensions for compliance and exceptions to the schedule should be granted only for good cause. Having ruled on the remaining discovery requests, the court is in a position to establish time schedules for all remaining pretrial proceedings and to fix a trial date as hereinafter recommended.

3.2 Considering the Appointment of a Special Master.

3.21 General considerations.

Only in exceptional cases should the appointment of a special master be considered. Where the complex case presents problems which justify appointing a master, a master may perform useful functions on limited and specified matters such as supervising discovery, fact reporting on preliminary motions, or complicated and involved accountings.[71]

La Buy v. Howes Leather Co.[72] is the point of departure for current discussion of the use of masters in complex litigation. There the court, quoting from *Ex Parte Peter-*

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[70] See Sample Pretrial Order No. 5, *Appendix* 3.3.

[71] In *Wilson v. Homestead Valve Manufacturing Company,* 217 F.2d 792, 800 (C.A. 3 1954), an action on contract for sales commissions, in commending the trial court's use of a special master, the court stated: ". . . We desire strongly to commend the trial judge . . . for making use of the services of a special master to examine the records of the defndant and report in summary form the significant figures for the use of the trial judge and the jury. This efficient procedure unquestionably shortened and simplified the trial, which otherwise might well have gotten bogged down in a welter of figures . . ." The report of the special master included mathematical computations so as to give effect to the respective conflicting interpretations of the contract.

[72] 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957).

son,[73] held that the use of masters under Rule 53 of the Federal Rules of Civil Procedure is "to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause," and that it is not the function of masters to "displace the court."[74] *La Buy* held that the reference of cases in their entirety "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."[75] "Exceptional circumstances" warranting reference are not established by either the congestion of the local docket or the complexity of the issues of fact and law.[76]

The Supreme Court, however, has not wholly banned the use of masters in complex cases. Courts have long had inherent power to appoint masters to aid them in the performance of specific duties. *Ex Parte Peterson, supra.* One of the listed purposes of the pretrial conference is to determine the advisability of a preliminary reference, Rule 16(5), F.R.Civ.P. The type of reference customary in other litigation under extraordinary circumstances continues to be proper in complex cases.

In exceptional situations, therefore, references may be appropriate for such purposes, as (a) supervising or facilitating discovery (treated in subparagraph 3.22, *infra*); (b) hearing of evidence with respect to complicated scientific and statistical facts of a specialized or technical nature; (c) reporting on detailed accountings incident to a deter-

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[73] 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

[74] 352 U.S. at 256.

[75] 352 U.S. at 256.

[76] See also, *United States, et al., v. Kirkpatrick, et al.,* 186 F.2d 393 (C.A. 3 1951), an admiralty case wherein the trial court was prohibited from making a general compulsory reference of a group of admiralty cases merely to relieve a congested docket.

mination of damages subsequent to a preliminary determination of liability; and (d) investigating complicated factual issues arising on preliminary motions directed to the service of process or venue.

3.22 Appointing a master to supervise discovery.[77]

It should again be emphasized that a master to supervise discovery should not be appointed automatically upon identification of the complex case. Neither should the master be utilized as a substitute for the judge. Masters to supervise discovery should be used sparingly. It is difficult to state definitively the circumstances in which appointment of such a master is justified. Among other things, criteria set forth in the *Handbook of Recommended Procedures for the Trial of Protracted Cases,* at pp. 39–42, 25 F.R.D. 390–394 should be considered. See *Appendix* 3.2.

In considering the appointment of a master, attention should be given to the following fundamental objections to the utilization of masters: the fear that the assigned judge will not adequately familiarize himself with the case in its pretrial phases; fear that the master selected will be inadequate; the master's inability finally to limit the scope of inquiry; and the increased costs in time and money which the reference may impose upon the litigants.

Appointment of a special master to supervise discovery will not justify the transfer to the master of the judge's pretrial responsibilities. The recommendation contemplates use of a master only under the direction of the judge.

The master alone cannot effectively limit the scope of inquiry. Although extremely broad pretrial discovery powers have been conferred on masters, the power to enter a pretrial order defining the issues and limiting the scope of

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[77] Sample Pretrial Order No. 4, *Appendix* 3.2, is a form of order appointing a master to supervise discovery.

inquiry usually is not conferred upon masters in the federal courts (except in accountings) but remains with the court.

Shortly after reference, there should be an informal conference of the judge, the master and counsel. At this conference all problems of discovery before the master which can be anticipated should be discussed and settled. The master should keep the judge apprised of problems as they arise. Additional pretrial conferences of the judge, the master and counsel can be arranged if and when necessary.

If a master is appointed, the master should be a person of outstanding competence and experience in his profession.[78]

One of the matters that should be given weight when considering the appointment of a master to supervise discovery is the cost of the reference. Since the master should be a man of outstanding and recognized competence in his profession, his compensation could be substantial. If after consulting counsel, the court decides to appoint a master, his selection fee and its allocation should be discussed with counsel.

The master's authority to rule on motions and objections should be made explicit in the order of reference. In making rulings, the master must view his role as quasi-judicial rather than merely advisory. The judge must make it clear to the parties at the outset that, while he will not hesitate to reverse an error of law, he will not lightly substitute his judgment for that of the master in a matter not involving legal error. In this way unnecessary applications for review will be discouraged.

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[78] Chief Judge William J. Campbell, *1957 New York Seminar,* 21 F.R.D. 395, 504.

3.3 Schedules for Filing Final Pretrial Briefs; Lists of Witnesses and Exhibits; Deposition Designations; and Written Offers of Proof of Technical and Scientific Opinions.[79]

At the third principal pretrial conference, the court should also schedule the filing of the final pretrial briefs; lists of trial witnesses and exhibits; designations of deposition evidence and objections thereto; requests for *voir dire* questions, special interrogatories and jury instructions; and written offers of proof including summarization of the parties' experts' opinions.

If a final pretrial order is to be constructed which will control effectively all important procedural and evidentiary aspects of the trial, the court should direct the parties to prepare comprehensive and precise final pretrial briefs which will narrow and define the issues in the light of the discovery completed on the merits. A pretrial order should establish an appropriate schedule for the submission of these briefs. The parties should be precluded from offering in evidence or otherwise raising at trial any factual matters not included in the final pretrial briefs [80] except upon a showing of good cause and with adequate safeguards to the opposing party.

Experience in complex cases has demonstrated that maximum benefits from the pretrial briefs can be obtained where the pretrial order provides for responsive pretrial briefs containing (a) a detailed narrative statement of facts proposed to be proved by the party having a claim for relief (and, in the responsive brief, admitting or denying each separate sentence contained in the narrative statement of facts of the adverse party in support of its claim for relief)

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[79] See Sample Pretrial Order No. 5, *Appendix* 3.3.

[80] If the suggestion in Section 1.4, *supra,* is followed, the parties will already be on notice of the court's intention to enter preclusion orders.

and (b) concise statements of legal contentions, citing authorities, in support of any legal matter contained in the brief and in response to the legal contentions made by the adverse party.

It is very important that a carefully constructed pretrial order be entered directing the structure of the final pretrial brief. For an action without a counterclaim it is recommended that the order contain the language precisely set forth in Sample Pretrial Order No. 5, Alternate Paragraph N. to Part III, *Appendix* 3.31, which has been repeatedly employed with success: [81]

Plaintiff's Pretrial Brief

"Each plaintiff shall file on or before the ..... day of ....., 19.., a detailed written pretrial brief consisting of, first, a narrative statement of all facts proposed to be proved by each plaintiff and, second, concise statements of the legal contentions of each plaintiff and the authorities in support thereof. The narrative statement of facts and the statements of legal contentions shall be set forth in the manner hereinafter ordered in separate sections of the pretrial brief and shall not be commingled.

"(1) The narrative statement of facts shall set forth in simple, declarative sentences, separately numbered, the narration of all facts relied upon by such plaintiff in support of its claim for relief herein. The narrative statement of facts shall be complete in itself and shall contain no recitation of what any witness testified to, or what any defendant stated or ad-

[81] Part III, Paragraph N., of Sample Pretrial Order No. 5, *Appendix* 3.3, sets forth instructions for the filing of the final pretrial briefs in a complex case containing a counterclaim. An alternate Paragraph N., designed for a case *without* a counterclaim, appears at the end of Sample Pretrial Order No. 5.

mitted in these or other proceedings and no reference to the pleadings or other documents or schedules as such, provided that at the option of plaintiffs (or of defendants in responses to this order) a narrative statement of facts may contain references in parentheses to the names of witnesses, depositions, pleadings, exhibits or other documents, but no party shall be required to admit or deny the accuracy of such references. The narrative statement of facts shall, so far as possible, contain no color words, labels, or legal conclusions; and in no event shall any such color words, labels, or legal conclusions be commingled with any statement of fact in any sentence or paragraph. The narrative statement of facts shall be so constructed, to the best of the ability of each plaintiff's counsel, that the opposite parties and each of them will be able to admit or deny each separate sentence of the statement. Each separate sentence of the statement shall be separately and consecutively numbered.

"(2) In the separate section of the pretrial brief containing the statement of legal contentions and authorities in support thereof, all legal contentions of each plaintiff, necessary to demonstrate the liability of each defendant to such plaintiff, shall be separately, clearly, and concisely stated in separately numbered paragraphs. Each paragraph shall be followed by citations of authorities in support thereof.

Defendant's Pretrial Brief

"(3) Within ..... days after service of plaintiffs' narrative statement of facts, each defendant shall file a pretrial brief containing factual statements adfitting or denying each separate sentence contained in the narrative statement of fact of each plaintiff,

except in instances where a portion of a sentence can be admitted and a portion denied. In those instances, each defendant shall state clearly the portion admitted and the portion denied. Each separate sentence of each defendant's response shall bear the same number as the corresponding sentence in the plaintiff's narrative statement of fact. In a separate portion of each defendant's narrative statement of fact, such defendant shall set forth in a separate narrative statement all affirmative matters of a factual nature relied upon by it. The defendant's narrative statement of affirmative factual matter shall be contained in a narrative statement of facts constructed in the same manner provided in paragraph (1) hereof for the narrative statement of facts of each plaintiff.

"(4) Within ..... days after the service of plaintiffs' statements of legal contentions and authorities in support thereof, each defendant shall file, in a separate part of its pretrial brief, a statement of its legal contentions and authorities in support thereof which shall directly respond to plaintiffs' separate legal contentions and contain such additional contentions of the defendant necessary to demonstrate the nonliability or limited liability of the defendant, or both. The statement of legal contentions of each defendant shall be constructed in the same manner provided in paragraph (2) hereof for the similar statement of each plaintiff.

Plaintiff's Reply Pretrial Brief [81.1]

"(5) Within ..... days after the service of de-

[81.1] The requirement of a reply brief of plaintiff to any factual and legal contentions of defendant was inadvertently omitted in the first draft of the *Manual.*

fendant's pretrial brief containing statements of affirmative matter, the plaintiff shall file a reply pretrial brief containing factual statements admitting or denying each separate sentence of the separate narrative statement of affirmative matters of the defendant. This portion of the plaintiff's reply brief shall be constructed in the same manner provided in paragraph (3) above for defendant's factual statements responding to plaintiff's narrative statement of facts, and shall be in a separate portion of the reply brief.

"(6) Within ..... days after service of defendant's statement of additional legal contentions and authorities in support thereof, plaintiff shall file in a separate part of its reply brief its separate statement of additional legal contentions and authorities in support thereof which shall directly respond to the additional legal contentions of defendant. The statement of legal contentions and authorities in support thereof shall be constructed in the same manner provided in paragraph (4) above for defendant's pretrial brief, and shall be in a separate portion of the reply brief.

"Any factual contention, any legal contention, any claim for relief or defense (in whole or in part) or affirmative matter not set forth in detail as provided hereinabove shall be deemed abandoned, uncontroverted, or withdrawn (as may be appropriate) in future proceedings notwithstanding the contents of any pleadigs or other papers on file herein, except for factual contentions, legal contentions, claims for relief or defenses thereto and affirmative matters of which a party may not be aware and could not be aware in the exercise of reasonable diligence at the time of filing the briefs hereinabove provided for. Any matters of which a party was not aware at the time of filing and which he

could not have been aware in the exercise of diligence at the time of the filing of a brief may be supplied by a supplemental brief by leave of Court for good cause shown on timely motion therefor."

The filing of lists of trial witnesses (including adverse witnesses) and exhibits, the designation of deposition evidence and the filing of written offers of proof on important issues (such as experts' qualifications and opinions), and objections thereto prior to the final pretrial conference affords the judge and the parties an opportunity to survey the proof which may be offered at trial and enables the court to indicate tentative and final rulings on admissibility prior to trial. In the event computer or computer-derived evidence is to be offered at the trial, the court should explore the parties' separate general views on the interpretation thereof.

3.4 Fixing the Dates for Final Pretrial Conference and Trial.

After the narrowing of the issues, which should result from the final pretrial briefs and from continued conferences among the attorneys with a view toward arriving at stipulations, a final pretrial conference should be held at which a definitive pretrial order is entered. This order will control the trial and define the broad issues framed by the pleadings with reasonable particularity.

A tentative agenda for the final pretrial conference should be distributed to counsel and dates fixed for the pretrial conference and trial.[82]

Early determination of the trial date is of primary importance. A target date for the start of trial should be fixed. The trial must be scheduled far enough in the future

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[82] See Sample Pretrial Order No. 5, *Appendix* 3.3.

to allow sufficient time for accomplishment of all remaining pretrial procedures.

3.5 Additional Steps to be Considered Prior to the Fourth (Final) Principal Pretrial Conference.

3.51 The court-appointed expert.

Recommendation: After the filing of final pretrial briefs, the court should consider appointing an expert for matters on which the parties' experts have expressed irreconcilable opinions. *Caveat:* great care should be exercised in the use and selection of a court-appointed expert.

Appointment of an expert by the court may be a useful procedure where the parties' experts have expressed irreconcilable opinions in the offers of proof or during discovery. In such a case it would be unwise to require a lay trier of fact to resolve conflicts of complex opinions without the opinion of an expert chosen by the court. Appointment of an expert by the court is a matter which should be approached with great caution. In no event should an expert be appointed by the court until counsel have been heard on the proposed action and consulted about the identity of the expert. Such an appointment in a complex case should be the exception rather than the rule.

When plainly irreconcilable views of experts are disclosed by the pretrial proceedings, the judge should study the opinions to determine the cause of divergence. If the experts involved agree on the theory to be applied and simply disagree on the factual assumptions underlying their opinions, and if the trier of fact does not need the assistance of expert opinion to determine the factual issues, appointment of an expert may not be indicated. But even where the experts agree on the applicable theory and disagree on the underlying factual assumptions and the fact finder is not

competent to resolve the factual issue without further expert opinion, a court-appointed expert to express an opinion on the fact issue may be desirable.

If the divergence of opinion is not on the underlying factual assumptions but on the applicable theory, the judge should acquaint himself with the recognized schools of thought in the field. When any well recognized school of thought is not represented in the opinions proposed to be offered, the appointment of an expert may be desirable.

The argument that in certain situations an expert will be biased by his doctrinal allegiances makes it evident that the court has the duty to exercise the utmost care in selecting the expert. In some circumstances, the failure of the court to appoint an expert could prevent the trier of fact from hearing a well recognized school of thought. Indeed, experienced and competent counsel often agree on the appointment and identity of a court-appointed expert.[83]

It is imperative that the data on which the expert's opinion is based be made available to all parties, that the court-appointed expert be available as a witness for either party or the court, and that the expert be subject to full cross-examination.[84] While the deposition of the court-appointed expert may be taken, it should not be taken except with leave of court.

If an expert is appointed by the court in a jury case, an appropriate cautionary instruction should be given to pre-

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[83] See, e.g., *Armstrong v. Motorola, Inc.,* 230 F.Supp 337, 340, 381 (N.D. Ill. 1964) *aff'd.* 374 F.2d 764 (C.A. 7 1967).

[84] Sample Pretrial Order No. 6, *Appendix* 3.5, is based on the order appointing an economist in *Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al.,* Civil Action No. 61 C 1278 and related power switchgear assembly cases in the Northern District of Illinois.

vent the jury from giving undeserved weight to his testimony solely because he has been appointed by the court.[85]

3.52 Polls, samples, surveys, summaries and computer runs.

Recommendation: Where polls, samples, surveys, summaries or computer runs may be offered in evidence, the court should require the party offering such evidence to divulge the raw data, the method and program employed in evaluating the data, and all the results derived (both favorable and unfavorable to the offering party).

Polls, samples, surveys, summaries and computer runs present unusual problems of admissibility under traditional exceptions to the hearsay rule. These problems of admissibility are discussed in the *Suggested Procedures* at 2.6. Elementary considerations of fairness require that these types of data be fully and freely discovered and be available for testing within a reasonable time prior to trial. Often great masses of underlying data are involved. If disclosure of this data is first made at trial, it might require a prolonged delay in trial to permit examination and testing for meaningful cross-examination and rebuttal. The liberal admission in evidence of summaries of and opinions based on large masses of data must be preceded by adequate pretrial procedures for examination and testing. Within this area, the protection against unreliable evidence afforded by the traditional orthodox hearsay rule can be supplied only by full disclosure to the adverse party in pretrial proceedings.[86]

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[85] See *Appendix* 3.51.

[86] See Sample Pretrial Order No. 7, *Appendix* 3.52, for form of order which requires complete disclosure of this type of data prior to trial. See also discussion of "Proof of Facts in Complex Cases," *Suggested Pro-*

3.53 Stipulations of fact.

Recommendation: In all complex cases the judge should take an active part in promoting stipulations of fact among the parties where it is obvious that a stipulation should be forthcoming in the light of all information available to the court and the parties.

The objective of obtaining stipulations of as many facts as possible in the complex case should be borne in mind at all stages of the case.[87] In addition, an accurate statement of the ultimate points of difference should always be obtained. In the unusual case where the stipulation of all facts is possible, a trial is avoided, thus saving the time and expense of the court and parties. Carefully drawn stipulations of fact also create a near-perfect record in the area covered by the stipulation. The stipulation may be that the fact or facts are "uncontroverted" or "uncontested" if not agreed to be true.

Requests under Rule 36, F.R.Civ.P., for admission of facts by parties in civil cases may not eliminate disputes over complicated matters, e.g., the reliability of industry and similar statistics. In such situations it is necessary and appropriate for the judge to explore in pretrial conferences the possibilities of stipulations and, where no sound reason for failing to stipulate appears, to urge that stipulations be signed. To be effective, however, work toward such stipulations should be initiated at an early stage and completed well in advance of trial.

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cedures at 2.6. Regarding claims of privilege and work product in the use of computer evidence, see Friedenthal, *Discovery and Use of an Adversary Party's Expert Information,* 14 Stanford L. Rev. 455 (1962).

[87] One method by which this can be done is to have the plaintiff file a list of proposed findings of fact and then have the other side respond. See Bromley, *1958 Palo Alto Seminar,* 23 F.R.D. 319, 422.

In many complex cases there is no serious dispute over the authenticity of documents or much of the basic economic or statistical data. Instead disputes frequently exist over the interpretation of and the weight to be given to such data. In such situations suitable safeguards to protect the parties' positions can be included in the stipulations. There is, therefore, in such cases no sound reason for failing to stipulate. The alternative is to waste days and even weeks of trial time.[88]

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[88] In *State Wholesale Grocers, et al. v. The Great Atlantic & Pacific Tea Company, et al.,* 154 F. Supp. 471 (N.D. Ill. 1957), *rev'd.* in part, 258 F.2d 831 (C.A. 7 1958), all the facts were stipulated, thus saving an estimated six months of trial time. See *1957 New York Seminar,* 21 F.R.D. 395, 499. See also, *Womack v. Consolidated Timber Co.,* 43 F.Supp. 625 (D. Ore. 1941); cf. *Clark v. U.S.,* 13 F.R.D. 342, 347 (D. Ore. 1952), *aff'd.,* 218 F.2d 446 (C.A. 9 1954), discussed at *1958 Palo Alto Seminar,* 23 F.R.D. 319, 385. The case of *United States v. Ling-Temco Electronics, Inc. and Chance Vought Corp.* is discussed as follows by Chief Judge Joe E. Estes (N.D. Tex.) in *Proceedings of the Seminars for Newly Appointed United States District Judges,* 49–50 (West, 1963):

> "I followed those suggestions in United States v. Ling-Temco Electronics, Inc. and Chance Vought Corp., which was decided against the Government and from which they took no appeal. The Honorable Lewis Bernstein, Chief of the Special Litigation Section of the Antitrust Division of the Department of Justice, wrote to me regarding this case, as follows: 'Unquestionably, this case demonstrates that if counsel co-operate, the court can try a so-called "big case" with dispatch. The completion of the trial of this action three months and eight days after the filing of the complaint should destroy the myth that antitrust cases are necessarily complex and must be protracted. The methods used to complete the trial of this action in the short time after the complaint was filed, in our opinion, can be successfully repeated. . . .' Lawrence E. Walsh, former United States District Judge and Deputy Attorney General, who represented the defendants, in commenting on the reasons for the expeditious disposition of the cases, pointed out: '(1) It was immediately assigned to one judge for all purposes, and (2) the pretrial conferences were conducted by a judge who had prepared himself

4.0 Fourth Principal (Final) Pretrial Conference.

The goal of the final pretrial conference is the construction of a final pretrial order[89] which will control all important aspects and stages of the trial. The matters to be taken up at this conference are listed in the following recommendation:

> *Recommendation:* At the final pretrial conference the following items should be considered: the pretrial briefs; ruling on objections to written offers of proof, deposition designations and documentary evidence; the delineation and simplification of undetermined issues of fact and law; preclusion orders or other sanctions; separation of issues; order of proof; limitation of period of proof; the use and reception in evidence of documents; limitations on the number of witnesses and scope of the testimony; exchange by counsel of proposed schedules listing the order for the calling of witnesses; agreement upon a trial schedule; appointment of spokesmen or liaison counsel; manner of use of depositions (including possible use of narrative summaries or verbatim extracts); provision for copies of exhibits for the court and counsel; limitations of opening statements; use of alternate jurors or less than twelve jurors; ruling on requests for *voir dire* examination; current index of the record; daily transcript; jury instructions; approval of special jury verdict or general verdict with interrogatories; and possibility of settlement.

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for this specific case. . . .' In all, the actual trial took less than ten hours of court time."

[89] See Sample Pretrial Order No. 8, *Appendix* 4.0, for a form of final pretrial order based on the order used in *Public Utility District No. 2 of Grant County, Washington v. General Electric Company, et al.,* Civil Action No. 5380 (W.D. Wash.).

4.1 Deposition Designations, Offers and Rulings with "Marginal" Indications.

In a complex case it is essential to an efficient presentation of deposition evidence that there be pretrial offers of deposition evidence, an opportunity to object thereto and rulings on objections prior to trial, as far as such rulings may be made.

An order scheduling the pretrial offers of deposition evidence and the filing of objections and counter offers should be entered. One of the techniques which aids all parties is for the material offered by each party to be enclosed in brackets in a distinctive color on the outer margin of the pages of the deposition. Opposite the brackets the opposing party can mark his objections in abbreviated language such as "D obj. hearsay—not best evidence"; etc.

The court's ruling can be indicated in similar fashion so that the admitted portion can readily be read from the original deposition. This technique should supplement a pretrial record of the full offer and objection made orally or in writing.

4.2 Preclusion Orders.

The final pretrial conference should include a review and discussion of the final pretrial briefs, rulings on objections to written offers of proof, objections to deposition designations (or summaries) and objections to documentary evidence in order to narrow the scope of proof, to arrive at additional stipulations and provide a basis for applying preclusion orders or other sanctions where a party has not complied with discovery orders and fails to show good cause therefor. In addition to general preclusion orders based upon non-compliance with discovery orders, the court may find it necessary to enter special preclusion orders relating to particular stipulations and covering factual or legal matters not raised in the final pretrial briefs. Evidence of

matters not stated in the final pretrial briefs may be received with leave of court on a showing of good cause with adequate safeguards for the opposing party. The pretrial rulings on use of preclusion orders will avoid delay and disorder in the trial.

4.3 Trial of Separate Issues.

Separate trials of separate issues may be feasible. *Caveat:* Make sure that the rule of *Beacon Theatres, Inc. v. Westover* is not violated in ordering trial of a separate issue.[90] The following are representative of those issues which might be considered for separation:

Statute of Limitations—Trial of a statute of limitations issue first may result in expediting disposition of the action.[91]

Claims under Different Laws—Separation of Sherman Act, 15 U.S.C. §§ 1, 2, conspiracy charges from claims under the Robinson-Patman Act, 15 U.S.C. § 13 (a, d–f).[92]

Liability v. Amount of Damages—Separation of the issues of liability from issues involved in determining the content and form of the decree or the amount of the dam-

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[90] 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed2d 988 (1959); see also *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). Cf. *Richmond v. Wiener* (C.A. 9) 353 F.2d 41.

[91] See *Whitsell v. Alexander,* 229 F.2d 47 (C.A. 7 1956), *cert. denied* 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461; *Electric Theater Co. v. Twentieth Century-Fox Film Corp.,* 113 F.Supp. 937 (W.D. Mo. 1953); cf. *Leonia Amusement Corp. v. Loew's Inc.,* 117 F.Supp. 747 (S.D. N.Y. 1953); *Winkler-Koch Engineering Co. v. Universal Oil Products Co.,* 100 F.Supp. 15 (S.D. N.Y. 1951).

[92] See *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 255 F.2d 214, 220 (C.A. 9 1958), *rev'd.* on other grounds, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

ages.[93] *Caveat:* Where issues of liability and damages are so interlocked that they must be considered together, separation may not be possible.[94] *Quaere:* Can separate juries try the separated issues of liability and damages? [95]

Foreign v. Domestic Commerce—Separation of issues involved in charges of restraint of foreign commerce from issues involved in charges of restrains of domestic commerce.[96]

Patent Validity v. Infringements—Separation of issues involving patent validity from issues involving infringement of patents.[97]

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[93] See *Orbo Theatre Corporation v. Loew's Inc., et al.,* 261 F.2d 380 (C.A.D.C. 1958), *cert denied* 359 U.S. 943, 79 S.Ct. 725, 3 L.Ed.2d 677 (1959); and *State Wholesale Grocers, et al. v. The Great Atlantic & Pacific Tea Co.,* 154 F.Supp. 471 (N.D. Ill. 1957), *rev'd.* in part, 258 F.2d 831 (C.A. 7 1958), discussed at *1957 New York Seminar,* 21 F.R.D. 502.

[94] *United Arilines v. Wiener,* 286 F.2d 302 (C.A. 9 1961), *cert. denied* 366 U.S. 924, 81 S.Ct. 1352, 6 L.Ed.2d 384 (1961). But cf. *United States v. Wiener,* 335 F.2d 379, 404 (C.A. 9 1964), *cert. dismissed* 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964).

[95] See *dictum* in *Hosie v. Chicago & Northwestern Railway Co.,* 282 F.2d 639 (C.A. 7 1960), *cert. denied* 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1960); and see the *Wiener* cases, *supra.*

[96] See, e.g., *United States v. Minnesota Mining & Mfg. Co.,* 92 F.Supp. 947 (D. Mass. 1950); and *United States v. National Malleable & Steel Casting Co.,* 1957 Trade Cas. ¶68,890 (N.D. Ohio 1957).

[97] See *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.,* Civil No. 62 C 1761 and related cases, 285 F.Supp. 714 (N.D. Ill., February 28, 1968) [Second Amended Class Action Memorandum and Order]; *Cataphote Corporation v. DeSoto Chemical Coatings, Inc.,* 356 F.2d 24 (C.A. 9 1966), *cert. denied* 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed.2d 67 (1966); *McCullough Tool Company v. Wells Surveys, Inc.,* 343 F.2d 381 (C.A. 10 1965); *Ditto, Incorporated v. Minnesota Mining & Mfg. Co.,* 336 F.2d 67 (C.A. 8 1964); *Swofford v. B & W, Incorporated,* 336 F.2d 406 (C.A. 5 1964), *cert. denied* 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965).

Patent Validity v. Misuse—Separation of issues involving patent validity from issues involving misuse of patents and violation of the antitrust laws.[98]

Primary v. Counterclaims—Separation of primary claims from counterclaims.[99] However, such separation may not operate to deny a party his right to a jury trial.[100]

Primary v. Cross Claims—Separation of primary claims from cross claims.[101]

Primary v. Third Party Claims—Separation of primary claims from third party claims.[102]

Interstate Commerce—Separation of the issue whether the interstate commerce involved in an alleged restraint is sufficient for a violation of the antitrust laws.[103] The interstate commerce issue is not as often in dispute in government actions as it is in treble damage actions.

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[98] See *Zenith Radio Corp. v. Radio Corp. of America,* 106 F.Supp. 561 (D. Del. 1952); *Beagle v. Thompson,* 6 F.R.Serv. 56c. 41, Case 10 (N.D. Ill. 1943).

[99] See *G. D. Searle & Co. v. Institutional Drug Distributors, Inc.,* 151 F.Supp 715 (S.D. Cal. 1957), *mandamus denied, Institutional Drug Distributors, Inc. v. Yankwich,* 249 F.2d 566 (C.A. 9 1957).

[100] *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).

[101] *Chicago, Rock Island & Pacific Railroad Co. v. Williams,* 245 F.2d 397 (C.A. 8 1957), *cert. denied* 355 U.S. 855, 78 S.Ct. 83, 2 L.Ed.2d 63 (1957).

[102] *Fidelity & Casualty Company of New York v. Mills,* 319 F.2d 63 (C.A. 5 1963).

[103] Cf. *United States v. Cigarette Merchandisers Ass'n, et al.,* 18 F.R.D. 497 (S.D. N.Y. 1955).

Release—Separation of the defense of release and discharge when raised in treble damage actions.[104]

Agency—Separation of agency issues (scope of employment) from negligence and damage issues.[105]

4.4 The Jury Demand Problem and the Order of Proof.

The issues should be tried in the order directed by the court at this conference, with deference to the rule of *Beacon Theatres, Inc. v. Westover.*[106]

To the extent feasible all evidence as to each issue should be presented consecutively by the plaintiff in accordance with any special order of court. After completion of plaintiff's case, the same procedure should apply to defense evidence.[107] This method will simplify the process of finding facts and formulation of jury issues and will reduce the length of the trial. The procedure should not be so rigidly followed as to require witnesses to make multiple appearances simply to maintain the order of presentation. Here a sound exercise of judicial discretion in the interests of economy and convenience of witnesses and parties, and in the interests of justice, should be exercised.

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[104] *Mannke v. Benjamin Moore & Co.,* 251 F.Supp. 1017 (W.D. Pa. 1966); *Sogmose Realties v. Twentieth Century-Fox Film Corp., et al.,* 15 F.R.D. 496 (S.D. N.Y. 1954); *Michael Rose Productions, Inc. v. Loew's Incorporated,* 19 F.R.D. 508 (S.D. N.Y. 1956).

[105] *Rosano v. Blue Plate Foods, Inc.,* 314 F.2d 174 (C.A. 5 1963), *cert. denied* 375 U.S. 866, 84 S.Ct. 139, 11 L.Ed.2d 93 (1963).

[106] 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); see also *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962).

[107] See Sample Pretrial Order No. 8, *Appendix* 4.0, based on a final pretrial order developed by Judge George H. Boldt in *Public Utility District No. 2 of Grant County, Washington v. General Electric Company, et al.,* Civil Action No. 5380 (W.D. Wash.)

4.5 Limiting Time Period of Proof.

Where appropriate, the final pretrial order should estab-
discovery and of proof have been demonstrated by com-
lish cut-off dates beyond which evidence will not be received except for good cause appearing. Complex cases can become unduly protracted if immaterial ancient history is permitted to be the subject of discovery and offer of evidence. The value and importance of establishing the period of
mittees studying the problems presented by the "big" case.[108] Careful consideration should be given to the possibilities of limiting the period of proof. Caution should be exercised that the limitation does not prevent the offer of substantial material evidence on important issues of fact.

Pretrial investigation may reveal an obviously appropriate period of discovery and proof.[109] But if it does not, the judge should select a date which, based upon information revealed during pretrial, will allow each party a reasonable opportunity to secure discovery and to make a case or defense.

The order establishing the period should not be unqualified but should provide for prohibition of discovery and the exclusion of evidence prior to and after dates selected, unless the offering party shows good cause why it should be

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[108] *The Prettyman Report* recommended that the period of inquiry be defined and limited by the trial judge at conferences prior to trial. 13 F.R.D. 62, 73–74. This recommendation was endorsed and expanded upon by the *1954 ABA Committee Report,* pp. 26–32. Cf. *Att'y Gen. Nat'l Comm. Antitrust Report,* p. 364 (1955).

[109] See *U. S. v. Armour,* Civil No. 48 C 1351, N.D. Ill. 1948, where an adjudication in 1930 in favor of defendants was held to negate any continuity of the alleged conspiracy said to have had its origin prior to 1900. See also, *U. S. v. General Outdoor Advertising Co.,* Civil No. 50 C 936, N.D. Ill. 1950, where an adjudication in 1929 was held to preclude use of evidence of alleged monopolistic activities in prior years, and *U. S. v. Borden,* Civil No. 51 C 947, N.D. Ill. 1951.

received. And in appropriate cases, different periods of discovery and proof on certain issues may be established by pretrial order.

Different periods may be established for different issues. Under the particular facts then before him in *United States v. Maryland and Virginia Milk Producers Ass'n, Inc.*,[110] Judge Holtzoff established a tentative ten year cut-off period on the allegations of restraint of trade and attempt to monopolize, but on the issue of acquisitions of other producers, found that "a much longer time [was] suitable." Pointing out that "the inordinate length of trials in antitrust litigation . . . caused largely by voluminous evidence reaching back many years that at times eventually has proven unnecessary, has created serious difficulties for the Federal Courts . . . ," and that the "excessive length of trials is closely related to the problem of congestion in the courts." Judge Holtzoff noted:

> ". . . One device [to shorten these proceedings] is to reduce the period to be covered by the evidence to a reasonable length, bearing in mind that the ultimate question in a civil suit for an injunction is whether at the time of the trial acts are being committed or threatened that should be enjoined for the future . . ." [111]

4.6 Use of Deposition Summaries.

Where extensive use will be made of deposition testimony, the court should instruct the parties to meet and consider possible use of deposition summaries or verbatim extracts in lieu of the whole or part of the depositions. This technique may be especially beneficial where numerous depositions dealing with the same facts and evidence have been listed for introduction. To the extent the parties can agree

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[110] 20 F.R.D. 441 (D. D.C. 1957).

[111] 20 F.R.D. at 443.

on summaries they should be used. However, the court should avoid requiring summaries in the sensitive areas where different inferences may be drawn from the deposition transcript.[112]

4.7 Schedule of Days and Hours of Trial.

A trial schedule should be decided upon which fixes the normal hours for each day of trial, the days each week when trial will be held, and the number of days for anticipated long recesses.

4.8 Special Timesaving Trial Orders.

Liaison Counsel: To reduce delays in the courtroom one or more spokesmen should be authorized to act in minor procedural matters for each side without specific prior consultation.[113] To save trial time the court should order that an objection made by one party may be relied on by any other party without repetition. Trial time can also be minimized by allowing continuing objections to a line of interrogation. A principal examining counsel on each side for each witness may be agreed upon to save repetition.

Daily Lists of Witnesses: Counsel should be directed to furnish opposing counsel, at a fixed time in advance of each trial day, with a list of the witnesses who are scheduled to testify on such day.

4.9 Alternate Jurors.

Because one or more jurors may be unable to serve

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[112] *The Prettyman Report,* 13 F.R.D. 62, 78–79, recommended that the trial judge might require a succinct narrative summary of each deposition to be filed with the deposition, and that opposing counsel might be required to point out alleged inaccuracies therein. On objections to use of deposition summaries, see *1954 ABA Committee Report,* pp. 50–52.

[113] See Judge Edward P. Murphy, *1958 Palo Alto Seminar,* 23 F.R.D. 319, 448.

throughout the trial, and because the trial of a complex case may be unusually long, alternate jurors should ordinarily be ordered in a complex case in the absence of an agreement that less than twelve jurors may return a unanimous verdict. In the alternative, a written pretrial stipulation that a unanimous verdict may be returned by a fixed number of jurors less than twelve may suffice if one or more jurors are excused before verdict.

4.10 Number and Use of Peremptory Challenges.

Pursuant to § 1870, Title 28, U.S.C., the court should set the number of peremptory challenges permitted for each party and determine the manner of their use. Special provisions for additional peremptory challenges and their use are appropriate in many complex cases, especially multiparty cases.

4.11 Manner of Voir Dire Examination.

Prior to trial objections to proposed *voir dire* questions should be ruled on and counsel should be made aware of the areas in which the court proposes to question the jury panel.[114] In districts in which the court conducts the *voir dire,* the court should secure the questions submitted by counsel for the parties. To this end counsel should be required to submit in advance of trial suggested questions for *voir dire* examination.

To insure efficiency and swiftness, it is suggested that the court conduct the *voir dire* examination.

4.12 Control of Opening Statements.

In appropriate cases, and after discussion with counsel, the court may set the length and scope of opening statements. Counsel may be required to state what they pro-

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[114] A sample *voir dire* examination is part of Sample Pretrial Order No. 8, *Appendix* 4.0.

pose to discuss on sensitive issues, and inadmissible and prejudicial information may be excluded. This will also eliminate possible traps for the unwary counsel who may, for example, state that he will introduce certain evidence which the court has excluded or may exclude when offered.

4.13 Request for Instructions and Proposed Findings and Conclusions in Nonjury Cases.

At a fixed time in advance of trial tentative proposed findings of facts and conclusions of law in nonjury cases should usually be required. In jury cases counsel should be requested to serve and file, at a fixed time in advance of trial, proposed written instructions, requests for which reasonably can be anticipated at that time. Each of these proposed instructions should be followed by a reference to its source or authorities on which it is based. Objections thereto should be requested and tentative rulings announced as early as possible. Provision should be made for additional and amended requests for instructions during the trial;[115] provision should also be made for amended and supplemental proposed findings of fact during and after the reception of the evidence.

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[115] See Rule 51, F.R.Civ.P.

PRETRIAL PROCEDURES IN MULTIPLE AND MULTIDISTRICT CIVIL LITIGATION

Many of the pretrial procedures in multiple and multidistrict litigation are the same as those in complex cases; therefore, reference will be made in this Section to the suggested procedures for complex civil cases.

5.1 Related Cases Which are Pending in one Division of a Single District (Intradivision Multiple Litigation).

5.11 Assignment to a single judge.

Recommendation: Local rules should provide for assigning all related cases pending in a division to a single judge.[116]

The possibilities for conflicts and duplication in discovery and other pretrial procedures can be avoided or minimized by centralized management of related cases. In many districts a local rule provides for the assignment of all related cases to a single judge. Once identification of related cases has been made, the rules of some districts provide for assignment of all related cases to the judge having the first case filed.[117] In other districts assignments are made by the Chief Judge or the Executive Committee of the District Court.

5.12 Consolidation of cases.

Recommendation: The judge to whom related cases have been assigned should consider consolidation for pretrial and trial purposes.

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[116] See Suggested Local Rule 5, *Appendix* 5.11.

[117] See, for example, General Rules 10B 4 and 5, Northern District of Illinois. See *Appendix* 5.12 for text of those rules.

The authority for consolidation is found in Rule 42(a), F.R.Civ.P.[118] The purpose of this Rule is to avoid unnecessary effort, costs and delays. In a complex case the Court of Appeals for the Second Circuit supported consolidation for limited purposes where the facts indicate that such procedure would be desirable, saying:

> "We see no reason nor has any been suggested by counsel why the considerations permitting consolidation for trial are not equally apposite in connection with consolidation in the period before trial. Indeed, an orderly and expeditious disposition at trial is dependent in large part on the manner in which the pretrial proceedings are conducted. If one of the purposes of consolidation for trial be to expedite the proceedings and avoid needless time and expense to the litigants and to the court, such objectives are as desirable and as attainable in the period utilized in preparing for the trial." [119]

Consolidation for pretrial purposes may eliminate needless effort, expense and paper work. For example, a master file for all of the related cases can be established in the clerk's office, and duplicate filings, records and rulings can thus be eliminated. Through consolidation for pretrial purposes, rulings in all related cases can often be made at one time in one document on each common legal issue. Counsel's paper work can be reduced through noticing

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[118] Rule 42(a) provides:

> "(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[119] *MacAlister, et al. v. Guterma, et al.,* 263 F.2d 65, 68 (C.A. 2 1958).

common depositions, serving uniform interrogatories, and filing joint motions in the consolidated cases.

Consolidation of cases or issues for trial ordinarily should be considered at the final pretrial conference, unless previously considered as recommended in Paragraph 4.3. When consolidation for trial will save expenses and time for the litigants and the court, without unduly complicating the trial, it should be employed.

In some circumstances separation of common issues of fact in related cases, and consolidation of these cases for trial on the separated issues may save much time and expense and provide for a uniformity of result.

5.13 Continue as in complex litigation.

Recommendation: After consolidation for pretrial purposes, the procedures recommended in this *Manual* for complex civil cases should be employed.

Procedures for a single complex case should be used in related complex cases and in such cases the procedures outlined in this *Manual* for complex civil cases should be followed. In simple multiple litigation the pretrial procedures for complex cases may not be desirable in whole or in part.

5.2 Related Cases Which Are Pending in Two or More Divisions of One District (Interdivision Multiple Litigation).

5.21 Transfer to single division.

Recommendation: All related cases pending in the district should be transferred to a single division and assigned to a single judge. In appropriate cases the transfer may be limited to pretrial proceedings.

Title 28, U.S.C. § 1404(b) [120] authorizes transfer between divisions of a single district on motion or on consent or stipulation of all parties or upon initiative of court.[121] Where feasible, consent or stipulation of the parties to transfer should be obtained. Existing § 1404(b), unlike earlier versions,[122] permits transfer over objections on motion of a party and on the court's own initiative.

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[120] Title 28, U.S.C. § 1404(b) provides:

"Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer." See Sample Pretrial Order No. 9, *Appendix* 5.2.

[121] Title 28, U.S.C. § 1404(a) has been construed to permit transfer by the court *sua sponte*. *City of Philadelphia, et al. v. Federal Pacific Electric Company, et al.,* C.A. Nos. 29810 and related cases (E.D. Pa. February 23, 1965); petition for writ of *mandamus* or rule to show cause *denied, sub nom. I-T-E Circuit Breaker Company v. City of Philadelphia, et al.,* No. 15,300 (C.A. 3 March 26, 1965); petition for *certiorari denied,* 381 U.S. 936, 85 S.Ct. 1768, 14 L.Ed.2d 701 (1965); *Kansas City Power and Light Co. v. I-T-E Circuit Breaker Company,* 240 F.Supp. 121 (W.D. Mo. 1965), *aff'd. I-T-E Circuit Breaker Company v. Becker,* 343 F.2d 361, 363 (C.A. 8 1965). See *The Problems Regarding the Federal Transfer Statute—Much Ado About Nothing,* 42 St. John's L.Rev. 93 (1967). See also Sample Pretrial Memorandum and Order No. 10, *Appendix* 5.32.

[122] "Under former 28 U.S.C. § 119 (1940) consent of all parties was necessary to empower the district judge to transfer a civil cause from one division of the district to another of its divisions. *Walsh & Wells v. City of Memphis* (W.D. Tenn. 1940) 32 F.Supp. 448.

"Present § 1404(b) is not so limited. A transfer may be made upon motion and the case transferred in the court's discretion, over objection of the adverse party. *McNeil Const. Co. v. Livingston State Bank, supra,* n.1." 1 *Moore's Federal Practice,* p. 1759, n.5 (1964).

5.22 Consolidate and continue as in complex litigation.

Recommendation: After transfer, the procedures recommended in Section 5.12 of this *Manual* should be employed to consolidate the cases. Thereafter the procedures recommended for complex litigation should be followed in consolidated complex cases.

5.3 Related Cases Which Are Pending in Two or More Districts of One Circuit (Intracircuit Multidistrict Litigation).

5.31 Intradistrict transfers and consolidation of cases in each district.

Recommendation: The procedures recommended in Section 5.21 of this *Manual* should be employed to transfer the cases in each district to a single division for assignment to a single judge. Thereafter, the procedures for complex cases should be considered for coordinated or centralized management under Section 5.32, *infra.*

5.32 Alternatives for coordinated or centralized management of cases.

Recommendation: After intradistrict transfers, but prior to any consolidation of the cases in a single division, the courts concerned should explore the following alternatives for joint processing of the litigation: (1) coordinated pretrial proceedings by the judges of the separate districts to whom the cases are assigned; (2) intracircuit transfers of all cases to a single district under § 1404(a), Title 28, U.S.C.; (3) assignment of one judge to all the districts concerned and assignment of all the related cases to this judge; (4) transfer for pretrial purposes by the Judicial Panel on Multidistrict Litigation under § 1407, Title 28, U.S.C.

1. *Coordinated discovery and pretrial program.* Because of venue problems,[123] or because the entire mass of litigation may place too great a burden on one judge, transfers under § 1404(a) may not be feasible. From time to time the needs of the litigation may require varying numbers of judges to act at widely scattered locations. A deposition program in related cases may schedule oral depositions to be taken throughout the circuit (and perhaps outside the circuit). Such a program should be coordinated in multidistrict cases. It may, therefore, be useful to have additional judges available to preside at such depositions.

It is important that uniformity be maintained in related cases both in the form and timing of the proceedings. When feasible, the common elements of the litigation should be treated first by coordinated action of the judges to whom the cases are assigned. Thereafter, each judge should separately handle the uncommon elements of each case. These objectives may be achieved by coordinated pretrial procedures by the judges of the concerned districts.

2. *Transfer of cases under § 1404(a), Title 28, U.S.C., to a single district for all purposes.* When venue permits and the convenience of the parties and witnesses and the interests of justice would be served, transfers under § 1404(a) [124] would permit achievement of the greater efficiency from centralized management of the cases pending in the circuit. Section 1404(a) has been construed to permit transfer by the court *sua sponte.* See *I-T-E Circuit Breaker Company v. Becker* [125] and other authorities cited

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[123] See *Hoffman v. Blaski, et al.,* 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960).

[124] Section 1404: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See also Sample Pretrial Memorandum and Order No. 10, *Appendix* 5.32.

[125] 343 F.2d 361, 363 (C.A. 8 1965).

in footnote 121, *supra.* Transfers under § 1404(a) on motion of the defendant do not affect the law applicable to the case under the Supreme Court decision in *Van Dusen, et al. v. Barrack, et al.*[126] The *Van Dusen* case holds that on transfer at defendant's request, the law which the transferor district should apply is to be applied in the transferee forum.

Since the rendering of the *Van Dusen* case, § 1404(a) has been used with excellent success in transferring multidistrict litigation arising out of air crash disasters in Rome, Italy (November 23, 1964; TWA Boeing-707), near Mt. Fuji, Japan (March 5, 1966; BOAC Boeing-707) and in the Gulf of Mexico (October 8, 1966; Petroleum Helicopters, Inc., *et al.,* defendants).

When venue problems do not permit transfer of the cases to a single district, it may be desirable to transfer the cases to a limited number of districts and then coordinate the pretrial proceedings in the transferee districts. This procedure has been successfully employed in multidistrict rock salt civil antitrust cases, processed by Judge Earl R. Larson of the District of Minnesota.

A situation may arise where the case or cases proposed to be transferred under § 1404(a) have on some previous occasion been transferred under that statute. *Insurance Company of North America v. Ozean/Stinnes-Linien, et al.*[127] casts doubt as to the legality of such successive transfers under § 1404(a) upon the ground that the initial determination of "the convenience of the parties and witnesses" is *res judicata.* However (as stated in subparagraph 4) since § 1404(a) and § 1407 are not mutually exclusive but are cumulative remedies, successive transfers under

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[126] 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964).

[127] 367 F.2d 224 (C.A. 5 1966).

§ 1404(a) and § 1407, in either order, would not be prohibited.

3. *Assignment of one judge to the districts concerned.* If all related cases are not transferred to a single district, the assignment of one judge to the districts concerned [128] and the assignment of all cases to him would achieve some of the benefits of centralized management that are otherwise attainable only by transferring the cases to a single district under § 1404(a).[129] This procedure may be cumbersome if the parties request separate hearings in each district in which the cases are pending, and is taxing upon the judge.[130] Moreover, the possible benefits of a consolidated trial of cases filed in separate districts are not available. However, to avoid inconvenience and expense, experienced counsel usually desire single hearings and often stipulate for consolidated trials.

4. *Transfer of cases under § 1407, Title 28, U.S.C., to a single district for pretrial purposes only.* In 1968 there became available a means of transferring related multidistrict litigation to one or more districts for pretrial purposes only. See § 1407 of Title 28, U.S.C., provided by S. 159, 90th Congress, Second Session.[131] Under this new section a Judicial Panel on Multidistrict Litigation appointed by the Chief Justice is authorized after notice and hearing to order certain related multidistrict litigation transferred to a single district for pretrial purposes (i.e.,

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[128] Authority for such assignments is provided by 28 U.S.C. §§ 291–296.

[129] This procedure has been employed with good results in the West Coast concrete pipe civil antitrust cases assigned to Judge Martin Pence, D. Hawaii, and in other multidistrict litigation in the Ninth Circuit.

[130] Rule 77(b), F.R.Civ.P., provides in part: ". . . no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby."

[131] The text of § 1407, Title 28, U.S.C., is set forth in the *Appendix* at 5.32.

"for coordinated or consolidated pretrial proceedings"). Such transfer proceedings may be ordered after hearing *sua sponte* by the Judicial Panel or upon motion filed with the Panel by a party in any action in which transfer under § 1407 may be appropriate. Upon conclusion of the pretrial proceedings in the transferee district, the Judicial Panel is required to remand the cases to the district in which the cases were originally filed for local discovery and for trial.

Section 1404(a) and Section 1407 are not mutually exclusive remedies but are cumulative, and may both be employed in respect to a given case.

5.4 Related Cases Which Are Pending in Two or More Circuits (Intercircuit Multidistrict Litigation).

Recommendation: (1) The procedures recommended in Section 5.21 of this *Manual* should be employed to transfer the cases in each district to a single division of the district; (2) the alternatives for joint processing or centralized management of the litigation, set forth in Section 5.32 of this *Manual,* should be explored; (3) following the adoption of one or more of these alternatives, the procedures recommended in Section 5.1 of this *Manual* should be employed.

Where litigation is pending in several districts in two or more circuits, the transfer procedure should be accomplished in two steps. First, under § 1404(b), the cases in each district should be transferred to a single division and assigned to a single judge. Second, consideration should be given to transfer, under § 1404(a), of all cases to a single transferee district; or to initiation by the court or by the parties of a proceeding before the Judicial Panel on Multidistrict Litigation for a transfer for pretrial purposes only under § 1407, Title 28, U.S.C. Thereafter, the pre-

trial procedures set forth in Section 5.1 of the *Manual* should be employed.

5.5 Use of Class Actions in Multidistrict Litigation: The Problem of Conflicting Class Actions.

The class action procedure provided by amended Rule 23, F.R.Civ.P., may be employed to avoid potential or existing multiple or multidistrict civil litigation. However, this device has introduced at least one new problem in the processing of multidistrict litigation.

The setting for this problem is created when a plaintiff in one or more of the earlier filed related actions moves to have the action declared a class action under Rule 23, (b)(3) usually, but (b)(1) or (b)(2) possibly.[132] If the plaintiff's motion in one district for determination that the action shall proceed as a class action on behalf of all plaintiffs in other districts is granted, a potential conflict of jurisdiction between the districts immediately arises. If *two* courts enter parallel orders determining that an action in each court shall proceed as a class action for all plaintiffs similarly situated, without regard to geographical areas or district boundaries, a real conflict between the courts exists.

If both determinations are under the optional (b)(3) provision of Rule 23, the problem may in theory be resolved since the potential plaintiffs can make an election between the two courts which are entertaining class actions, or they may elect to exclude themselves from both courts and proceed elsewhere or nowhere. If, on the other hand, compul-

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[132] See *Eisen v. Charlisle & Jacquelin,* 41 F.R.D. 147 (S.D. N.Y. 1966), *rev'd* 391 F.2d 555 (C.A. 2 1968); *Richland, et al. v. Cheatham, et al.,* 272 F.Supp. 148 (S.D. N.Y. 1967); *Siegel v. Chicken Delight, Inc., et al.,* 271 F.Supp. 722 (N.D. Cal. 1967); and *School District of Philadelphia, et al. v. Harper and Row Publishers, Inc., et al.,* 267 F.Supp. 1001 (E.D. Pa. 1967). The same problem arises when the defendant or the court moves to have an action declared a class action.

sory provisions (b)(1) or (b)(2) of Rule 23 are enforced by more than one court in a conflicting manner under the same circumstances, the conflict can only be resolved at the appellate level or by the Supreme Court; and until the problem is settled by a higher court or courts, the result is frustration, uncertainty and delay.

It is apparent that coordination of the activities of the concerned courts is a necessity under these latter circumstances. Some of the solutions to these class action problems are:

(1) Informal spontaneous and consultation and cooperation between the concerned judges and courts.

(2) Formal consultation and cooperation between the concerned courts, initiated and recommended by the Co-Ordinating Committee for Multiple Litigation, the chief judges of the courts of appeals for the districts concerned, or upon the initiative of the Judicial Panel on Multidistrict Litigation under new § 1407, Title 28, U.S.C.

(3) Assumption of control, by one transferee district court of the pretrial proceedings in all potentially conflicting class actions in multidistrict litigation on transfer under § 1407 by the Judicial Panel on Multidistrict Litigation.[132.1]

[132.1] The opinion of the Panel (*In Re Multidistrict Private Civil Treble Damage Litigation Involving Plumbing Fixtures,* Docket No. 3, . . . F.Supp. . . .) clearly defines the acute problems of conflicting requests for class action determinations in multidistrict litigation, and the solutions of the problems.

PRETRIAL PROCEDURES IN COMPLEX CRIMINAL CASES

6.1 Pretrial Conference.

Recommendation: One or more pretrial conferences should be held, with a reporter present, in all complex criminal cases, in order to refine the issues, establish rules for the handling of voluminous documentary evidence, resolve procedural problems, provide an atmosphere which will encourage voluntary agreements and, generally, to take any other action which will tend to simplify and expedite the trial of such a case.

Pretrial conferences in criminal cases are authorized by Rule 17.1, F.R.Cr.P.; and Rule 16, F.R.Cr.P., makes practicable the type of two-way discovery usually associated with civil pretrial proceedings, although more limited in scope. Furthermore, the judge has inherent power to utilize pretrial procedures in a criminal case, and he should not hesitate to do so when the ends of justice will be served thereby.[133]

Pretrial conferences should be held in all criminal cases involving complex issues, multiple parties, or extensive documentary evidence. Pretrial conferences can be invaluable in streamlining the criminal case and in promoting

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[133] *Handbook* 47–51, 25 F.R.D. 351, 399–403; and Judge Irving R. Kaufman, *Problems in Protracted Criminal Cases, 1958 Palo Alto Seminar,* 23 F.R.D. 319, 551; *Report on Recommended Procedures in Criminal Pretrial,* 37 F.R.D. 95, prepared by a subcommittee of the Committee on Pretrial Procedure (composed of Judge James M. Carter, Chairman, Chief Judge George C. Sweeney, Chief Judge Wallace S. Gourley, and Chief Judge Robert L. Taylor); Judge Leo Brewster, *Criminal Pre-Trials—Useful Techniques,* 29 F.R.D. 442; W. B. West, III, *Criminal Pre-Trials—Useful Techniques,* 29 F.R.D. 436; and Chief Judge Joe E. Estes, *Pre-Trial Conferences in Criminal Cases, 1958 Palo Alto Seminar,* 23 F.R.D. 319, 560.

a fair and expeditious trial. Pretrial conferences are especially useful in antitrust, mail fraud, conspiracy, income tax, organized crime, racketeering, and securities cases; and in cases involving the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act and Regulations.

Pretrial proceedings in criminal cases differ from pretrial proceedings in civil cases in several respects, but procedures and techniques developed in civil cases often may be adapted to criminal cases, especially in the antitrust field. Because of the guarantees afforded criminal defendants under the Fourth, Fifth and Sixth Amendments to the Constitution, pretrial proceedings in criminal cases must be on a purely voluntary basis, except to the extent that discovery by the government is authorized under subdivision (c) of Rule 16, F.R.Cr.P., and should not be employed unless the defendant is represented by counsel. Under Rule 43, F.R.Cr.P., corporations may appear by counsel for all purposes. However, where indivdiual defendants are involved, such defendants should be present at each pretrial conference or else have on file in the case a written waiver of such right and authorization for the attorney to participate in the pretrial proceedings.[134]

In general, pretrial proceedings in criminal cases differ from their civil counterparts in that the emphasis in most criminal cases will be primarily on the establishment of rules and procedures for the handling of voluminous documentary evidence and the resolution of procedural problems, especially those inherent in the trial of multiple defendant cases, rather than on the refining and simplifica-

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[134] See Sample Pretrial Order No. 11, *Appendix* 6.1, a stipulation and order for a pretrial conference, Form A appended to the *Report on Recommended Procedures in Criminal Pre-Trials,* footnote 133, *supra;* see also, *Handbook,* footnote 133, *supra.*

tion of issues, which usually will be clear enough.[135] However, discovery motions, including motions for discovery evidence and proceedings as well as motions filed under Rule 16, F.R.Cr.P., as well as motions based on *Brady v. Maryland*[136] for evidence favorable to any defendant on the issue of guilt or punishment, may be considered at the pretrial conference.[137] Such a procedure would be consistent with subdivision (f) of Rule 16, which is designed to discourage unnecessary delay occasioned by a multiplication of discovery motions.[138] An informed and resourceful judge can shape available procedures and techniques to fit a particular case and by the use of his persuasive powers can create a climate conducive to voluntary agreements which will eliminate undue delays at trial, unnecessary volume of record, simplify and expedite the handling of voluminous documentary evidence, and resolve a multitude of procedural problems. For example, agreement of the parties on the scope and timing of the production of grand jury transcripts and *Brady v. Maryland* materials might be reached. Similarly, procedures developed at the pretrial hearing can be shaped to avoid the necessity of interrupting trial procedures while counsel read documents produced pursuant to the Jencks Act, Title 18, U.S.C., § 3500.[139] The resolution of other intermediate procedural problems, such as those raised by *Miranda v. Arizona* (warn-

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[135] See Sample Pretrial Order No. 12, *Appendix* 6.1, a stipulation and order to control the course of the action, Form B appended to the *Report on Recommended Procedures in Criminal Pre-Trials,* footnote 133, *supra.*

[136] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[137] See Paragraph G. of Sample Pretrial Order No. 12, *Appendix* 6.1.

[138] See *Report,* footnote 133, *supra;* also Advisory Committee's note to Rule 16, F.R.Cr.P., 39 F.R.D. 178.

[139] See Paragraph C. of Sample Pretrial Order No. 12, *Appendix* 6.1.

ing); [140] *Jackson v. Denno* (confessions); [141] *Katz v. U. S.* (electronic surveillance); [142] *Wade v. U. S.* (fingerprinting); [143] *Doyle v. U. S.* (insanity); [144] and *Bruton v. U. S.* (prejudicial joinder); [144.1] may also be expedited at the pretrial hearing. Recently in a potentially protracted criminal case, one judge made signally successful use of these techniques and credits them with cutting down what would have been an eight months' trial to a trial of just fifty-nine days.[145]

Experience has taught us that good lawyers are usually willing or even anxious to make agreements which expedite the trial of complex criminal cases and which do not tend to prejudice the cause of either party. Hence, a great deal can be accomplished to accelerate the trial of such cases simply by bringing the parties together, informally and on a voluntary basis, in a pretrial conference.

However, in the event that agreement cannot be reached on such things as the scope and timing of the production of grand jury transcripts or *Brady v. Maryland* materials, the judge can utilize the pretrial conference as a forum for

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[140] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 674 (1966); *Mathis v. U. S.* (1968) 391 U.S. 1.

[141] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

[142] 389 U.S. 347, 88 S.Ct. ...., 19 L.Ed.2d 576 (1967).

[143] 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

[144] 366 F.2d 394 (C.A. 9 1966).

[144.1] 391 U.S. 123, 131 (1968), Footnote 6, on Criminal Rules 8(b) and 14.

[145] Judge George H. Boldt in discussion of *U. S. v. Dave Beck,* Nos. 16515 and 16526 (W.D. Wash. 1959).

a discussion of those issues and as an aid in his ultimate ruling.[146]

Pretrial proceedings have been successfully employed in so many criminal cases that, where appropriate, federal judges should make wider application of systematic pretrial procedures in criminal cases, especially in the complex criminal case.[147]

6.2 Discovery of Documentary Evidence.

Recommendation: In complex criminal cases, the judge should encourage the use of discovery to the extent authorized under Rule 16 and the last sentence of Rule 17(c), F.R.Cr.P., to give each side access, well in advance of its use, to documentary evidence and other material made available by the rules.

Rule 16(a), F.R.Cr.P., permits defendants to "inspect and copy or photograph" relevant (1) "written or recorded statements or confessions made by a defendant," (2) "results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case" and (3) "recorded testimony of the defendant before a grand jury." [148]

Rule 16(b), F.R.Cr.P., provides that upon motion of a

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[146] For example, Sample Pretrial Order No. 12A, *Appendix* 6.1, is a draft of such a ruling. The portion of the sample order dealing with the production of grand jury transcripts is adapted from an order entered in the Southern District of Florida in a criminal antitrust case.

[147] This view is supported by the amendments to the Federal Rules of Criminal Procedure effective July 1, 1966.

[148] See *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 973, 16 L.Ed.2d 973 (1966); *National Dairy Products Corporation v. U. S.,* (C.A. 8 1967) 384 F.2d 457, *cert. denied,* 390 U.S. 957; .... S.Ct. ...., 19 L.Ed.2d 1151 (1968); *Atlantic City Electric Co. v. A. B. Chance Co.,* (C.A. 2 1963) 313 F.2d 431.

defendant, the "court may order the attorney for the government to permit the defendant" (under prescribed limitations, such as materiality and reasonableness) to "inspect and copy or photograph" other books, papers, documents, tangible objects, or places. However, internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. And, except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by Title 18, U.S.C., § 3500.

The Advisory Committee's note to Rule 16(c) states that "there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage." Such situations arise in cases involving opinions of experts making psychiatric examinations and in antitrust cases in which "mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases." [149]

Rule 17(c), F.R.Cr.P., permits the government or the defendants to issue subpoenas to each other or to third parties, demanding production of documentary evidence and objects "at a time prior to the trial." The documents may then "be inspected by the parties and their attorneys." The use of Rule 17(c) should be encouraged in complex criminal cases in order that each party may be compelled to produce its documentary evidence well in advance of the time it is to be offered.

The individual defendant has the protection of the Fifth Amendment. The question has been raised, but not authoritatively decided, whether documents and materials other

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[149] See 39 F.R.D. 69, 177.

than those specifically authorized by the Rules could be subpoenaed from an individual defendant unless he, with assistance of counsel, "voluntarily and knowingly waived" his privilege against self-incrimination "after proper advice and admonition to the defendant." [150]

The Advisory Committee concluded that "where pre-trial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings."

In pretrial proceedings in civil cases conversion of discovery and other motions into preliminary pretrial hearings at which all pending motions are determined has resulted in the elimination of many hearings and motions and has made a great contribution to the fair, prompt and inexpensive disposition of the cases. Upon the filing of any such motion in a complex criminal case, the judge should suggest a pretrial conference.

An excellent order for a pretrial conference in a criminal case entered by Chief Judge David W. Dyer (S.D. Fla., now Circuit Judge, Fifth Circuit), setting the conference and directing "United States and Department of Justice Attorneys and all attorneys representing defendants . . . to meet not later than thirty days prior to the pre-trial conference . . . and confer to consider such matters as will promote a fair and expeditious trial," includes ten specified matters to be covered.[151]

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[150] *Report on Recommended Procedures in Criminal Pre-Trials,* 37 F.R.D. 95, 103; see also, The Advisory Committee's note to subdivision (c) of March 1964 draft of Rule 16, citing California State Court cases which "have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination." 34 F.R.D. 411, 425; and 39 F.R.D. 69, 177.

[151] See Sample Pretrial Order No. 13, *Appendix* 6.2.

PART II

APPENDIX OF MATERIALS FOR PRETRIAL AND TRIAL OF COMPLEX AND MULTIDISTRICT LITIGATION

TABLE OF CONTENTS

PAGE

0.2 Suggested Local Rule 1
(Notice by district court clerk of potential complex or multidistrict litigation) 105

0.2 Suggested Local Rule 2
(Notice by attorneys to district court clerk to be filed in all civil cases) 105

0.3 Local Civil Rule 12(d), Eastern District of Pennsylvania
(Protracted actions, designation of and procedures following) 107

1.1 Sample Pretrial Order No. 1
(With sample agenda) 107

1.1 Sample Pretrial Order No. 1
(Based upon notice employed by Chief Judge Estes (N.D. Texas) in *Murphy, et al. v. Braniff Airways, Inc., et al.*) 109

1.5 Sample Pretrial Order No. 2 110

1.5 Sample Pretrial Order No. 3
(First wave of discovery; transaction information; request for second wave of discovery; subsequent pretrial conference) 113

2.5 Sample Pretrial Order No. 3A
(To be added to Sample Pretrial Order No. 3 if document depositories controlled by the parties are to be established) 135

2.5 Sample Pretrial Order No. 3B
(To be added to Sample Pretrial Order No. 3 if a document depository under court control is established) 136

PAGE

2.5 Sample Pretrial Order No. 3C
(To be added to Sample Pretrial Order No. 3, at subparagraph E.(4), where a document depository is to be established at the election of the parties) 136

1.6 Local Rule on Class Actions 137

1.10 Suggested Local Rule No. 6
(Cooperation of Counsel in Resolving Differences) 138

3.2 Sample Pretrial Order No. 4
(Appointment of special master to supervise discovery) 139

3.2 Use of Masters With Respect to Discovery
(An excerpt from the *Handbook,* 25 F.R.D. 390–394) 140

3.2 Example of an Order Appointing a Special Master to Determine Damages 147

3.3 Sample Pretrial Order No. 5
(Second wave and completion of discovery; designations of deposition evidence and documents for objections thereto; final pretrial briefs, written offers of proof, written narrative summaries of expert testimony and statements of uncontroverted facts; listing of trial witnesses; filing of proposed *voir dire* questions; scheduling final pretrial conference; setting trial date) 148

3.31 Sample Pretrial Order No. 5—Alternate Paragraph N. to Part III
(Designed for a case without a counterclaim) 158

3.51 Sample Pretrial Order No. 6
(Appointment of an expert) 162

3.51 Expert Witnesses
(Recommendation and discussion) 163

PAGE

3.52 Sample Pretrial Order No. 7
(Production of all results and materials relating to polls, samples, summaries, surveys and computer runs) 176
4.0 Sample Pretrial Order No. 8
(Final pretrial order) 177
5.11 Suggested Local Rule 5
(Assignment of related civil cases to a single judge) 182
5.12 Local Rule 10B, Northern District of Illinois
(Subparagraphs 4 and 5, assignment of related cases) 182
5.21 Sample Pretrial Order No. 9
(Transfer of cases pursuant to Title 28, U.S.C., Section 1404(b)) 184
5.32 Sample Pretrial Memorandum and Order No. 10
(Transfer *sua sponte* by the court of cases pursuant to Title 28, U.S.C., Section 1404(a)) 184
5.32 Text of Title 28, U.S.C., § 1407
(The Multidistrict Litigation Act) 188
5.33 Provisional Rules of Procedure of the Judicial Panel on Multidistrict Litigation 192
6.1 Suggested Local Rule 3
(Notice by district court clerk of potentially complex criminal case) 196
6.1 Suggested Local Rule 4
(Notice by United States Attorney and defense attorneys to be filed in potentially complex criminal cases) 197
6.1 Sample Pretrial Order No. 11
(Stipulation and order for a pretrial conference for use in criminal cases) 197
6.1 Sample Pretrial Order No. 12
(Stipulation and order to control the course of the action for use in criminal cases) 200

PAGE

6.1 Sample Pretrial Order No. 12A
(Patterned upon an order entered in a Sherman Act proceeding, where no agreement was reached as to the production of grand jury transcripts and *Brady v. Maryland* materials) 207

6.2 Sample Pretrial Order No. 13
(Alternate order for a pretrial conference for use in criminal cases) 210

6.2 Sample Pretrial Order No. 14
(Order creating a central depository for documents produced before a grand jury) 213

0.2 Suggested Local Rule 1. Notice by district court clerk of potential complex or multidistrict litigation.

The Clerk shall inspect all complaints and answers in civil cases filed in this Court and shall inspect all notices filed pursuant to Suggested Local Rule 2 and shall promptly notify the judge to whom each such action is assigned (in districts where individual calendars are maintained), the Chief District Judge, and the Administrative Office of the United States Courts of any notices filed pursuant to Suggested Local Rule 2 which contains an affirmative response to question number 3, and of any complaints, answers or pleadings in each case which: (a) arises under the antitrust laws of the United States; (b) involves a large number of parties or an unincorporated association of large membership; (c) involves a request for injunctive relief affecting the operations of a large business entity; (d) is a patent, copyright, or trademark case; (e) is a common disaster case; (f) is an individual stockholders', stockholders' representative, or a stockholders' derivative action; (g) is a products liability case; (h) is a case arising out of prior Government litigation; (i) is or may be a portion of multiple or multidistrict litigation; (j) is brought as a class action; or (k) may involve unusual multiplicity or complexity of factual issues.

0.2 Suggested Local Rule 2.* Notice by attorneys to district court clerk to be filed in all civil cases.

Any attorney filing a complaint or answer (or other pleading when specially ordered) shall complete and file a notice with the District Court Clerk in the following form:

> Notice to Clerk of the United States District Court of the ..... District of ..... (to be com-

* This suggested Rule is modeled on local procedures now in use in the Northern District of Illinois and the District of Massachusetts.

pleted in all civil cases by attorneys with the filing of the complaint, the answer or other pleadings when specially ordered)

1. Full title of case. .....
.....

2. Nature of case (check applicable space or spaces).

Antitrust	☐
Civil rights	☐
Class actions	☐
Common disaster	☐
Contract	☐
Copyright	☐
Federal Employees' Liability Act	☐
Habeas corpus	☐
Income tax	☐
Individual stockholders' action	☐
Insurance	☐
Land condemnation	☐
Patent	☐
Products Liability	☐
Securities or Securities Exchange Act	☐
Stockholders' derivative action	☐
Stockholders' representative action	☐
Trademark	☐
General civil (all other civil and admiralty cases)	☐

3. Has any case which is or which may be related to this action (involving a common issue or issues of fact) been filed in this Court, any other federal court, or any state court?
Yes ..... No .....

4. If the answer to question number 3 is affirmative, please state for each case which is or which may be related to this case:

(a) Its full title .....
(b) Its docket number .....
(c) The court in which such related case is pending
.....

5. Additional comments .....
.....

.....
Attorney-at-law

0.3 Local Civil Rule 12(d), Eastern District of Pennsylvania (12/19/61)* Protracted actions, designation of and procedures following.

"Whenever the Chief Judge, upon application of counsel or sua sponte, shall be of the opinion that the trial of an action or the pre-trial proceedings therein are likely to be so protracted that the administration of the business of the Court requires it, he shall designate the action as a 'Protracted' action and assign it to a Judge of the Court.

"After such designation and assignment, all proceedings therein, including the trial, shall, unless otherwise ordered by the Chief Judge, be before the Judge to whom the action is assigned. No action so designated shall be or remain on the general trial calendars. All such actions shall be placed on a separate trial calendar maintained by the Clerk on which the Clerk shall note the Judge assigned and the trial date, when fixed by the Judge assigned."

1.1 Sample Pretrial Order No. 1.

A. The complaint in the above entitled cause having been brought to the Court's attention, and it appearing that

* Only the first two paragraphs are quoted.

the case may be a complex case or a part of multiple or multidistrict litigation, the Court, on its own initiative, orders that: this action be and it hereby is set for preliminary pretrial conference in the chambers of the undersigned Judge in Room ...., ... Building, at .... o'clock, ...m., on the ..... day of ....., 19... Each party to this action shall be represented at such hearing by such attorney who shall conduct the trial for said party.

B. Attorneys for each party shall be prepared to discuss all matters set forth on the agenda attached hereto.

C. Attorneys for all parties are directed to confer in advance with respect to all items on the proposed agenda and to consider any amendment of or additions to such agenda for presentation at such conference.

D. All pending discovery procedures initiated by any party shall be stayed pending such pretrial conference, unless the Court shall otherwise order for good cause shown.*

E. Prior to such pretrial conference, the attorneys for each party shall be familiar with the *Manual for Complex and Multidistrict Litigation.*

Dated this ..... day of ....., 19...

.....
JUDGE

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* A stay of discovery, pending the early preliminary pretrial conference, is necessary and desirable if the Court is to assume real control of the complex case. However, it should not be an unyielding rule. This provision contemplates that whenever good cause exists for proceeding with discovery, the stay may be lifted; even here, however, it is an exercise of judicial control to lift the stay. *Caveat:* except in rare cases for good cause appearing, the stay should be accompanied by a positive plan for completion of discovery within as short a time as practicable.

Sample Agenda

(1) Appearances by attorneys for the respective parties.

(2) If multiple parties are involved, the naming of one or more attorneys for each side as liaison counsel for the purposes of serving papers and notices and acting as spokesmen for each side at future pretrial conferences.

(3) Exploration of the current views of counsel on the issues involved in the case.

(4) Establishment of a timetable for filing pleadings and motions other than discovery motions.

(5) Establishment of a schedule for filing preliminary discovery requests designed to secure information which will permit a schedule of discovery on the merits.

(6) Provide for discovery on the merits for emergencies and to narrow the issues.

(7) [Where appropriate:] Consider the necessity and desirability of consolidation of cases, joinder of parties and class actions.

(8) Schedule a further pretrial conference.

(9) Such other matters as the court or the parties may desire to have considered.

1.1 Sample Pretrial Order No. 1.*

TO ALL COUNSEL OF RECORD IN THE ABOVE ACTIONS:

All parties are directed to appear on the ..... day of ....., 19.., at ....m., at a Preliminary

* This is an alternative form of notice of the preliminary pretrial conference, based upon a notice employed by Chief Judge Joe E. Estes in *Murphy, et al. v. Braniff Airways, Inc., et al.,* Civil Actions Nos. 3-2694-C through 3-2709-C (N.D. Texas).

Pretrial Conference in the above captioned actions. At such conference questions concerning the pleadings, jurisdiction, venue, pending motions and consolidation for pretrial and trial will be considered; the issues of fact and law will be explored and their simplification and formulation with particularity will be commenced.

All motions must be supported by a brief memorandum of authorities filed with (or included in) the motion. All motions not determined on the moving papers will be heard at a pretrial conference.

Should a party or his attorney fail to appear at the Preliminary Pretrial Conference or to comply with the directions set out above, an ex parte hearing may be held and judgment of dismissal or default or other appropriate judgment entered or sanctions imposed.

Dated this ..... day of ....., 19...

.....
JUDGE

1.5 Sample Pretrial Order No. 2.

A preliminary pretrial conference was held in the above captioned cause on the ..... day of ....., 19.., wherein or as a result of which the following proceedings were had:

A. The following counsel were present representing the plaintiffs: (list)

B. The following counsel were present representing the defendants: (list)

C. The following counsel were present representing third party defendants, intervenors and parties applying for leave to intervene: (list)

D. ....., counsel for plaintiffs, and ....., counsel for the defendants, are hereby designated to represent all counsel of the respective parties to receive and forward all notices, to notify the Court of responses and actions concerning pretrial discovery steps and pretrial pleadings, to call conferences of counsel to consider possible joint response or action, and to act as spokesman at future pretrial conferences.

E. Oral statements of the position of the parties were made. These statements were tentative and were received without prejudice to later modification or amendment by means of the pleadings or otherwise.

F. All discovery or other pretrial proceedings in this Court shall be stayed in this cause subject to further Order of the Court, except as hereinafter provided in this Order.

G. On or before the ..... day of ....., 19.., defendants shall file any motions to strike allegations of the complaint in the above actions.

H. On or before the ..... day of ....., 19.., defendants shall file their answers in this cause.

I. On or before the ..... day of ....., 19.., plaintiffs and defendants shall file any motions other than discovery motions, including motions for leave to conduct discovery of information to support or refute the contentions that this action should be maintained as a class action under Rule 23, F.R.Civ.P.

J. Briefs and other papers in connection with the motions provided for by Paragraphs G. and H. hereof, and in connection with motions provided for by Paragraph J. as regards the class action question, shall be served and filed on or before the dates set forth below and hearings thereon shall be had before this Court at .... o'clock in the forenoon, in Room .... of the United States Courthouse, according to the following schedule:

Motion Identified in Paragraph ( ) above	Supporting Briefs and Papers	Opposing Briefs and Papers	Hearing
(1)	.....	.....	.....
(2)	.....	.....	.....
(3)	.....	.....	.....

K. On or before the ..... day of ....., 19.., plaintiffs shall file all motions for the production of documents, requests for leave to propound written interrogatories, and lists of proposed deponents, designed to disclose as far as possible (1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; and (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits. This discovery is intended to serve as a preliminary step to organize plaintiffs' discovery program and should be utilized exclusively for this purpose.

L. On or before the ..... day of ....., 19.., defendants shall file all motions for the production of documents, requests for leave to propound written interrogatories, and lists of proposed deponents, designed to disclose as far as possible (1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; and (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits. This discovery is intended to serve as a preliminary step to organize defendants' discovery program and should be utilized exclusively for this purpose.

M. It appearing to the Court that the following discovery on the merits is necessary at this time, the Court hereby orders: (list)*

* Include transaction information if necessary at this time; see Part I of Sample Pretrial Order No. 3, *Appendix* 1.5.

N. A subsequent pretrial conference is hereby scheduled for the ..... day of ....., 19.., at Room ...., of the United States Courthouse at .....

Dated this ..... day of ....., 19...

.....
JUDGE

1.5 Sample Pretrial Order No. 3.

Part I First Wave of Discovery

Part II Transaction Information

Part III Request for Second Wave of Discovery

Part IV Subsequent Pretrial Conference

A pretrial conference was held in the above-captioned cause on the ..... day of ....., 19.., wherein or as a result of which the following proceedings were had:

*Part I First Wave of Discovery.**

A. *Interrogatories on Behalf of Plaintiffs Designed to Elicit the Names of Possible Deponents*—The following interrogatories on behalf of plaintiffs designed to elicit the names of possible deponents were approved and ordered answered on or before the ..... day of ....., 19..:

(1) State whether you communicated orally during the period from ..... to ..... with any officer, agent, employee or person acting or purporting to act on behalf of any other defendant named in the complaint or any other corporation engaged in the manufacture and sale of the product defined in the complaint, or with any intermediary, through

* Parts I, II and III of this Sample Pretrial Order were designed for use in private antitrust cases in which price fixing is alleged.

statements referring or relating in any way to inquiries from, or efforts made to offer or sell the product defined in the complaint on a specific job, contract or purchase to third persons, or prices, terms and conditions of sale of the product defined in the complaint to third persons (other than credit data), or to your or such corporation's pricing or selling policy applicable to such product with respect to third persons.

(2) As to each defendant answer Interrogatory (1) of this Paragraph A. affirmatively, state as to each communication:

(a) whether made in person or by telephone;

(b) the date and place;

(c) the content of the communication as disclosed in any corporate or internal record;

(d) an identification of each person who participated in the communication or who had knowledge thereof;

(e) an identification of each document referring or relating to the subject matter of subparagraph (c) hereof.

(3) Identify each document passing between you and any officer, agent, employee or other person acting or purporting to act on behalf of any other defendant named in the complaint or any other corporation engaged in the manufacture and sale of the product defined in the complaint during the period from ..... to ....., referring or relating in any way to inquiries from, or efforts made to offer or sell the product defined in the complaint on a specific job, contract or purchase to third persons, or prices, terms and conditions of sale of the product

defined in the complaint to third persons (other than credit data), or to your or such corporation's pricing or selling policy applicable to such product with respect to third persons.

(4) Identify each person employed by or who acted for you who testified before any agent, agency or committee of the executive or legislative branch of the United States or of any state or who submitted any written document or statement, data or report to such agent, agency or committee in connection with any investigation of alleged unlawful pricing or alleged unlawful marketing agreements affecting the product defined in the complaint.

(5) As to each person identified in the answer to Interrogatory (4) of this Paragraph A:

(a) state the date and place such information or testimony was given;

(b) identify the person, agency or committee receiving such information or testimony; and

(c) identify such statement, data or report.

(6) Identify each person employed by you or who acted for you who was a witness before the Grand Jury of the United States District Court for the .... District of ..... which in 19.. returned an indictment charging a combination and conspiracy in violation of Section .... of the ..... Act with respect to the product defined in the complaint.

(7) State whether or not your company had any policy directed to compliance with the ..... laws and, if so, describe the policy and identify any directive or other writing which sets forth such policy.

(8) As to each defendant which answers Interrogatory (7) of this Paragraph A. affirmatively, identify each

person who, in connection with the product defined in the complaint, was discharged, reprimanded or otherwise disciplined for what was believed to be or found by you to be a violation of such policy.

(9) If you are or were organized by divisions, departments or other units other than subsidiaries, state for each year in the period defined in Interrogatory (1) of this Paragraph A. the name of each such division, department or unit engaged in each of the following activities with respect to the product here in suit:

(a) sales or marketing of such product;

(b) pricing or negotiation with respect to price.

(10) As to each division or other unit identified in the answer to Interrogatory (9) of this Paragraph A. identify each person in charge of the activities enumerated in subparagraphs (a) and (b) therein and his immediate assistant.

(11) If available and in existence, given an organization chart of each such division, department or other subdivision identified in response to Interrogatories (9) and (10) of this Paragraph A.

(12) With respect to the product here in suit, identify by name and by date and place of incorporation any company, the product business of which was acquired by your company during the period defined in Interrogatory (1) of this Paragraph A. giving in each case the date of such acquisition and the disposition of such business.

(13) Identify for the period defined in Interrogatory (1) of this Paragraph A. each person who had authority to or was permitted to make or approve decisions with respect to prices and terms and conditions of sale for the product classifications described in the

complaint, including the product here in suit, on the basis of which defendants maintain their records, particularly as to each of the following matters:

(a) establishing or changing list prices, multipliers, net book prices, discounts or other price formulae;

(b) determining whether or not established list prices, multipliers, net book prices, discounts or price formulae and established terms and conditions of sale would be applied;

(c) determining the customers or classes of customers to whom quotations or sales would be made or to whom different price schedules would be applicable.

B. *Interrogatories on Behalf of Plaintiffs Designed to Disclose the Existence, Location and Custodian of Documents*—The following interrogatories on behalf of plaintiffs designed to disclose the existence, location and custodian of documents were approved and ordered answered on or before .....:

(1) Identify each document stating your export or domestic price policy or the final making and approval of your published prices for the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records, for the period ..... through ....., as well as such documents embodying intermediate recommendations prior to such final approval by the person or persons having authority to give such final approval.

(2) Identify for the period defined in Interrogatory (1) of this Paragraph B. by number or date and effective period each price list or catalog, including additions, insertions, supplements and changes therein, issued

by your company in connection with pricing the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records.

(3) If at any time you did not have in effect or use a price list, sheet or book in connection with pricing the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records:

(a) state the period of time during which no price list, sheet or book was in effect or used;

(b) state how prices and price quotations were determined during such period.

(4) State whether during the period defined in Interrogatory (1) of this Paragraph B. you ever issued, quoted or used any discount, multiplier or pricing formula in conjunction with a price list, sheet or book in order to determine the price of the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records.

(5) As to each defendant which answers Interrogatory (4) of this Paragraph B. affirmatively:

(a) state the dates of issue, or if not available, other identifying number or symbol of any document promulgating or stating such formulae;

(b) if any such discount, multiplier or pricing formula applied only under certain conditions, including, but not being limited to, class of purchaser, quantity purchased, or geographical location of the purchaser not disclosed or stated in such document, state each such condition and the discount, multiplier or pricing formula to which it applied;

(c) state the period during which each such discount, multiplier or pricing formula was issued, quoted or used unless it is stated and set forth in the documents listed in subparagraph (a) hereof.

(6) State whether you ever used a price adjustment clause in connection with pricing the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records.

(7) As to each defendant which answers Interrogatory (6) of this Paragraph B. affirmatively:

(a) state or permit inspection and copying of the terms of each such clause which was in use as an ordinary or standard clause and the period of time during which it was used;

(b) identify as to each ordinary or standard contract price adjustment clause the person or persons who directed the derivation or development thereof;

(c) as to each such ordinary or standard price adjustment clause or provision which was based in whole or in part on any labor or material index or indices, state such index or indices.

(8) If any escalation formula was applicable to the product here in suit, list by date or other means of identification whatever studies or reports you have which would reflect the proportion to the total cost of manufacturing such product of the cost of labor, materials and other cost items, excluding management and overhead, for each calendar quarter during the period from ..... to .....

(9) List each study or report, if any, concerning the productivity of labor prepared or used by you during

the period defined herein, including, but not being limited to, those used in any labor, wage or salary negotiation affecting employees engaged in the production of the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records.

(10) Identify each study, report or other memorandum prepared or used by you during the period defined in Interrogatory (1) of this Paragraph B. relating to any one or more of the following with respect to the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records:

(a) new entrants, either foreign or domestic into the market;

(b) production capacity or overcapacity of any manufacturer;

(c) price structure of any other manufacturer.

(11) Identify for the period defined in Interrogatory (1) of this Paragraph B. each report, statistical bulletin or memorandum which you have submitted to or received from any trade association relating to the product defined in the complaint with respect to each of the following:

(a) production;
(b) prices;
(c) sales;
(d) costs;
(e) profits;
(f) unfilled orders;
(g) inventories;
(h) shipments;
(i) exports;
(j) imports.

(12) Identify each report, statistical bulletin or memorandum submitted by you during the period defined in Interrogatory (1) of this Paragraph B. to the Department of Commerce and to the United States

Department of Labor with respect to the product classifications described in the complaint, including the product here in suit, on the basis of which defendants maintain their records, relating to each of the matters referred to in subparagraphs (a) through (j) of Interrogatory (11) of this Paragraph B.

(13) State annually for the period defined in Interrogatory (1) of this Paragraph B. the policy of your company with respect to the retention of records and identify any directive or other writing which sets forth such policy.

C. *Interrogatories on Behalf of Defendants Designed to Elicit the Names of Possible Deponents*—The following interrogatories on behalf of defendants designed to elicit the names of possible deponents were approved and ordered answered on or before .....

(1) Identify each of your departments, divisions, bureaus, offices, or other units that has had responsibility for the purchase of these products or ..... equipment including these products.

(2) Identify each past or present employee exercising discretion, making policy and making decisions or participating in any of the foregoing functions in each such department, division, bureau, office, or other designation of your company together with the dates during which such person held such position.

(3) Set forth the duties and responsibilities of each person identified in your answer to Interrogatory (2) of this Paragraph C. with respect to the purchase of these products or ..... equipment including these products.

(4) Identify your officers and principal managing agents.

(5) Identify each organization, chart, or diagram re-

flecting the matters referred to in Interrogatories (1) or (2) of this Paragraph C.

(6) Set forth the powers, duties and responsibilities assigned to your engineering or technical employees in the process of deciding for you which of these products to purchase, when to purchase it, and from whom to purchase it.

(7) Set forth the manner of resolution of conflicting recommendations from your purchasing employees, and your engineering or technical employees, and your consultants as to which of these products to purchase, the supplier or contractor from whom to purchase, and when to purchase it.

(8) Identify each document, if any, which forms the basis, wholly or in part, of your responses to Interrogatories (6) or (7) of this Paragraph C.

(9) State whether you have systematically, regularly or repeatedly revealed to or discussed with suppliers or contractors who had then submitted or subsequently submitted a bid or quotation for these products, the price contained in any bid or quotation for the same products submitted by any other supplier or contractor.

(10) If so, with respect to each communication (as disclosed in any corporate or internal record) in which any such price was so revealed or discussed:

(a) give the date thereof and identify the parties thereto;

(b) identify the supplier or contractor whose price was revealed or discussed;

(c) identify the bid or quotation or the purchase which was the subject of such communication.

(11) Identify each document, if any, which forms the basis, wholly or in part, of your answer to Interrogatory (10) of this Paragraph C.

(12) If you or your attorneys have interviewed any present or past employee of any supplier or contractor concerning any alleged, rumored or actual price fixing, allocation, collusion, or discussions of prices, terms or conditions of sale of these products or ..... equipment including these products among any employees of suppliers, with respect to each such interview:

(a) identify the person so interviewed, the person or persons conducting the interview, the persons present when the interview was taken, the persons having knowledge of the substance thereof, and the persons having custody or control of the recordation of the interview or any summary or evaluation thereof;

(b) state the date and place thereof.

D. *Interrogatories on Behalf of Defendants Designed to Disclose the Existence, Location and Custodian of Document*—The following interrogatories on behalf of defendants designed to disclose the existence, location and custodian of documents were approved and ordered answered on or before .....:

(1) Identify by supplier and date each price book or other document to which you have had access containing prices or discounts, or both, of any supplier for these products, and as to each such price book or other document, state the time period during which you had such access.

(2) State whether your practice was to compute the book or catalog price and discount (if any) of these prod-

ucts, or any ..... equipment including these products.

(3) Identify each document, if any, which forms the basis, wholly or in part, of your responses to Interrogatory (2) of this Paragraph D.

(4) Have you adopted or systematically followed any criteria, other than price, terms and conditions of sale, in selecting the suppliers or contractors from whom you would solicit bids or quotations or purchase these products, including, but not exclusively, preferred bidders lists or specifications in terms of a particular manufacturer's products or their equivalent?

(5) If the answer to Interrogatory (4) of this Paragraph D. is affirmative, state and describe:

(a) the criteria adopted or systematically followed by you;

(b) each instance of deviation from such criteria in the solicitation of bids or quotations or in the purchase of these products, giving, in each case, a description of the product for which bids or quotations were solicited or which was purchased, the identity of your employees responsible for the decision not to apply such criteria, the bids or quotations submitted or purchase price and the respective dates of such submissions or purchase, and the manner in which the solicitations or purchase constituted a deviation from such criteria (failure to include a solicitation of bids or quotations or a purchase in answer hereto shall be deemed to constitute an affirmative statement that such solicitation or purchase was made in accordance with the criteria described in answer to subparagraph (a) hereof).

(6) Identify each document, if any, which forms the basis, wholly or in part, of your responses to Interrogatories (4) and (5) of this Paragraph D.

(7) To the extent that the information has not been given in response to any previous interrogatory:

(a) have you adopted or systematically followed a practice or policy (defined for this interrogatory only as written or unwritten) of rotating, dividing, spreading or allocating your purchases of ..... equipment among any suppliers or contractors?

(b) If the answer to subparagraph (a) hereof is affirmative, state and describe:

(i) the practice or policy adopted or systematically followed by you;

(ii) each instance of deviation from such practice or policy in the solicitation of bids or quotations or in the purchase of ..... equipment, giving, in each case a description of the product for which bids or quotations were solicited or which was purchased, the identity of your employees responsible for the decision not to apply such practice or policy, the bids and quotations submitted or purchase price and respective dates of such submissions or purchase, and the manner in which the solicitations or purchase constituted a deviation from such practice or policy (failure to include a solicitation of bids or quotations or a purchase in answer hereto shall be deemed to constitute an affirmative statement that such solicitation or purchase was made in accordance with the practice or policy described in answer to subparagraph (b) (i) hereof).

(c) identify each document, if any, which forms the basis, wholly or in part, of your responses to subparagraphs (a) and (b) hereof.

(8) With respect to your policy or practice of soliciting bids or quotations for these products or ..... equipment including these products from a supplier whose principal place of business is outside the United States:

(a) identify each document which refers to or reflects such policy or practice;

(b) identify the suppliers considered;

(c) identify each study, report, or other document prepared by or for you alone or in conjunction with any other purchaser concerning the price, quality or availability of such products manufactured by such suppliers;

(d) identify (as disclosed in any corporate or internal record) each person who participated in the decision to solicit or purchase or not to solicit or purchase from such a supplier;

(e) describe any action taken by you to prohibit, discourage or avoid the receipt of bids or quotations on or the purchase of these products from such a supplier;

(f) identify each document, if any, which forms the basis, wholly or in part, of your response to subparagraph (e) hereof.

(9) Identify each document to which you have access or have had access that contains any reference to or reflects any study or analysis of, or policy or proposal with respect to any price adjustment clause, escalation clause, or other similar provision or price rule to which your purchases of these products alone or

..... equipment including these products were subject or proposed to be made subject.

(10) Set forth each of your policies with respect to the retention of records called for by these interrogatories and identify any directive or other document which sets forth such policy.

E. *Preliminary Document Production.*

(1) *Production of Documents.*

[Preliminary document production should be permitted where required in the areas where interrogatories have been permitted under Parts I and II of this Sample Pretrial Order No. 3. The original or legible photocopies of documents to be produced should be deposited with the Clerk of the Court or in a document depository.*]

(2) *Protective Order*:

(a) To respond to these requests for production of documents the parties are under no obligation to interview past employees or to locate documents not available to them.

(b) Each party may designate certain documents as confidential. In general, confidentiality may be claimed with respect to documents of the following types, but this paragraph shall not be deemed to exclude any other type or classification of documents for which confidentiality is claimed by a party:

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* See Sample Pretrial Orders No. 3A and 3B, *Appendix* 2.5, for provisions controlling the establishment and maintenance of, and production of documents in, a document depository; and see Sample Pretrial Order No. 3C, *Appendix* 2.5, providing for the establishment and maintenance of a document depository at the election of the parties.

(i) Documents containing information of a financial nature.

(ii) Documents containing information relating to engineering and technological developments.

(iii) Documents containing information relating to purchasing or marketing techniques and programs.

(iv) Documents containing information relating to future development plans of a party.

(c) Documents which a party wishes to designate as confidential pursuant to subparagraph (b) of this Paragraph E. shall bear the following designation when deposited:

"CONFIDENTIAL"

"IN ACCORDANCE WITH PROTECTIVE ORDERS OF THE COURT, THIS DOCUMENT SHALL BE TREATED AS CONFIDENTIAL AND MUST NOT BE SHOWN TO A PERSON OTHER THAN ATTORNEYS IN THIS CASE OR TO PERSONS ASSISTING THOSE ATTORNEYS."

(d) Documents designated as confidential by a party pursuant to subparagraphs (b) and (c) of this Paragraph E. shall be deposited. Unless and until otherwise ordered by the Court, documents so designated may be inspected by attorneys and other parties accorded access by subparagraph (c) of this Paragraph E. who shall not suffer or permit disclosure of any such document, its contents, or any portion thereof, except to persons assisting such attorneys in the prosecution or defense of the claims here in suit.

(e) Until further Order of the Court, any copies of documents designated as confidential, pursuant to subparagraphs (b) and (c) of this Paragraph E., which attorneys for a party may cause to be made shall be treated as confidential and shall not be delivered or exhibited by attorneys for such party to any persons except to persons assisting such attorneys in the prosecution or defense of the claims here in suit.

(f) Information obtained from documents designated as confidential pursuant to subparagraphs (b) and (c) of this Paragraph E. shall be treated as confidential by the party's attorneys and persons assisting such attorneys and used solely for the prosecution or defense of the claims here in suit.

(g) Nothing contained in this Order shall be construed to prejudice any party's right to use in the taking of depositions or at trial any documents designated as confidential, and any such documents shall only be used, and their confidentiality protected, as determined and directed by the Court.

(h) Documents with respect to which privilege is claimed (privilege as used herein shall include work product) shall be deposited under seal, adequately described, and the basis for the claim of privilege stated on the cover or in the papers of transmittal, and may not be inspected except upon Order of the Court. Documents shall be deemed to be adequately listed and described for the purpose of this Order when the following data shall have been provided by affidavit:

(i) the identity and corporate position of the person or persons interviewed or supplying the information;

(ii) the place, approximate date, and manner of recording or otherwise preparing the instrument;

(iii) the name of each person or persons (other than stenographic or clerical assistants) participating in the interview and in the preparation of the document;

(iv) the name and corporate position, if any, of each person (in the case of plaintiffs) other than attorneys representing plaintiffs in the treble damages litigation or (in the case of defendants) other than attorneys representing defendants in the government civil and criminal proceedings and subsequent treble damages litigation, to whom the contents of the document have heretofore been communicated by copy, exhibition, reading or substantial summarization.

(i) Documents with respect to which privilege is granted shall be deposited under seal and may not be inspected except upon order of this Court, or except upon order of a judge before whom depositions on oral examination are to be taken under such orders as are entered hereinafter, upon notice to the party having deposited such documents.

(3) *Memorandum of Compliance.*

(a) Whenever any party shall, under the terms of any pretrial order entered heretofore or hereafter, be required to deposit any document with the Clerk of this Court or shall deposit any docu-

ment in lieu of a response to any interrogatory, such party shall prepare a Memorandum of Compliance stating that full compliance has been made by the party depositing the documents with the terms of the order under which they are deposited. The original of such Memorandum shall be filed with the Clerk of this Court and shall be accompanied by an index identifying the documents deposited as ordered. Copies of such Memorandum shall be served upon counsel of record for the opposing parties;

(b) Any party claiming inability to make a deposit on the date such deposit has been ordered shall file, on or before such date, with the Clerk of this Court a schedule and affidavit or affidavits setting forth:

(i) the date it is proposed to file each document or class of documents as to which inability to make timely deposit is claimed;

(ii) the particular facts which make it not reasonably possible to file each such document or class of documents on or before the date specified for production above, and;

(iii) any other relevant facts;

Said affidavit or affidavits shall be signed by an officer or officers of the party having knowledge of the facts set forth in the affidavit or affidavits, and copies of such schedule shall be filed with the Clerk of this Court for filing in this action and served upon counsel of record for the opposing parties.

(4) *Election to Establish and Maintain a Document Depository.*

(See Sample Pretrial Order No. 3C, *Appendix* 2.5, which may be employed where the establishment of a document depository is not agreeable to the parties possessing the documents and is not clearly required.)

Part II Transaction Information.

F. *Defendants' Transaction Interrogatories*—The following transaction interrogatories on behalf of the defendants were approved and ordered answered by each plaintiff separately on or before the ..... day of ....., 19...

State separately as to each purchase or contract to purchase with respect to which plaintiff is seeking damages in this action, each of the following:

(1) The date or dates of (i) the purchase order or the formal written sales contract, or the award of the bid, (ii) any letter of intent, or other commitment to purchase or pay a stated price, either verbal or written, given to the seller by the purchaser, and (iii) the invoice or invoices.

(2) The name and address of the purchaser and, if the purchaser was not such plaintiff, the nature of the relationship between such plaintiff and such purchaser and of the interest which such plaintiff claims entitles it to damages on orders placed by such purchaser.

(3) The name and address of the person from whom the purchase was made and, if shown on any of the documents referred to in Interrogatory (1) of this Paragraph F. the name and address of the manufacturer if other than the seller (including designation of the regional, district or other office of the seller involved).

(4) The file and each other number and symbol assigned to the purchase by the purchaser for purposes of identification of the transaction.

(5) The file or invoice or requisition or such other number or symbol assigned to the purchase by the seller if shown on any of the documents referred to in Interrogatory (1) of this Paragraph F. which counsel for any defendant notifies plaintiff on or before the ..... day of ....., 19.., is necessary for identification of a purchase from that defendant.

(6) The product or products and the quantity of each ordered or purchased, the rating, the catalog number, with such other information as is sufficient adequately to identify the product or products ordered or purchased, and as applicable where the seller was other than a defendant, and if shown on any of the documents referred to in Interrogatory (1) of this Paragraph F. the code number, factory number, and serial number.

(7) The order price and the price actually paid for each product ordered or purchased if different from the order price, and the date of the final payment.

(8) The date or dates of final shipment of each product ordered or purchased to the extent that such information is reflected in any of the documents referred to in Interrogatory (1) of this Paragraph F.

(9) The place of delivery and the original installation location of the product or products ordered, including the identifying name, if any, of the installation site, to the extent that such information is reflected in any of the documents referred to in Interrogatory (1) of this Paragraph F.

G. *Verification of Plaintiffs' Answers to Transaction Interrogatories**—Unless the Court for good cause shown shall hereafter otherwise order, the answers to be served by the plaintiffs to the interrogatories allowed by Paragraph F. of this Order shall be deemed admitted by the defendants, except as to those particulars specifically claimed by the defendants to be inaccurate in a statement filed and served on the plaintiffs on or before the ..... day of ....., 19.., in which statement defendants shall set forth such corrections as they claim are necessary to make such answers accurate or shall state that their records do not contain those particulars, or shall state that plaintiff has not supplied information in response to said interrogatories adequate to permit such statement. Any corrections so set forth shall be deemed admitted by plaintiff unless plaintiff shall file and serve upon the defendants objections thereto on or before the ..... day of ....., 19.., unless for good cause shown the Court shall hereafter otherwise order.

Part III Request for Second Wave of Discovery.

H. *Plaintiffs' Additional Requests for Discovery*—On or before the ..... day of ....., 19.., plaintiffs shall file all additional motions for the production of documents, requests for interrogatories and lists of proposed deponents. Except for good cause shown and in the interests of the just determination of this cause, no further requests for the production of documents, interrogatories or depositions will be permitted.

I. *Defendants' Additional Requests for Discovery*—On or before the ..... day of ....., 19.., defendants

* This procedure is also suitable for use when the original information to be verified is supplied by a defendant or defendants. In such a case, change "plaintiff" or "plaintiffs" to "defendant" or "defendants" or vice versa.

shall file all additional motions for the production of documents, requests for interrogatories and lists of proposed deponents. Except for good cause shown and in the interests of the just determination of this cause, no further requests for the production of documents, interrogatories or depositions will be permitted.

Part IV Subsequent Pretrial Conference.

A subsequent pretrial conference is hereby scheduled for the ..... day of ....., 19.., in Room ...., of the United States Courthouse at .....

Dated this ..... day of ....., 19...

.....
JUDGE

2.5 Sample Pretrial Order No. 3A. (To be added to Sample Pretrial Order No. 3 if document depositories controlled by the parties are to be established.)

A. Plaintiffs and defendants, respectively, shall establish document depositories under the terms and conditions set forth herein and under such additional terms and conditions as may hereafter be specified by Court Order.

B. The document depositories shall be located at such addresses as plaintiffs and defendants, respectively propose and are approved by the Court, and shall be maintained at the expense of the plaintiffs and defendants, respectively, and subject to their supervision and control.

C. Counsel appearing for any party in this cause shall have reasonable access during business hours to each document in any such depository, and may obtain a copy thereof at such party's expense.

D. All documents which have heretofore or which may hereafter be ordered produced in this cause shall be de-

posited at the depository of the party producing the document. No document may be removed from a depository other than by Order of Court.

Dated this ..... of ....., 19...

.....
JUDGE

2.5 Sample Pretrial Order No. 3B. (To be added to Sample Pretrial Order No. 3 if a document depository under court control is established.)

A. A document depository shall be established for this cause under the terms and conditions set forth herein and such additional terms and conditions as may hereafter be specified by Court Order.

B. The document depository shall be located in the United States Courthouse for this District, Room ...., under the supervision and control of the Clerk of this Court or such deputy or deputies designated by him.

C. Counsel appearing for any party in this cause shall have reasonable access during business hours to each document in such depository, and may obtain a copy thereof at such party's expense.

D. All documents which have heretofore or which may hereafter be ordered produced in this cause shall be deposited at such depository. No document may be removed from the depository other than by Order of Court.

.....
JUDGE

2.5 Sample Pretrial Order No. 3C. (To be added to Sample Pretrial Order No. 3, at subparagraph E.(4), where a document depository is to be established at the election of the parties.)

A. Any (plaintiff) (defendant) who, on or before the ..... day of ....., 19.., elects in writing filed and served herein to establish on or before the ..... day of ....., 19.., and maintain until further Order of Court a document depository in ....., accessible during
(location)
business hours to all parties interested as parties in this action, will not be required to produce documents in this district pursuant to this Order.

B. (Insert the appropriate provisions of Sample Pretrial Order No. 3A or 3B governing the terms and conditions for maintenance of the document depository.)

Dated this ..... day of ....., 19...

.....
JUDGE

1.6 Local Rule on Class Actions.*

In any case sought to be maintained as a class action:

(1) The complaint shall bear next to its caption the legend, "Complaint—Class Action."

(2) The complaint shall contain under a separate heading, styled "Class Action Allegations":

(a) A reference to the portion or portions of Rule 23, F.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(b) Appropriate allegations thought to justify such claim, including, but not necessarily limited to:

1. the size (or approximate size) and definition of the alleged class,
2. the basis upon which the plaintiff (or plaintiffs) claims

* This is based upon a proposed local rule drafted by Judge Marvin E. Frankel of The Southern District of New York.

(i) to be an adequate representative of the class, or

(ii) if the class is comprised of defendants, that those named as parties are adequate representatives of the class,

3. the alleged questions of law and fact claimed to be common to the class, and

4. in actions claimed to be maintainable as class actions under subdivision (b)(3) of Rule 23, F.R.Civ.P., allegations thought to support the findings required by that subdivision.

(3) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion [before the same judge (in districts using central calendars)].

(4) The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross claim alleged to be brought for or against a class.

1.10 Suggested Local Rule 6.* Cooperation of Counsel in Resolving Differences.

To curtail undue delay in the administration of justice,

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* This Rule is based on Local Rule 12(d) in the Northern District of Illinois.

this Court shall hereinafter refuse to hear any and all motions for discovery and production of documents under Rules 27 through 37 of the Federal Rules of Civil Procedures, unless moving counsel shall first advise the Court in writing that after personal consultation and sincere attempts to resolve differences they are unable to reach an accord. This statement shall recite, in addition, the date, time and place of such conference, and the names of all parties participating therein.

3.2 Sample Pretrial Order No. 4. (Appointment of special master to supervise discovery)

A pretrial conference was held on the ..... day of ....., 19.., wherein or as a result of which the following proceedings were had:

A. The following counsel were present representing the plaintiffs (list).

B. The following counsel were present representing the defendants (list).

C. It appearing at such pretrial conference that both plaintiffs and defendants plan to take the deposition of numerous persons and that because of the complexity of the issues many questions will arise as to the relevancy and materiality of the testimony and exhibits; that all parties expect to move for the production and inspection of documents under Rule 34, and that many questions will arise as to privilege and confidential treatment of documents, and that all parties expect to request numerous and complex interrogatories. The Court (with the consent of counsel) hereby appoints ..... as special master in this cause to supervise such discovery proceedings.*

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* This Sample Pretrial Order No. 4 is based on an order appointing a special master in *State of Washington v. General Electric, et al.,* Civil Action No. 5271, by Judge George H. Boldt on November 15, 1963 (W.D. Wash.).

D. The special master is hereby invested with the powers enumerated in Rule 34, F.R.Civ.P., and all proceedings had before him and appeals from his orders, if any, shall be controlled by that Rule.

E. The special master shall make periodic reports to the Court at intervals of not less than .... days with respect to the matters committed to him under this order of reference or by subsequent Order of the Court.

F. Compensation allowed the special master for his services shall be fixed by Order of the Court whenever it may appear appropriate to do so. At that time the Court will allocate the special master's compensation between the parties, and such allocation shall be taxable as costs in this cause at the close of the case within the Court's discretion.

Dated this ..... day of ....., 19...

.....
JUDGE

3.2 Use of Masters With Respect to Discovery. (This is an excerpt from the *Handbook of Recommended Procedures for the Trial of Protracted Cases,* pp. 39–42, 25 F.R.D. 390–394. The numbered footnotes are those appearing in the *Handbook.*)

Masters useful to supervise discovery under exceptional circumstances

"*Recommendation:* Where discovery in the protracted case presents problems involving exceptional circumstances or where requested by the parties, a master may be used to advantage to supervise dis-

covery as an adjunct to the court's supervision of the case in its entirety . . .[45]

"*Master not substitute for judge*

"*Discussion:* It must be understood at the outset that special masters should not be appointed automatically upon identification of a case as one which is potentially protracted.[46] Neither should special masters be utilized as substitutes for the trial judge.[47] Rather, they should complement the judge's work in cases where extensive day-in, day-out supervision proves to be necessary. While it is true that, in the

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[45] "Resolution number 17 adopted at 1957 N.Y. Seminar provided: 'Masters for the . . . supervision of discovery should be sparingly used and only in exceptional circumstances.' 21 F.R.D. 521. See generally: Ten Cures for Court Congestion, A.B.A. 1959 (Cure Seven); Bryant, The Office of Master in Chancery: Early English Development, 40 A.B.A. Journal 498 (1954); Colonial Development, 40 A.B.A. Journal 595 (1954); Institute of Judicial Administration, Court Commission Systems and References (July 18, 1958); Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L.Rev. 452 (1958); Use of Masters to Preside at the Taking of Depositions, 22 F.R.D. 465 (1958); Report on Study of the Protracted Case, 21 F.R.D. 55 (1957); Marsh, Pretrial Discovery in An Antitrust Case, 8 The Record 401 (1953); New York Temporary Commission on the Courts, Recommendations Respecting Calendar Congestion and Delay, 47 (N.Y. Leg. Doc. No. 6(c) 1957); Note: Reference of the Big Case Under Federal Rule 53(b), 65 Yale L.J. 1057 (1956); Weinstein, Standing Masters to Supervise Discovery in the Southern District of New York, 23 F.R.D. 36 (1959); Zavatt, Pre-Trial Practice, 23 N.Y. State Bar Ass'n Bull. 75 (1950); The Use of Masters in Aid of the Court in Interlocutory Proceedings, 22 F.R.D. 283 (1958).

[46] "Reference should not be made in cases to which the United States is a party except as provided by law."

[47] "For a discussion of the use of pre-trial masters and other means available to trial judges for coping with the problem of protracted litigation see MacAlister v. Guterma, 263 F.2d 65 (2 Cir. 1958).

past calendar problems have forced the appointment of masters in some cases which have not been assigned to a trial judge for all purposes, this is not a desirable procedure.

"*Indicia of cases which justify reference*

"It is difficult to define with any degree of precision the exceptional circumstances under which a pre-trial master's services will be justified. However, certain factors may be pointed to as indicia of such a case.

"*Where the case is of inordinate size and complexity*

"(1) Primarily, of course, the services of a special master are required where a case is of such inordinate size and complexity that it would be impossible for any judge to devote the time necessary for adequate supervision of discovery.

"This was the situation in Ferguson v. Ford Motor Co. (Civil No. 44-483—S.D. N.Y.—master appointed by agreement of parties October 1, 1948) and Schwartz v. Broadcast Music, Inc. (Civil No. 89-103—S.D. N.Y.—master appointed February 9, 1955).

"Ferguson v. Ford Motor Co. was an antitrust case of enormous proportions involving claims of patent infringement and unfair competition. During the discovery phase more than 100,000 pages of depositions were taken of approximately 173 witnesses. 45,000 documents were marked as exhibits. More than 700,000 pages of documents were produced, 420,000 of which were microfilmed. The special master to whom this gigantic case was referred for pre-trial supervision, former New York Supreme Court Justice Marsh, de-

voted an average of twenty hours a week over a two and one-half year period at actual hearings, exclusive of time devoted to studying and deciding matters, etc.

"Not every case calls for the full range of services performed by the special master in Ferguson v. Ford. In Zenith v. R.C.A., Civil No. 48C 1818, N.D. Ill., 1948, the reference was made for the sole purpose of determining a question of privilege raised with respect to documents sought under Rule 34, 28 U.S.C.A.

"*Where extensive discovery is to be conducted in distant places*

"(2) Another complicating factor might arise from the fact that extensive discovery or parts of it will be conducted in places distant from the court in which the case is to be tried.

"In Armstrong v. R.C.A. (Civil No. 1138, D. Del.—master appointed September 4, 1951) the action had been commenced in the District of Delaware, but the depositions were being taken in New York City. Because of the inconvenience of carrying all discovery disputes back to the District Judge in Wilmington, Delaware, former New York Supreme Court Justice McCook was appointed special master to preside at the taking of the depositions.[48]

"*Where there is animosity among counsel*

"(3) Another complicating factor which may justify appointment of a pre-trial master is the existence of undue animosity among the attorneys or parties.

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[48] "The geographic flexibility attainable through the use of a special master was illustrated also in Ferguson v. Ford Motor Co. where the special master supervised the taking of depositions in England and Ireland."

"First Iowa Hydro Electric Cooperative v. Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir), certiorari denied 355 U.S. 871, 78 S.Ct. 122, 2 L.Ed.2d 76 (1957), is an example of this. There the district judge felt compelled to appoint a special master in order 'to "prevent oppression or hardship to any part."' This view was shared by the Court of Appeals which concluded that: 'There was obvious possibility of oppression and hardship unless the discovery proceedings were continuously supervised and kept in order through the services of a Master.' (245 F.2d at page 626)

"So strong was the ill feelings in this case that after many harassing tactics certain plaintiffs flatly refused to permit their depositions to be taken. Ultimately, the court granted motions of the defendants to dismiss the case for infractions of the Rules and failure to prosecute, and entered a final judgment of dismissal providing that it should operate as an adjudication of the merits.

"In appointing masters under the exceptional circumstances contemplated, strong efforts must be made to obviate four basic objections to the utilization of masters: the fear that the assigned judge will not adequately familiarize himself with the case in its pretrial phases; the caliber of the master; the master's inability effectively to limit the scope of inquiry; and the increased costs in time and money which the reference will impose upon the litigants.

"(a) Appointment of a special master to supervise discovery will not justify the judge's washing his hands of pre-trial responsibility. The recommendation contemplates use of a master only in conjunction with the judge assigned to the case for all purposes.

"(b) It is essential that the master be a man of the highest caliber. This can best be accomplished by selecting a master who is proposed by and agreed upon by the parties.[49]

"(c) The master cannot effectively limit the scope of inquiry. Although extremely broad pre-trial discovery powers have been conferred on special masters in Ferguson v. Ford Motor Co., Schwartz v. B.M.I. and First Iowa-Hydro Electric Cooperative v. Iowa-Illinois Gas & Electric Co., the power to enter a pre-trial order defining the issues and limiting the scope of inquiry usually is not conferred upon special masters in the federal courts except in accountings.

"*The optimum procedure*

"The optimum procedure in any 'big' case where a master is to be used to supervise discovery would be to combine the services of a master and a judge. Shortly after the reference, there should be an informal conference among the judge, master and

"*Regular reports to judge*

"counsel aimed at the particularization of issues. As soon as practicable the issues to be tried should be embodied in a pre-trial order of the court that will thereafter control discovery and trial of the case. After the entry of this initial pre-trial order, the master should continue to report regularly to the judge in

"*Supplementary orders as necessary*

"order to keep him apprised of the progress being

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[49] "Cf. Judge William J. Campbell, 1957 N.Y. Seminar, 21 F.R.D. 504."

made. Additional pre-trial conferences can be arranged for the periodic entry of supplementary orders if and when necessary.

"(d) One of the matters that should be given serious consideration in connection with the appointment of a master to supervise discovery is the cost of such a master. Since the master should be a man of the highest caliber, his compensation would necessarily be a very substantial item. However, in the unusually protracted case, the increased cost occasioned by the appointment of a master may be more than compensated by the dispatch with which the case may be reached for trial. It could also be that a master would so reduce duplicative and other unnecessary discovery as to make a substantial over-all reduction in discovery costs.

"*Master's authority to be made explicit*

"Assuming that a reference is justified in the light of the considerations discussed above, the master's authority to rule on applications for relief should be made explicit in the order of reference.

"*Attitude of judge important*

"In making rulings, the master must view his role as quasi-judicial rather than merely advisory. The judge must make it clear to the parties at the outset that, while he will not hesitate to reverse an error of law, he will not lightly substitute his judgment for that of the master in a matter not involving legal error. In this way excessive review-seeking will be discouraged, and the litigants are more likely to respect and have confidence in the master."

3.2 Example of an Order Appointing a Special Master to Determine Damages.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARINA N. OSWALD PORTER, *et al.* v. UNITED STATES OF AMERICA	Civil Action No. 3–2282

ORDER

For the appointment of a special master to report as to just compensation, or damages, in the above cause, it appearing to the Court that this is an unusual case which will involve the presentation of evidence of a specialized nature by expert witnesses, that the determination of just compensation, or damages, will require a consideration of complicated issues of fact concerning approximately five hundred (500) items taken by the United States of America, that a jury will have difficulty in determining just compensation, or damages, and that a jury would be materially assisted and the interests of justice will be served by the appointment of a special master with experience in the presentation of evidence of value by expert witnesses in proceedings governed by the Federal Rules of Civil Procedure, it is

ORDERED that William B. West, III, Esq., of Dallas, Texas, be and he hereby is appointed special master for the purpose of hearing evidence on the issue of the value of

* This order, drafted by Chief Judge Joe E. Estes, was attached to an order to show cause why the order appointing the master should not be entered.

the items of personal property described in the complaint, which were acquired by the United States of America on October 31, 1966, pursuant to Public Law 89–318 (79 Stat. 1185), to make findings as to the value of each of said items as of October 31, 1966, the date of taking, together with such subsidiary findings underlying the determination of value as may be appropriate and necessary, and to make and file a preliminary report containing his findings of fact in the Office of the Clerk of the Court, with a view to aiding the jury on the amount of damages to be awarded, keeping in mind that the final determination of the amount of damages will be made by a jury on the trial of this cause, and that this case is referred to said special master for the specified and limited purpose of making findings as to the value of the items in question and such issues of fact as are or may be subsidiary to a determination of the issue of value. It is further

ORDERED that the said William B. West, III, Esq., as special master, shall have all of the powers and authority, and shall proceed in accordance with Sections (c) and (d) of Rule 53, Federal Rules of Civil Procedure, and shall submit his report in accordance with the provisions of subsections (1) and (2) of Section (e) of said Rule 53, subject in all respects to the further orders of this Court, if any.

SIGNED and ORDERED ENTERED, the ..... day of ....., 1968.

.....
UNITED STATES DISTRICT JUDGE

3.3 Sample Pretrial Order No. 5.

Part I Second Wave and Completion of Discovery

Part II Designation of Deposition Evidence and Documents for Objections Thereto

*Part III	Final Pretrial Briefs, Written Offers of Proof, Written Narrative Summaries of Expert Testimony and Statements of Uncontroverted Facts
Part IV	Listing of Trial Witnesses
Part V	Filing of Proposed *Voir Dire* Questions
Part VI	Scheduling Final Pretrial Conference
Part VII	Setting Trial Date

A pretrial conference was held in the above captioned cause on the .... day of ....., 19.., wherein or as a result of which the following proceedings were had:

Part I Second Wave and Completion of Discovery.

A. The following interrogatories on behalf of plaintiffs were approved and ordered answered on or before the ..... day of ....., 19.. (list interrogatories).

B. The following motions for production of documents on behalf of plaintiffs were granted and the documents were ordered produced at (insert location) on or before the ..... day of ....., 19.. (list motions approved).

C. Depositions on behalf of plaintiffs of the following persons, at the places and times designated, were approved:

Witness	Company	Location	Date
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

D. The following interrogatories on behalf of defendants were approved and ordered answered on or before the ..... day of ....., 19.. (list interrogatories).

E. The following motions for production of documents on behalf of defendants were granted and the documents

* An alternate Paragraph N. to Part III, designed for a case *without* a counterclaim, appears at the end of this Sample Pretrial Order.

were ordered produced at (insert location) on or before the ..... day of ....., 19.. (list motions approved).

F. Depositions on behalf of defendants of the following persons, at the places and times designated, were approved:

Witness	Company	Location	Date
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

G. Except as may hereafter be ordered by the Court for good cause shown and in the interest of the just determination of this cause, no discovery in addition to the discovery heretofore ordered shall be taken in this cause.

*Part II Designation of Deposition Testimony, Documents, and Objections Thereto.**

H. On or before the ..... day of ....., 19.., plaintiffs shall designate those portions of deposition testimony which it desires to offer in evidence at the trial.

I. On or before the ..... day of ....., 19.., defendants shall counter-designate such portions of the deposition designated by plaintiffs and shall designate such portions of depositions as defendants desire to offer in evidence at the trial.

J. On or before the ..... day of ....., 19.., plaintiffs shall counter-designate such portions of the depositions designated by defendants as plaintiffs desire to offer in evidence at the trial.

K. On or before the ..... day of ....., 19.., plaintiffs shall designate those documents which they desire to introduce at trial and shall provide each defendant with a copy of each such document.

* A variation of this procedure consisting of marginal indications in different colors is described in the *Suggested Procedures* at 4.1.

L. On or before the ..... day of ....., 19.., defendants shall designate those documents which they desire to introduce at trial and shall provide each plaintiff with a copy of each such document.

M. On or before the ..... day of ....., 19.., plaintiffs and defendants shall file all objections to designated deposition testimony and exhibits.

Part III Final Pretrial Briefs, Written Offers of Proof, Written Narrative Summaries of Expert Testimony and Statements of Uncontroverted Facts.

N.* Plaintiffs and defendants shall each file two detailed written pretrial briefs constructed as hereinafter provided. The first such brief shall be filed by the plaintiffs on or before the ..... day of ....., 19.., and shall relate to the claims for relief by plaintiffs against defendants. The second such brief shall be filed by the defendants on or before the ..... day of ....., 19.., and shall relate to the defenses, including affirmative defenses, of the defendants to plaintiffs' claims for relief and, in a separate section, to the defendants' claims for relief on their counterclaims herein. The third such brief shall be filed by the plaintiffs on or before the ..... day of ....., 19.., and shall relate to plaintiffs' reply to the affirmative matter in the defenses of defendants to plaintiffs' claims for relief, to plaintiffs' defenses including affirmative defenses and to defendants' counterclaims for relief. The fourth such brief shall be filed by the defendants on or before the ..... day of ....., 19.., and shall relate to the reply of the plaintiffs to any af-

* This paragraph of Part III is based upon a pretrial order entered by Chief Judge William H. Becker on June 21, 1967, in *Johnson, et al. v. Tri-State Motor Transit Co.,* Civil No. 15974–3 (W.D. Mo.) in which both a complaint and a counterclaim were filed. See alternate Paragraph N., designed for a case *without* a counterclaim, at the end of this Sample Pretrial Order.

firmative matter in the defenses of plaintiffs to the counterclaims of defendants.

Each of the four briefs required to be filed as hereinafter provided shall consist of first, a detailed narrative statement of the facts proposed to be proved by the party filing the brief and second, concise statements of legal contentions of the party filing the brief in support of any affirmative matter contained in the brief and in response to legal contentions made by the adverse party in the next preceding brief. In separate sections of the pretrial brief there shall be stated a narrative statement or statements of facts and statements of legal contentions. Neither shall be commingled with the other and shall be in the following form:

(1) In support of each claim for relief whether contained in the complaint or the counterclaim, the party or parties asserting the claim for relief shall set forth in simple declarative sentences, separately numbered, the narration of all facts relied upon in support of the claim or claims for relief herein. Each narrative statement of facts shall be in a separate section and shall be complete in itself and shall contain no recitation of what any witness testified to, or what the adverse party or parties stated or admitted in these or other proceedings and no reference to the pleadings or other documents or schedules as such; provided, however, that at the option of a party or parties any narrative statement of facts may contain references in parentheses to the names of witnesses, depositions, pleadings, exhibits or other documents, but no such party or parties shall be required to admit or deny the accuracy of such references. No narrative statement of facts shall, so far as possible, contain any color words, labels or legal conclusions; and in no event shall any color word, label, or legal

conclusion be commingled with any statement of fact in any sentence or paragraph. Each narrative statement of facts shall be so constructed, to the best of the ability of plaintiffs' counsel, that the opposite party will be able to admit or deny each separate sentence of the statement of facts. Each separate sentence of the statement of facts shall be separately and consecutively numbered.

(2) In each separate section of the pretrial brief containing the statement of legal contentions, and authorities in support thereof, all legal contentions and authorities in support of the claim or claims for relief which are the subject for the foregoing narrative statement of facts, necessary to demonstrate the liability of the adverse party or parties to the party or parties filing the brief shall be separately, clearly and concisely stated in separately numbered paragraphs. Each such paragraph shall be followed by a citation of authorities in support thereof without quotations therefrom.

(3) The party or parties filing a pretrial brief in defense of a claim or claims for relief shall set forth in a separate section in separate simple declarative sentences factual statements admitting or denying each separate sentence contained in the narrative statement of facts of the adverse party in support of its claim for relief, except in instances where a portion of a sentence can be admitted and a portion denied. In those instances the brief shall state clearly the portion of the sentence admitted and the portion denied. Each separate sentence of a brief in response to a narrative statement of facts in support of a claim for relief shall bear the same number as the corresponding sentence and the narrative statements of facts in support of the claim for

relief. In a separate portion of the narrative fact statement in response to a narrative fact brief in support of a claim for relief the responding party shall set forth in a separate narrative statement all affirmative matters of a factual nature relied upon by it in defense (in whole or in part) against the claim or claims for relief. This separate narrative statement of affirmative matters shall be contained in a narrative statement of facts constructed in the same manner as hereinabove provided for a narrative statement of facts in support of a claim for relief.

(4) In a separate section of the written pretrial brief in response to a brief in support of a claim for relief the party or parties responding shall, in a separate section of the pretrial brief, set forth a statement of legal contentions and authorities in defense (in whole or in part) against the claim for relief to which the response is made. In this separate section the party or parties shall set forth its legal contentions and authorities in support thereof directly responding to the legal contentions of the adverse party in support of the claim for relief and shall separately set forth such additional contentions of the party or parties which may be necessary to demonstrate the nonliability (in whole or in part) of the party or parties filing the brief or briefs. The statement of legal contentions in a brief responding to a brief in support of a claim for relief shall be constructed in the same manner as provided in paragraph (2) hereinabove for the statement of legal contentions of a party or parties in support of a claim for relief.

(5) Within .... days after the service of defendant's pretrial brief containing statements of affirmative

matter, the plaintiff shall file a reply pretrial brief containing factual statements admitting or denying each separate sentence of the separate narrative statement of affirmative matters of the defendant. This portion of the plaintiff's reply brief shall be constructed in the same manner provided in paragraph (3) above for defendant's factual statements responding to plaintiff's narrative statement of facts, and shall be in a separate portion of the reply brief.

(6) Within .... days after the service of defendant's statement of additional legal contentions and authorities in support thereof, plaintiff shall file in a separate part of its reply brief its separate statement of additional legal contentions and authorities in support thereof which shall directly respond to the additional legal contentions of defendant. The statement of legal contentions and authorities in support thereof shall be constructed in the same manner provided in paragraph (4) above for defendant's pretrial brief, and shall be in a separate portion of the reply brief.

(7) Any factual contention, any legal contention, any claim for relief or defense (in whole or in part) or affirmative matter not set forth in detail as provided hereinabove shall be deemed abandoned, uncontroverted, or withdrawn in future proceedings notwithstanding the contents of any pleadings or other papers on file herein, except for factual contentions, legal contentions, claims for relief or defenses thereto and affirmative matters of which a party may not be aware and could not be aware in the exercise of reasonable diligence at the time of filing the briefs hereinabove provided for. Any matters of which a party was not aware at the time of filing

and which he could not have been aware in the exercise of diligence at the time of the filing of a brief may be supplemented by a supplemental brief by leave of Court for good cause shown on timely motion therefor.

O. On or before the ..... day of ....., 19.., each plaintiff and each defendant herein shall serve and file written offers of proof on the following issues: (list)

P. On or before the ..... day of ....., 19.., each plaintiff and each defendant herein shall serve and file written narrative summaries setting forth in detail the testimony of each expert which the party so filing will employ at trial, including a complete listing of all documents, data and authorities studied by each such expert.

Q. On or before the ..... day of ....., 19.., the parties shall confirm and attempt to agree on a joint statement of those factual issues which are without substantial controversy, and agree upon forms of statements of factual issues which are controverted. If the parties are unable to agree upon the uncontroverted factual issues, or upon the forms of statements of the controverted factual issues, each party shall separately prepare on or before the ..... day of ....., 19.., a proposed statement thereof.

Part IV Listing of Trial Witnesses.

R. On or before the ..... day of ....., 19.., each plaintiff shall identify each witness it intends to call at trial in its case in chief and state whether such witness will appear in person or by deposition.

S. On or before the ..... day of ....., 19.., each defendant shall identify each witness it intends to call at trial in its case in chief and state whether such witness will appear in person or by deposition.

Part V Filing of Proposed Voir Dire Questions.

T. On or before the ..... day of ....., 19.., all parties shall file in writing (1) proposed topics for questions for *voir dire* examination of the jury, and (2) separate written requests for instructions to the jury and for special interrogatories. On each request for an instruction to the jury there shall be noted the source or authorities from which it is derived or on which it is based.

Part VI Scheduling Final Pretrial Conference.

U. A final pretrial conference is set for the ..... day of ....., 19.., beginning at the hour of .... o'clock, ...m.

V. At the pretrial conference set in Paragraph U. final trial plans will be developed and, among other things, the following matters will be considered:

(1) The then undetermined issues of fact and law will be delineated and, to the extent feasible, simplified;

(2) The reception in evidence of documentary matters not precluded by stipulation of fact, subject to such objections, if any, as may be reserved for the trial;

(3) The identity and scope of testimony of witnesses to be called at time of trial will be considered and possible limitation with respect thereto;

(4) An agreement upon a trial schedule;

(5) The handling of documentary evidence;

(6) Authentication of documents;

(7) Witness lists;

(8) Spokesmen;

(9) Examination of witnesses;

(10) Use of written narrative statements of expert witnesses;

(11) Use of depositions, including the possible use of narrative summaries or verbatim extracts;

(12) Final pretrial briefs filed pursuant to this Pretrial Order;

(13) Limitation of opening statements;

(14) Current index of the record;

(15) Daily transcripts;

(16) Instructions;

(17) Separation of issues;

(18) Use of and mechanics for special jury verdict, or general verdict with interrogatories;

(19) Possibility of settlement.

Part VII Setting Trial Date.

W. Trial of the above captioned case shall begin on the ..... day of ....., 19.., at .... o'clock, ...m.

Dated this ..... day of ....., 19...

.....
JUDGE

3.31 Sample Pretrial Order No. 5—Alternate Paragraph N. to Part III. (Designed for a case without a counterclaim)

N. Each plaintiff shall file on or before the ..... day of ....., 19.., a detailed written pretrial brief consisting of, first, a narrative statement of all facts proposed to be proved by each plaintiff and, second, concise statements of the legal contentions of each plaintiff and the

authorities in support thereof. The narrative statement of facts and the statements of legal contentions shall be set forth in the manner hereinafter ordered in separate sections of the pretrial brief and shall not be commingled.

(1) The narrative statement of facts shall set forth in simple, declarative sentences, separately numbered, the narration of all facts relied upon by such plaintiff in support of its claim for relief herein. The narrative statement of facts shall be complete in itself and shall contain no recitation of what any witness testified to, or what any defendant stated or admitted in these or other proceedings and no reference to the pleadings or other documents or schedules as such, provided that at the option of plaintiffs (or of defendants in responses to this order) a narrative statement of facts may contain references in parentheses to the names of witnesses, depositions, pleadings, exhibits or other documents, but no party shall be required to admit or deny the accuracy of such references. The narrative statement of facts shall, so far as possible, contain no color words, labels, or legal conclusions; and in no event shall any such color words, labels, or legal conclusions be commingled with any statement of fact in any sentence or paragraph. The narrative statement of facts shall be so constructed, to the best of the ability of each plaintiff's counsel, that the opposite parties and each of them will be able to admit or deny each separate sentence of the statement. Each separate sentence of the statement shall be separately and consecutively numbered.

(2) In the separate section of the pretrial brief containing the statement of legal contentions and authorities in support thereof, all legal contentions of each plaintiff, necessary to demonstrate the liability of

each defendant to such plaintiff, shall be separately, clearly, and concisely stated in separately numbered paragraphs. Each paragraph shall be followed by citations of authorities in support thereof.

(3) Within .... days after service of plaintiffs' narrative statements of facts, each defendant shall file a pretrial brief containing factual statements admitting or denying each separate sentence contained in the narrative statement of fact of each plaintiff, except in instances where a portion of a sentence can be admitted and a portion denied. In those instances, each defendant shall state clearly the portion admitted and the portion denied. Each separate sentence of each defendant's response shall bear the same number as the corresponding sentence in the plaintiff's narrative statement of fact. In a separate portion of each defendant's narrative statement of fact, such defendant shall set forth in a separate narrative statement all affirmative matters of a factual nature relied upon by it. The defendant's narrative statement of affirmative factual matter shall be contained in a narrative statement of facts constructed in the same manner provided in subparagraph (1) hereof for the narrative statement of facts of each plaintiff.

(4) Within .... days after the service of plaintiffs' statements of legal contentions and authorities in support thereof, each defendant shall file, in a separate part of its pretrial brief, a statement of its legal contentions and authorities in support thereof which shall directly respond to plaintiffs' separate legal contentions and contain such additional contentions of the defendant necessary to demonstrate the nonliability or limited liability of the defendant, or both, the statement of legal contentions of each defendant

shall be constructed in the same manner provided in subparagraph (2) hereof for the similar statement of each plaintiff.

(5) Within .... days after the service of defendant's pretrial brief containing statements of affirmative matter, the plaintiff shall file a reply pretrial brief containing factual statements admitting or denying each separate sentence of the separate narrative statement of affirmative matters of the defendant. This portion of the plaintiff's reply brief shall be constructed in the same manner provided in paragraph (3) above for defendant's factual statements responding to plaintiff's narrative statement of facts, and shall be in a separate portion of the reply brief.

(6) Within .... days after service of defendant's statement of additional legal contentions and authorities in support thereof, plaintiff shall file in a separate part of its reply brief its separate statement of additional legal contentions and authorities in support thereof which shall directly respond to the additional legal contentions of defendant. The statement of legal contentions and authorities in support thereof shall be constructed in the same manner provided in paragraph (4) above for defendant's pretrial brief, and shall be in a separate portion of the reply brief.

Any factual contention, any legal contention, any claim for relief or defense (in whole or in part) or affirmative matter not set forth in detail as provided hereinabove shall be deemed abandoned, uncontroverted, or withdrawn (as may be appropriate) in future proceedings notwithstanding the contents of any pleadings or other papers on file herein, except for factual contentions, legal contentions, claims

for relief or defenses thereto and affirmative matters of which a party may not be aware and could not be aware in the exercise of reasonable diligence at the time of filing the briefs hereinabove provided for. Any matters of which a party was not aware at the time of filing and which he could not have been aware in the exercise of diligence at the time of the filing of a brief may be supplied by a supplemental brief by leave of Court for good cause shown on timely motion therefor.

3.51 Sample Pretrial Order No. 6. (Appointment of an expert)

A pretrial conference was held on the ..... day of ....., 19.., wherein the following proceedings were had:

A. The following counsel were present representing the plaintiffs (list).

B. The following counsel were present representing the defendants (list).

C. The parties to this cause have presented widely divergent positions with respect to the scientific, technical and economic questions in this cause.

D. In view of the parties' positions the Court is of the opinion that an expert should be appointed to present an evaluation of the scientific, technical or economic questions, and hereby appoints ..... to act as the expert for the Court.*

E. The parties shall submit for examination by said court-appointed expert, subject to objections by the parties,

* This Sample Pretrial Order No. 6 is based on an order appointing an economic expert for the Court in *Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al.,* Civil Action No. 61 C 1278 and related power switchgear assembly cases, by Judge Edwin A. Robson on December 15, 1965 (N.D. Ill.).

all material pertaining to this cause which he may request from time to time.

F. Said court-appointed expert shall be authorized to consult with the Court, its representatives and, subject to objection by the parties, the employees, representatives and experts of the plaintiffs and defendants as he shall deem necessary.

G. Said court-appointed expert shall file a report of his findings and deliver same to the parties in this cause. After said report is completed and delivered to the parties, said expert will meet with the Court and the parties to discuss his report.

H. Said court-appointed expert may be called as a witness for or on behalf of any of the parties hereto or the Court at the trial of this cause.

I. Compensation allowed the court-appointed expert for his services shall be fixed by Order of the Court whenever it may appear appropriate to do so. At that time the Court will allocate the appointed expert's compensation between the parties, and such allocation shall be taxable as costs in this cause within the Court's discretion.

It is therefore ORDERED that ..... be and he is hereby named the court-appointed expert, subject to the terms set forth herein.

Dated this ..... day of ....., 19...

.....
JUDGE

3.51 Expert Witnesses.

Recommendation: The court should require early disclosure of the proposed expert testimony. This is desirable to confine such testimony to those issues which are properly the subject of expertise, to discourage the

use of multiple expert witnesses by one party where their testimony is simply cumulative, and to determine whether court appointment of an expert is desirable. Before determining to appoint an expert witness, the court should consult with counsel on the propriety of the appointment under standards discussed hereinafter. If the court decides to appoint an expert, counsel should be consulted on the identity of the expert.

The issues which are properly the subject of expert testimony should be promptly identified in the course of pretrial proceedings.

As soon as practical each party should be required to disclose the name, qualifications and content of the testimony of each expert witness proposed to be called at the trial. This should be done in a written pretrial offer of proof. Disclosure of expert testimony is particularly desirable when there is reason to suspect each side's witnesses will express plainly divergent views. In such circumstances the court should consider appointment of an impartial expert.

Objections to the written offers of proof should be heard and tentative rulings announced in the pretrial proceedings. It may be desirable to limit the number of expert witnesses on each issue.

In complex litigation which may involve any area of knowledge the triers of fact may be, and probably are, laymen in the particular field. Expert testimony is appropriate to assist them in these areas. The difficulties of explaining special knowledge and opinion to the triers of fact include: (a) specialized language;[1] (b) differences in the

[1] Each science has its own nomenclature and jargon. See J. G. Palfrey, *Proof of Scientific and Technical Facts in the Courts,* Armstrong Project, Part I.

qualification of the experts;[2] (c) bias on the part of experts employed by adversary parties;[3] (d) controversy concerning underlying factual data; (e) difficulty of laymen to choose between inconsistent specialized theories; and (f) difficulty in weighing contradictory opinions or statements of fact.[4]

The following is a description of some of the methods which are presently used or suggested to resolve issues of fact and conflicting opinions in specialized areas.[5]

(a) *Use of adversary experts.* The traditional method is the use of adversary experts employed by the parties.[6]

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[2] See *Prettyman Report,* 13 F.R.D. 62, 79 (that different qualifications can produce honest differences of opinion).

[3] L. H. Whinery, *Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 85th Cong., First Sess., Study No. 8* (hereinafter referred to as the *1958 Senate Study*); L. H. Whinery, *Court Experts and the Proof of Scientific Fact—An Experiment in Law Reform, 1958 Palo Alto Seminar,* 23 F.R.D. 319, 481, 483; M. Ladd, *Expert and Other Opinion Testimony,* 40 Minn. L.Rev. 437 (1956); J. H. Beuscher, *The Use of Experts by the Courts,* 54 Harv. L.Rev. 1105 (1941); and see 2 Wigmore, *Evidence* § 563, n.2 (3d ed. 1940).

[4] See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony,* 15 Harv. L.Rev. 40, 53–54 (1901).

[5] Two methods not discussed above have been referred to as additional devices for introducing such evidence. They are: (1) a physical view of the process of manufacture or the operation of an industry by the trier of fact, and (2) the presentation of agreed-upon "accurate, nonargumentative factual" statements. The latter method is useful where there is no real dispute as to what many of the facts are, but there is serious controversy as to their significance. James H. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific and Technical Facts, 1958 Palo Alto Seminar,* 23 F.R.D. 319, 474–476. See also, Sample Pretrial Order No. 4, paragraphs N., O. and P., in which the parties are directed to submit factual memoranda.

[6] An exhaustive treatment has been made by Dession in *The Trial of Economic and Technological Issues of Fact,* 58 Yale L.J. 1019, 1242

Naturally litigants present those experts who adhere to their cause, which may result in irreconcilably divergent opinion testimony. Nevertheless, this method has the advantages of simplicity, the Bar's familiarity with it, and the opportunity it affords each litigant to present evidence favoring his theory of the case.

(b) *Reference to masters.* Specific scientific issues may be referred to a master (or a panel of masters). He (or they) should be an expert in the area of the dispute.[7] The procedure should be in accordance with Rule 53, F.R. Civ.P.,[8] which empowers reference of difficult issues to masters if such issues are complicated and the conditions are exceptional within the meaning of 53(b). Any such reference should be discussed fully with counsel and the issues of fact to be resolved should be defined with precision in the order of reference. A definition of the issues to be referred, agreed upon by the parties, is desirable, but not always obtainable.

The advantages of this method of reference to masters are that the language, reasoning and conclusions of the adversary experts are digested and rendered into a conclusion by persons familiar with the vocabulary and the sub-

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(1949); see also, John M. Maguire and Jefferson E. Hahesy, *Requisite Proof of Basis for Expert Opinion,* 5 Vand. L.Rev. 432 (1952); and *On the Use of Experts in Patent Cases,* 22 J.Pat. Off. Soc'y. 639 (1940).

[7] This procedure was used in *Head Ski Company v. Kam Ski Company,* 158 F.Supp. 919 (D. Md. 1958). At the request of both parties, Chief Judge Roszel C. Thomsen referred the issues of theft of trade secrets and patent infringement to a professor of industrial engineering, who was appointed as a special master under Rule 53, F.R.Civ.P.

[8] See *LaBuy, U. S. District Judge v. Howes Leather Co., Inc. et al.,* 352 U. S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); and *1954 ABA Committee Report* p. 12.

ject.[9] The disadvantages of the method are (a) problems of compensation for the master or masters; (b) rulings upon legal questions of procedure required from time to time during the master's inquiry; (c) if Rule 53, F.R.Civ.P., is followed, the judge must rule upon exceptions to the master's report; (d) if the Rule is not followed and the master's report is accepted as conclusive, advance agreement of the parties is necessary, and (e) duplication of time and effort involved in the judge's ultimate consideration and decision if the process of Rule 53 is followed.

(c) *Reference to a scientific organization.* It has been suggested that specific scientific questions might be referred to a bureau or organization of accepted expertise in the field, such as the Bureau of Standards in the Federal Government.[10] Agreement of the parties may be essential for such a reference.

(d) *Reference to an administrative agency.* It has also been suggested that the Congress establish an administrative agency of scientific competence to which all courts could refer all questions concerning a science.[11] This method of reference is not presently available.

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[9] Note, however, the *Prettyman Report* adds one caveat suggesting the desirability of having at least one lawyer, as a member of, or as advisor to, the master's panel. 13 F.R.D. 62, 81; and see *1954 ABA Committee Report* 44.

[10] *A Needed Patent Reform,* an editorial in The New York Times on October 21, 1934 reprinted in 16 J.P.O.S. 973 (1934) as quoted in Whinery, *1958 Senate Study* 14, n.75.

[11] V. Bush, *Some Proposals for Improving the Patent System,* as quoted in the *1958 Senate Study* 14, n.76; see also, J. H. Beuscher, *The Use of Experts by the Courts,* 54 Harv. L.Rev. 1105, 1111–1120 (1941); and see the suggestions of the late Chief Judge Harold M. Stephens in *What Courts Can Learn from the Commissions,* 19 A.B.A.J. 141, 142 (1933).

(e) *Advisory juries.* It would appear that a trial court required to decide an issue in the physical or social sciences may utilize the procedure provided by Rules 39(c) and 48, F.R.Civ.P. These permit the court to try an issue with an advisory jury in cases where there is no right to jury trial, e.g., equitable suits. Presumably such a jury would be picked by a lawful method which would insure the particular competence of the jurors.[12]

(f) *An advisor to the court.* This method employs an expert who sits throughout the trial and advises the court *in camera* and who may or may not testify or appear as a witness. The method has statutory sanction in England patent litigation [13] and has had usage in admiralty and antitrust cases in this country.[14] In *Danville Tobacco Association, et al. v. Bryant-Buckner Associates, Inc.,* 333 F.2d 202, 208 (C.A. 4 1964) (action for a declaratory judgment on whether a tobacco association's plan for allotting selling time among the various warehousemen violated the antitrust laws) a court-appointed expert was employed. The Fourth Circuit described the expert's function:

> "He [the expert] was an official of the Bright Belt Warehouse Association who had testified in the case before his appointment and who testified thereafter. If B-B [the defendant] may object despite its contrary

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[12] There is considerable authority supporting the proposition that an *expert* advisory jury can be called under Rule 39. See, e.g., Whinery, *1958 Senate Study,* p. 17. But see *1957 New York Seminar,* 21 F.R.D. 395, 468 where Judge Smith is referred to as stating that the Rule does not contemplate selection of an *expert* jury.

[13] The Patents Act, 1949, 12, 13, 14 Geo. 6, ch. 87, § 84 substantially reenacting Patents and Designs Act 1907, 7 Edw. 7, ch. 29, § 31.

[14] 3 Benedict, *The Law of American Admiralty,* § 381b (6th ed. 1940); Judicial Conference of the United States, *Interim Report of Committee on Compensation of Expert Witnesses in Civil Litigation,* committee memorandum 4 (mimeographed September 1952).

representation to the Court, still there was no error in his appointment and service. 'Master' was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. He did not take evidence; he did not resolve any factual disputes; he made no rulings of law. Impressed with his marked knowledge in tobacco marketing, demonstrated in his testimony, the Court chose him as an expert for its guidance. He was subject to questioning as a witness before and after his counseling advice to the Court. Rightfully, and with every propriety, he expounded to the Court and the parties the techniques of the subject in suit."

The disadvantage of the use of such an "advisor" is the antagonism of the Bar and the understandable objection of litigants to any communication with a trial judge concerning a case under trial, in the absence of counsel for the parties, except by persons within the judicial system, such as law clerks.[15]

(g) *The court-appointed expert.* This method contemplates the designation by the court, with [16] or without the consent of the parties, of a witness or witnesses selected for expert knowledge in the field involved in the pending issue.[17] But particular attention is invited here to the material in Paragraph 3.51 of Part I of the *Manual.* There is little question that the courts have the inherent power to

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[15] See, e.g., *Report of Committee No. 18, Section of Patent, Trademark and Copyright Law* (Mimeographed 1957), pp. 4–5 (quoted by Whinery, *1958 Senate Study* 25, n.150).

[16] See Section 3.51 in Part I of this *Manual.*

[17] See, e.g., Whinery, *1958 Senate Study* 25–33, for a general discussion and *ibid.,* pp. 33–84, for the role of the court-appointed expert in patent litigation. See also, Whinery in, *1958 Palo Alto Seminar,* 23 F.R.D. 319, 481, 487.

call [18] and examine witnesses,[19] including court-appointed experts.[20] In *Scott, et al. v. Spanjer Bros., Inc.*, 298 F.2d

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[18] State courts have generally recognized the inherent power to call witnesses. See, for example, *Polulich v. J. G. Schmidt Tool Die & Stamping Co.*, 46 N.J. Super. 135, 134 A.2d 29 (1957); *State v. Beaver Portland Cement Co.*, 169 Or. 1, 126 P.2d 1094 (1942); and *Atkinson v. United Rys. Co.*, 286 Mo. 634, 228 S.W. 483 (1921).

[19] See *Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co., Inc.*, 143 F.2d 826, 829 (C.A. 5 1944) (action for specific performance of a contract for the sale of land). The Fifth Circuit observed that two parties central to the dispute had not testified at trial and ordered a new trial, noting the court's power to call and examine witnesses neither party would present in the interests of truth and justice.

[20] Rule 35, F.R.Civ.P., provides for a court ordered mental or physical examination where the mental or physical condition of a party is in controversy. Rule 53, F.R.Civ.P., provides for appointment of and reference to a "master" (which work includes "a referee, an auditor, and an examiner"). There is, however, no civil rule comparable to Rule 28, F.R.Cr.P., which provides for court appointment of expert witnesses in criminal cases.

Local rules exist in the Eastern District of Pennsylvania (Rule 22) and the Northern District of Illinois (Rule 20) for court appointment of medical experts in civil cases. Numerous proposals have been made for enacting legislation or a federal rule codifying the court's inherent power to call experts. See, for example, 2 Wigmore, *Evidence,* § 563 (3d ed. 1940); and *Uniform Rules of Evidence,* National Conference of Commissioners on Uniform Laws (1938 and 1959). The Magruder Committee of the Judicial Conference rejected such a proposal in 1953. See *Interim and Final Reports of the Magruder Committee of the Judicial Conference* (submitted September 1952 and 1953). The Magruder Committee's mandate provided as follows:

> "*Resolved:* That it was the consensus of the conference held on July 19, that the Judicial Conference of the United States be requested to appoint a committee to consider whether statutory authority should be given to federal judges to compensate, at rates appropriate for expert witnesses, experts called by the Court itself in civil litigation to testify with respect to economic, professional, or other technical matters upon which the court desired, disinterested expert testimony."

928 (C.A. 2 1962) (personal injury action), the Second Circuit upheld the trial court's appointment of a medical expert to examine the plaintiff and testify concerning his injury. Similarly, in *Dinsel v. Pennsylvania Railroad Company,* 144 F.Supp. 880, 882 (W.D. Pa. 1956) (suit under the Federal Employer's Liability Act) the trial court considered ordering a medical examination of defendant's employee over defendant's objection, stating:

> ". . . authority exists in the District Court, when necessary to a proper consideration of a case by a court and jury, to appoint, without consent of the parties, an appropriate specialist in the field where a disputed issue of fact is raised, to express an opinion on the facts in dispute without prejudice, however, of either party to call, examine and cross-examine witnesses as if said examination had not been directed by the court, and that the examination made by order of court shall function as prima facie evidence of the facts found and conclusions reached, unless rejected by the court."

The court-appointed expert or experts may be selected by (a) the court,[21] (b) the parties,[22] (c) the court from a list proposed by the parties, or (d) automatically by rote from a panel arranged by authority *de hors* the court, such, for example, as the medical panels arranged by the medical societies in New York City.[23] There are variations in the procedure for utilizing the court-appointed expert or experts. Such an expert may be presented as merely another witness in addition to the experts. Or the court and parties

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[21] See McCormick, *Handbook of the Law of Evidence* § 17, n.6 (1954).

[22] See Section 3.51 in Part I of this *Manual.*

[23] See *Report of the Association of the Bar of the City of New York, Impartial Medical Testimony* (1956).

at pretrial may decide upon the expert procedure as the only presentation of technical, scientific or economic proof with no witnesses presented separately by the respective parties. Another procedure which has been utilized, notably by District Judge William C. Coleman of Maryland, is to have the court-appointed expert hear all the evidence as it is presented in open court by the experts for the parties, and thereafter have him take the witness chair, testify to his own reasoning and conclusion and be cross-examined by all parties.[24] This sense of objectivity, if exercised, may make the court-appointed expert a useful and powerful tool for inducing settlement.

In *Commonwealth Edison Company, et al. v. I-T-E Circuit Breaker Company, et al.,* Civil Action No. 61 C 1278 and related power switchgear assembly cases (part of the electrical equipment antitrust cases), the parties' offer of proof showed that their economic experts held plainly divergent views on the damage issue. Accordingly, the court appointed Professor Reuben A. Kessel, of the University of Chicago, as the court-appointed economic expert. The order of appointment provided that the expert would have full access to all data and that he could be called as a witness at the trial by the court or any party. The expert's final report was completed and distributed to the parties a few days prior to commencement of the trial. The expert, however, did not testify because the case was settled at the beginning of trial for amounts closely paralleling the opinions of the appointed expert.

Two possible disadvantages of the use of a court-appointed expert are: (a) problems of selection and com-

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[24] This plan is explained in Judge William C. Coleman, *Use of Inter-Parties Neutral Expert Witnesses in Patent Cases, 1957 New York Seminar,* 21 F.R.D. 395, 548–551. See *Specialty Equipment & Machinery Corp. v. Zell Motor Car Co., et al.,* 96 F.Supp. 904 (D. Md. 1951), *rev'd,* 193 F.2d 515 (C.A. 4 1952), 113 F.Supp 161 (D Md. 1953).

pensation,[25] and (b) the conclusive weight which may be given to his testimony by the trier of fact. It has also been urged that an expert selected by a judge may not have the same qualifications as experts employed by the parties,[26] and that when an issue of fact is really subject to a difference of opinion among experts, every person of competence has a view one way or the other. This selection of the witness is a prejudgment of the outcome,[27] and tantamount to selection of an answer to the problem. The argument only points up the obvious necessity that the court exercise discretion and care in employing this technique and in choosing the particular expert. However, it is not sufficient reason to avoid using a court-appointed expert when the parties experts have taken extreme positions and the court feels an appointed expert is necessary to fairly interpret the data.

The court's power to compensate the appointed expert in civil actions has been questioned.[28] Some decisions have cited *Henkel, Administratrix v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444 (1931) (suit under the Federal Employer's Liability Act) for the proposition that court-appointed expert's fee is not a taxable cost of the

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[25] See generally, Bomar, *The Compensation of Expert Witnesses,* 2 Law & Contemp. Probs. 510 (1935).

[26] Elwin A. Andrus, *The Court Appointed Expert, 1958 Palo Alto Seminar,* 23 F.R.D. 319, 519, 521.

[27] Another criticism of the court-appointed expert (testifying on questions involving the exact sciences) is stated by Moses Lasky in, *Proof of Complicated Economic and Technical Facts and Handling of Documents, 1958 Palo Alto Seminar,* 23 F.R.D. 319, 606, 611.

[28] See Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness,* 29 S. Cal. L.Rev. 195 (1956); Whinery, *Court Experts and the Proof of Scientific Fact—An Experiment in Law Reform, 1958 Palo Alto Seminar,* 23 F.R.D. 319; and *Interim Report of the Magruder Committee of the Judicial Conference, supra,* footnote 20.

litigation.[29] This is of considerable importance since no public fund, comparable to that available in criminal cases,[30] exists for paying an expert in civil actions. Absent taxation the expert's compensation would presumably be limited to the statutory witness fee. *Henkel* may, however, be distinguished on its facts. The question which the court decided was whether the prevailing plaintiff could recover *his* expert's fee, and the court held that the expert witness's fee was limited by an act of Congress which prescribed witnesses fees and made no exception for expert witnesses.

Moreover, those who believe that *Henkel* prohibits taxation of a court-appointed expert's fees have ignored the following portion of the opinion:[31]

> "In *Ex Parte Peterson, supra,* the question related to the fees of an auditor appointed by the court, and as the court had the power to appoint him, and there was no statute or rule of court on the subject, the court had authority to allow the expense in the items taxable as costs."

The Supreme Court, in affirming the trial court's denial of plaintiff's application, did not reach the question of whether a court-appointed expert's fees could be taxed.

In *Ex Parte Peterson,* 253 U.S. 300 (1920) the court expressed the applicable principles of law in the following language:

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[29] Cases citing *Henkel* include: *Green v. American Tobacco Co.,* 304 F.2d 70 (C.A. 5 1962); *Euler v. Waller,* 295 F.2d 765 (C.A. 10 1961); *Searamucci v. Universal Manufacturing Co., Inc.,* 234 F.Supp. 290 (W.D. La. 1964); and *E. W. Bliss Company v. U. S.,* 226 F.Supp. 382 (N.D. Ohio 1964).

[30] See Rule 28, F.R.Cr.P.

[31] 284 U.S. 444, 447.

> "Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were *ordered by the court because deemed essential to a proper consideration of the case by the court or the jury* . . ." (p. 315) (Emphasis supplied.)
>
> ". . . In cases in which courts have refused to tax as costs copies of stenographer's minutes and other expenditures incident to the litigation, attention has been called to the fact that they were made for the benefit of the party as distinguished from *expenditures incurred under order of the court to make possible or to facilitate its consideration of the case* . . ." (p. 316) (Emphasis supplied.)

The cost of an expert witness, court advisor, master or any other necessary officer of the court is therefore taxable to the parties under the principles enunciated in *Peterson.*

(h) *Lay witnesses.* In some cases a layman may be competent to testify on subjects which ordinarily are matters for expert testimony. For example, a housewife might testify whether she would assume that Beechnut cigarettes are made by the company which makes Beechnut hams and bacon.

(i) *Standard publications.* Authoritative standard publications, such as government market reports, established statistical manuals and the like, may often be judicially noticed.[32] Whenever such publications are to be judicially noticed, advance notice should always be given the parties [33]

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[32] For the proposition that such standard publications are exceptions to the hearsay rule: see generally, McCormick, *Handbook of The Law of Evidence* 620–621 (1954).

[33] *Id.* at 708.

and the fact of the notification should appear in the record.[34]

3.52 Sample Pretrial Order No. 7. (Production of all results and materials relating to polls, samples, summaries, surveys and computer runs)

A pretrial conference was held on the ..... day of ....., 19.., wherein or as a result of which the following proceedings were had:

A. On or before the ..... day of ....., 19.., plaintiffs shall produce the results of all polls, samples, summaries, surveys or computer runs which it proposes to offer into evidence at trial. Plaintiffs shall further make available to defendants all raw data, work sheets and computer inputs and outputs from which such polls, samples, summaries, surveys or computer runs have been prepared and shall provide a written statement of the method or program employed in evaluating or preparing the data.

B. On or before the ..... day of ....., 19.., defendants shall produce the results of all polls, samples, summaries, surveys or computer runs which they propose to offer into evidence at trial. Defendants shall further make available to plaintiffs all raw data, work sheets and computer inputs and outputs from which such polls, samples, summaries, surveys or computer runs have been prepared and shall provide a written statement of the method or program employed in evaluating or preparing the data.

C. Failure to comply with the provisions of Paragraphs A. or B. hereof shall preclude the defaulting party from introducing into evidence at trial the results of any polls, samples, summaries, surveys, computer runs or raw data,

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[34] *Nichols v. Nichols,* 126 Conn. 614, 13 A.2d 591, 595 (1940); and see National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence,* R. 11.

work sheets and computer inputs and outputs for which such failure has occurred.

Dated this ..... day of ....., 19...

.....
JUDGE

4.0 Sample Pretrial Order No. 8. (Final pretrial order) *

A final pretrial conference was held in this cause on the ..... day of ....., 19.., wherein the following proceedings were had:

A. The following counsel were present representing the plaintiffs (list).

B. The following counsel were present representing the defendants (list).

C. The following issues of fact and law were framed, and the following witnesses who may be called at trial and exhibits which may be offered at trial were identified (list):

(1) Jurisdiction and venue;

(2) Admitted facts;

(3) Plaintiffs' contentions on disputed facts;

(4) Defendants' contentions on disputed facts;

(5) Plaintiffs' contentions on the principal issues of law;

(6) Defendants' contentions on the principal issues of law;

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* This Order is based on a final pretrial order developed by Judge George H. Boldt for use in *Public Utility District No. 2 of Grant County, Washington v. General Electric Company, et al.,* Civil Action No. 5380 (W.D. Wash.).

(7) Plaintiffs' exhibits;

Exhibit No.	*Identification (Description)*
.....	.....
.....	.....

(8) Defendants' exhibits;

Exhibit No.	*Identification (Description)*
.....	.....
.....	.....

(9) Plaintiffs' witness list;

Name	*Live or Deposition Testimony*
.....	.....
.....	.....

(10) Defendants' witness list.

Name	*Live or Deposition Testimony*
.....	.....
.....	.....

D. Trial in this cause shall commence on the ..... day of ....., 19... Court sessions will be held from .... o'clock a.m. to .... o'clock p.m. on .....

(1) Plaintiffs shall to the extent possible present separately the evidence as to each issue following the order set forth below (list).

(2) When plaintiffs' case is completed, defendants shall to the extent possible present separately the evidence as to each issue following the order set forth below (list).

(3) Each defendant shall present its evidence in the order in which defendants are named in the caption of this case.

(4) When defendants' case is completed, plaintiffs shall present their rebuttal evidence.

(5) None of the provisions herein shall require witnesses to make multiple appearances to maintain the order of presentation set forth above.

(6) The Court will not receive evidence relating to the period prior to ..... or subsequent to .....

(7) ....., of counsel for plaintiff and ....., of counsel for defendants are designated to represent all counsel of the parties as liaison counsel to receive notifications and act as spokesmen for co-counsel.

(8) Each motion by any defendant on each objection (and any plaintiff) shall be considered as made by each defendant (or plaintiff) in the same manner and to the same extent as though made separately by each such party, unless otherwise stated.

(9) Unless otherwise authorized by the Court, only one counsel for each party shall examine any witness. Counsel for the respective defendants shall attempt to designate one of their number to handle the cross-examination of any witness. Cross-examination of witnesses shall follow the direct examination, unless otherwise authorized by the Court.

(10) Plaintiffs' opening statements shall be limited to ..... Defendants' opening statements shall be limited to ..... Plaintiffs' and defendants' counsel respectively shall agree on the division of time. If necessary, the Court will make the division.

(11) Daily transcript shall be delivered after adjournment of the Court each day. Corrections shall be suggested at the opening of Court on the second following morning.

(12) (Jury Case) A jury of twelve jurors and ..... alternates shall be selected. Each plaintiff is permitted ..... peremptory challenges. Each defendant is permitted ..... peremptory challenges. The *voir dire* examination initially shall be conducted on the basis of the following questions:

(Questions Nos. (a-o) to be asked of the entire panel as a group.)

(a) This trial in all probability will be a lengthy one. While it is not possible to make a precise estimate, it may last as long as .... months or more. Is there any reason why you cannot serve as a juror for that duration? What is it?

(b) Are you or any of your immediate family (spouse, children, parents or brothers and sisters) or have you or any of your immediate family ever been employed by or represented any of the following: (list plaintiffs).

(c) Are you or are any of your immediate family (spouse, children, parents or brothers and sisters) or have you or any of your immediate family ever been employed by or represented any of the following: (list defendants).

(d) Are you or any of your immediate family stockholders or holders of any other securities or obligations, or have you or any of your immediate family ever been stockholders or holders of any other securities or obligations of any of the above companies?

(e) Do you or any of your immediate family have any business connections, or dealings, or have you or any of your immediate family ever had any business connections or dealings, with any of the above companies? If so, elicit details.

(f) Have you or any of your immediate family or any organization you have been associated with ever had any dispute or unpleasantness with any of the above named companies? If so, was it resolved to your satisfaction?

(g) Do you know any lawyers who are or ever have been associated with any of the following firms (list).

(h) Do you have any relatives or friends who are lawyers? If so, elicit details.

(i) Have you ever worked for a lawyer or law firm? If so, elicit details.

(j) Have you ever served on a federal jury in the past year?

(k) Have you or any of your immediate family ever been involved in a lawsuit as a plaintiff or a defendant? If so, elicit details.

(l) Has any one among you ever heard or read anything concerning any proceeding in this cause?

(m) Have you ever discussed this case with anyone?

(n) Would the fact that the defendant (or defendants) in a prior federal criminal proceeding entered a plea of guilty make it difficult or impossible for you to find for the defendants if the evidence shows that plaintiffs were not injured?

(o) Have you formed or expressed an opinion who should prevail in this controversy?

(Questions Nos. (p-v) to be asked of each juror individually.)

(p) What is your name?

(q) What is your home address?

(r) What is your husband's (or wife's) business or occupation? Who is his (or her) employer?

(s) Who is your employer?

(t) Briefly describe the work you do.

(u) How long have you been with your present employer? (a) [If less than 10 years]: Would you describe what jobs you have had since 19..?

(v) Are you married? If so: (a) How many children do you have? How old are they? What are the occupations of each of your adult children, and by whom are they employed? What is the occupation of your spouse?

It is hereby so ORDERED.

Dated this ..... day of ....., 19...

.....
JUDGE

5.11 Suggested Local Rule 5. Assignment of Related Civil Cases to a Single Judge.

If the notice filed by an attorney pursuant to Suggested Local Rule 2 indicates that the civil case in which a notice is filed is related to another case or cases which are pending in this division, (involving a common or similar issue or issues of fact) the case shall be assigned to the judge before whom the related case with the lowest file number is pending.

5.12 Local Rule 10B, Northern District of Illinois. Subparagraphs 4 and 5 read as follows:

"4. *Related Cases.* At the time of filing any action,

counsel shall indicate on the appropriate form whether the case is related to a pending suit.

"(a) Criminal cases are deemed related when (i) a superseding indictment or information has been filed, or (ii) more than one indictment or information is filed or pending against the same defendant or defendants.

"(b) Bankruptcy cases are deemed related when (i) separate voluntary petitions are filed by husband and wife, or (ii) they involve property included in an earlier numbered bankruptcy suit.

"(c) Civil cases are deemed related when a case filed (i) relates to property included in an earlier numbered pending suit, or (ii) involves the same issue of fact or grows out of the same transaction as a pending suit, or (iii) involves the validity or infringement of a patent already in suit in any pending earlier numbered case.

"5. *Assignment of Related Cases.*

"(a) If the fact of relationship is indicated on the appropriate form, the assignment clerk shall use a separate block of cards on which he shall place the case number, as directed by paragraph 4 of subdivision A of this rule, and the category, as directed by paragraphs 1(a) and (b) of subdivision B of this rule, and the name of the judge to whom the earlier numbered case is assigned.

"(b) If the judge receiving the later case determines that a relationship does not exist, he shall transfer the case to the Executive Committee. If that Committee finds that good cause exists for the transfer, it shall cause the case to be reassigned by lot. If it finds

that good cause for the transfer does not exist, it shall return the case to the transferring judge."

5.21 Sample Pretrial Order No. 9. (Transfer of cases pursuant to Title 28, U.S.C., Section 1404(b))

A motion (consent or stipulation by all parties) having been made in the above-captioned action to transfer this cause (or specific proceedings therein) from this Division to the ..... Division of this Court pursuant to Title 28, U.S.C., § 1404(b); the Court having heard and considered argument and being advised that ..... actions which are related to this action are pending in the ..... Division, and the Court being of the view that a substantial economy of time and money for the litigants and the Court can be achieved by effecting such transfer.

It is hereby so ORDERED.

Dated this ..... day of ....., 19...

.....
JUDGE

5.32 Sample Pretrial Memorandum and Order No. 10. (Transfer *sua sponte* by the Court of cases pursuant to Title 28, U.S.C., Section 1404(a))

A. The above-captioned action is one of approximately ..... related cases growing out of ..... which are pending in ..... districts.

B. The present matter is before the Court on its motion to transfer this action to the ..... District of ..... pursuant to Title 28, U.S.C., § 1404(a).

C. The Court has carefully considered the record in this cause in light of the criteria for transfer under Section 1404(a) "the convenience of parties and witnesses, in the interest of justice." After considering the statutory criteria individually and jointly, the Court has concluded that

such transfer should be ordered. The following factors were considered in the exercise of its discretion:

(1) This action could have been brought originally in the ..... District of .....

(2) The United States District Court for the ..... District of ..... is able and willing to accept transfer and to expedite this action through pretrial and trial.

(3) The facts and circumstances of this and similar actions demonstrate that substantial portions of discovery and evidence to be offered at trial is the same as that which would be discovered and presented if each such action were pretried and tried separately in the districts in which they were filed.

(4) Repetition of similar or identical proof in numerous courts and trials would be wasteful of the time, energy and money of the litigants and the courts. Transfer of this action will promote judicial efficiency and economy in its disposition. *Continental Grain Co. v. Barge FBL–585,* 364 U.S. 19, 26 (1960):

> "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.
>
> * * *
>
> "The idea behind § 1404(a) is that where a 'civil action' to vindicate a wrong . . . presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court."

(5) Transfer of this action will facilitate the disposition of this and related cases by permitting wherever feasible consolidated pretrial and trial. *City of Philadelphia, et al. v. Federal Pacific Electric Company and I-T-E Circuit Breaker Company,* Civil Action Nos. 29810 and related power switchgear assembly cases (E.D. Pa., Lord, J.) (1965), petition for writ of *mandamus* or *rule to show cause denied sub nom. I-T-E Circuit Breaker Company v. City of Philadelphia, et al. and Honorable Joseph S. Lord, III, District Judge,* No. 15,300 (C.A. 3 1965), *cert. denied,* 381 U.S. 936 (1965); *Kansas City Power & Light Company, et al. v. I-T-E Circuit Breaker Company,* 240 F. Supp. 121 W.D. Mo. 1965), *mandamus* and *prohibition denied sub nom. I-T-E Circuit Breaker Company v. Honorable William H. Becker, United States District Judge,* 343 F.2d 361 (C.A. 8 1965), and *Union Electric Company v. I-T-E Circuit Breaker Company,* Civil Action No. 62 C 38 (3) (E.D. Mo., Regan, J.) (1965), *prohibition denied sub nom. I-T-E Circuit Breaker Company v. Honorable John K. Regan, District Judge,* 348 F.2d 403, 405 (1965):

> "... Whatever might be the limits of the questions entitled to consideration under § 1404(a) in a strictly single case in an individual federal court, having no relation to the administration or disposition of any other litigation pending in the federal judicial system, the situation here went beyond those bounds. The question of convenience of parties and witnesses under § 1404(a) is one which must be measured in terms of 'the interest of justice' in relation to the situation which is involved and on the basis of proper judicial discretion exercised as to its whole.

"We think that on the facts before it and on those of which it could properly take judicial notice, the District Court was entitled to find, as it did, that the convenience of witnesses, on the national issue of alleged conspiracy and its effect on prices charged by petitioner would be served by a central location for trial, together with the possibility of reducing the number of appearances required by these witnesses; that the convenience of the parties would be served by reducing the cost of separate preparation of power switchgear assembly cases and by better accessibility of documents in the National Documents Depository in Chicago for use in preparation and trial of the case; and that the interest of justice would be served by the apparently planned early trial in Chicago and concentrating many of the power switchgear assembly cases in one jurisdiction and avoiding to the extent possible repetitive trails in many jurisdictions."

(6) The experience gained and the benefits and economy of effort derived through the inter-circuit transfer program employed in the electrical equipment antitrust cases has demonstrated the advantages which may result from consolidating related cases in a single district.

(7) (*If local practice requires*) All actions necessary to effect transfer of this action pursuant to this order are stayed until ....., 19.., and in the event any party to this action challenges this transfer by filing an appeal or petition for writ of mandamus or prohibition in the United States Court of Appeals for the ..... Circuit on or before that date, all action necessary to effect this transfer shall be stayed pending disposition of such appeal or petition.

It is, therefore, ORDERED that the above captioned action be, and it is hereby transferred under Title 28, U.S.C. § 1404(a) to the ..... District of ..... without delay.

Dated this .... day of ....., 19...

.....
JUDGE

5.32 Text of Title 28, U.S.C., § 1407.* (Providing for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes)

"§ 1407. *Multidistrict litigation*

"(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, howver,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and re-

* Enacted by Public Law 90–296, 90th Congress, 2d Sess., S. 159, April 29, 1968.

mand any of such claims before the remainder of the action is remanded.

"(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

"(c) Proceedings for the transfer of an action under this section may be initiated by—

"(i) the judicial panel on multidistrict litigation upon its own initiative, or

"(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

"The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice

shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

"(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

"(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to

the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

"(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

"(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. 'Antitrust laws' as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a)."

Sec. 2. The analysis to chapter 87 of title 28, United States Code, is amended by inserting the following new section:

"1407. Multidistrict litigation."

after

"1406. Cure or waiver of defects."

5.33 Provisional Rules of Procedure of the Judicial Panel on Multidistrict Litigation.*

"PROVISIONAL RULES OF PROCEDURE
of the
JUDICIAL PANEL ON MULTIDISTRICT
LITIGATION

Explanatory Note

"Chief Justice Earl Warren, on May 31, 1968, announced the appointment of members of a panel on multidistrict litigation which he is required to appoint by the provisions of Public Law 90–296, approved by the President April 29, 1968.

"This new statute provides for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact. The statute provides further for the establishment of a judicial panel on multidistrict litigation which shall make the transfers for pretrial purposes authorized by the legislation. The statute provides that the panel shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The first panel appointed by the Chief Justice consists of:

"HONORABLE ALFRED P. MURRAH, *Chairman*
Chief Judge
United States Court of Appeals
Tenth Judicial Circuit
Oklahoma City, Oklahoma

"HONORABLE JOHN MINOR WISDOM
United State Court of Appeals

* 44 F.R.D. 389.

Fifth Judicial Circuit
New Orleans, Louisiana

"HONORABLE WILLIAM H. BECKER
Chief Judge
United States District Court
Western District of Missouri
Kansas City, Missouri

"HONORABLE JOSEPH S. LORD, III
United States District Court
Eastern District of Pennsylvania
Philadelphia, Pennsylvania

"HONORABLE EDWIN A. ROBSON
United States District Court
Northern District of Illinois
Chicago, Illinois

"HONORABLE STANLEY A. WEIGEL
United States District Court
Northern District of California
San Francisco, California

"HONORABLE EDWARD WEINFELD
United States District Court
Southern District of New York
New York, N.Y.

RULES

"*Rule 1. Definitions*

"As used in these Rules 'Panel' means all available but not less than four members of the Judicial Panel on Multidistrict Litigation appointed by the Chief Justice of the United States pursuant to Section 1407 of Title 28, United States Code.

" 'Clerk' means the person or official appointed by the Panel to act as Clerk of the Panel and shall include those deputized by the clerk to perform or assist in the

performance of his duties under Section 1407, Title 28, U.S.C., and under these Rules. The Clerk may be the same person as the Administrative Attorney for the Panel.

"'Chairman' means the Chairman of the Judicial Panel on Multidistrict Litigation appointed by the Chief Justice of the United States pursuant to Section 1407, or the member of the Panel designated by the Panel to act as Chairman in the absence or inability of the appointed Chairman.

"*Rule 2. Admission to Practice Before Panel*

"Every member in good standing of the Bar of any District Court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. No such member shall be required to employ or associate with local counsel.

"*Rule 3. Place and Manner of Filing Papers*

"All papers filed for consideration by the Panel shall be filed with the Clerk, Multidistrict Litigation Panel, Supreme Court Building, Washington, D. C. 20544. Papers may be filed by mailing or by delivery by hand. An original and nine copies of each paper shall be filed with the clerk.

"*Rule 4. Place of Keeping Records and Files*

"The records and files of the Panel shall be kept by the Clerk in the offices of the Panel. Records and files may be temporarily removed to such places at such times as the Panel or the Chairman of the Panel shall direct.

"*Rule 5. Form of Papers Filed*

"(a) Averments in any motion seeking action by the Panel shall be made in numbered paragraphs, each of which shall be limited, as far as practicable, to a

statement of a single factual averment. Responses to such motions shall be made in numbered paragraphs each corresponding to and stating a concise summary of the paragraph to which it is directed.

"(b) Each document filed shall be flat and unfolded, shall be plainly written, typed in double space, printed or prepared by means of a duplicating process, without erasures or interlineations which materially deface it, on opaque, unglazed, white paper approximately 8½ x 11 inches in size, and shall be secured on the left margin. Each shall bear the caption, descriptive title and number, if any, of the action or proceeding in which it is filed, and on the final page thereof shall contain the name, address and telephone number of the attorney in active charge of the case.

"(c) Documents which fail to comply with the provisions of this Rule shall be filed subject to being stricken by the Panel.

"*Rule 6. Service of Papers Filed*

"No papers shall be filed unless accompanied by proof of service on all interested parties. Service and proof of service shall be made as provided in the Federal Rules of Civil Procedure.

"*Rule 7. Motion Practice*

"All requests for action by the Panel shall be made by written motion as provided in the Federal Rules of Civil Procedure. Every motion shall be accompanied by a brief in support thereof in which the factual and legal contentions of the movant shall be concisely stated with citation of authorities relied on. If a motion is not accompanied by a brief in support thereof the clerk shall not file the motion unless directed by the Chairman of the Panel. Within ten days after service of a motion the opposing party or parties shall file

and serve brief in opposition thereto. The movant may, within three days after service of brief in opposition, file brief in reply.

"The clerk shall give notice to all interested parties of the time, place and subject matter of each hearing ordered by the Panel.

"*Rule 8. Submission of Proof of Facts*

"So far as practicable and consistent with the purposes of Section 1407 the offering of oral testimony before the Panel shall be avoided. Accordingly oral testimony shall not be received except upon notice motion and order of the Panel expressly providing for it. Proof may be submitted as provided in the Federal Rules of Civil Procedure.

"*Rule 9. Sessions of the Panel*

"The Panel shall convene whenever and wherever desirable or necessary in the judgment of the Chairman, or of four members of the Panel.

"*Rule 10. Withdrawal of Exhibits*

"Exhibits submitted to the Panel may be returned or withdrawn by counsel or a party on order of the Chairman or the Panel."

6.1 Suggested Local Rule 3. Notice by District Court Clerk of Potentially Complex Criminal Case.

Prior to the setting of any criminal case for arraignment the Clerk shall inspect the indictment or information therein and shall notify the Chief Judge (or judge to whom such case is assigned) of any such case which appears to involve complicated issues or to be a probable complex case.*

* In criminal cases the most propitious time for the Court to determine whether a case has the complex case or the multidistrict litigation potential would appear to be at the arraignment, and this Rule is therefore

6.1 Suggested Local Rule 4. Notice by United States Attorney and Defense Attorneys to be Filed in Potentially Complex Criminal Cases.

The United States Attorney and defense attorneys each shall notify the District Court Clerk of all potentially complex criminal cases. The notice shall be filed in the following form:

Notice of Probable Complex Criminal Case to Clerk of the United States District Court of the ..... District of .....

.....

1. Full title of case. .....
   .....
2. It appears to the undersigned that the above cause may be a criminal case involving complex issues, or to be a probable complex case.
3. Comments. .....
   .....

.....
Attorney-at-law

6.1 Sample Pretrial Order No. 11. (Stipulation and order for a pretrial conference for use in criminal cases)

It is stipulated between the defendants, ..., ..., and their attorney ..... and .....,

A. That a pretrial conference in the above case be held on ....., 19.., in open court.
The United States Attorney (or Assistant United States Attorney) as follows:

B. The defendant and his attorney consent to the holding of the conference. The defendant waives his right to be

---

designed to have the probable candidate for complex case treatment brought to the Court's attention before the arraignment calendar is made up.

present at all or any part of the conference or subsequent conferences.

C. No admissions against interest made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney.

D. The court reporter will be present at the conference.

E. Stipulations and agreements arrived at shall be entered solely for use in this case and will not be binding or usable by any party hereto in any other case or proceeding.

F. Motions for bills of particulars, and discovery will be held in abeyance until the conclusion of the pretrial conference.

G. At the pretrial conference attempt will be made to—

(1) Mark for identification various documents of the plaintiff and defendant.

(2) Waivers of foundation as to such documents will be secured if possible.

(3) Consideration will be given to supplying defendant with Jencks Act statements *prior* to the testimony of the witness.

(4) Attempts will be made to obviate hearings on bills of particulars and discovery.

(5) Procedures for the trial will be explored, including:

(a) Jurors lists and questionnaires.

(b) *Voir dire.*

(c) Methods of handling cross-examination where multiple defendants are involved.

(d) Order of presentation of case by multiple defendants.

(e) Number and use of peremptory challenges.

(f) Seating arrangements for defendants and counsel.

(g) Procedure on objections, where multiple counsel exist.

(h) Use of grand jury transcripts of witnesses who testified before the grand jury (*Dennis v. U.S.*).

(i) Temporary absence of defense counsel during trial.

(j) Handling of motions under *Brady v. Maryland* for evidence favorable to defendant on issue of guilt or punishment.

Following the pretrial, an order will be prepared, for signature by the defendant, his attorney, the United States Attorney and the Court, summarizing the stipulations and agreements arrived at.

.....
DEFENDANT

.....
ATTORNEY FOR DEFENDANT

.....
DEFENDANT

.....
ATTORNEY FOR DEFENDANT

.....
UNITED STATES ATTORNEY

Ordered and approved this
..... day of .....,
19...

.....
UNITED STATES DISTRICT JUDGE

6.1 Sample Pretrial Order No. 12. (Stipulation and order to control the course of the action for use in criminal cases)

A pretrial hearing having been held in the above-entitled case in open court on the ..... day of ....., 19.., pursuant to stipulation and order heretofore made, at which there was present ....., the (Assistant) United States Attorney, and ..... (and/by) his attorney ....., and ..... (and/by) his attorney ....., this pretrial stipulation and order summarizes the results of the pretrial hearing and may be used at the trial by either the plaintiff or the defendant.

A. *Waiver of Foundation.*

The government produced for the defendant's inspection (and/or delivered copies to the defendant) the following documents which have been marked for identification:

Exhibit 1	(describe)
Exhibit 2	(describe)
Exhibit 3, etc.	(describe)

The defendant waives proof of foundation and concedes the authenticity of the following of such exhibits above numbered, and they may be received in evidence at the trial.

Exhibit 1	(describe)
Exhibit 3, etc.	(describe)

The defendant will require proof as to the authenticity (or parties present at time of execution, or general foundation evidence) of the following exhibits:

Exhibit 6	(describe)
Exhibit 7, etc.	(describe)

B. *Other Documents Delivered to the Defendant.*

Copies of the following documents which have not been marked for identification and which the government does not propose to offer on direct, have been delivered to the attorneys for the defendant.

(1) Question and answer statement taken from the defendant .....

(2) Statement of defendant made to agent ..... and reduced to writing and signed by the defendant.

(3) Copy of defendant's grand jury testimony.

C. *Handling of Documents Under the Jencks Act (18 U.S.C. § 3500)*

The government has agreed (alternatives):

(1) To exhibit to the defendant's attorney (or deliver copies) ten days prior to trial, the statements of all witnesses whom the government proposed to call on direct.

(2) To exhibit to the defendant's attorney (or give him copies of) the statements of witnesses to be called the following day.

(3) To exhibit to defendant's attorney (or to give him copies of) the testimony of each witness at the time the witness is called to the witness stand to testify.

D. *Defendant's Documents.*

The defendant has exhibited to the government (or supplied copies thereof) of the following exhibits which have been marked for identification and which the defendant proposes to offer

Exhibit A	(describe)
Exhibit B	(describe)
Exhibit C	(describe)
Exhibit D	(describe)

The government waives foundation and concedes authenticity of

Exhibit D	(describe)
Exhibit E	(describe)
Exhibit F	(describe)

and they may be received in evidence at the trial.

The government will require foundation (or proof of parties present at the time of execution or other foundation evidence) as to the following defense exhibit marked for identification

Exhibit H	(describe)
Exhibit I	(describe)
Exhibit J	(describe)

E. *Elimination of Defenses.*

The defendant and his counsel stipulate that they will not offer testimony on and waive the following defenses

(1) Insanity

(2) Alibi

(3) Other defenses

F. *Disposition of Motion for Bill of Particulars and for Discovery.*

(Alternatives)

(1) Defendant ..... is entitled as a matter of right and justice to a ruling on his motion for a bill of particulars and the Court will forthwith rule on such motion.

(2) The defendant has heretofore made a motion for bill of particulars and in view of the pretrial held and the discovery thereby obtained, it is stipulated that the motion be denied.

G. *Handling Brady v. Maryland Materials.*

The defendant has heretofore made a motion based on *Brady v. Maryland* asking for all evidence in the possession of the government favorable to the defendant material to the question of his (or its) guilt or punishment.

[FOR USE WHERE GOVERNMENT AGREES TO DISCLOSURE] *

The government has agreed (alternatives):

(1) Ten days prior to trial to place in the document depository established by this Court, all evidence favorable to the defendant material to the question of his (or its) guilt, including, but not limited to, evidence which could reasonably weaken or overcome testimony adverse to the defendant given by the government witnesses.

(1) On the day prior to the testimony of each government witness, to place in the document depository established by this Court all evidence favorable to the defendant material to the question of his (or its) guilt which could reasonably weaken or overcome testimony adverse to the defendant given by government witness, and to exhibit to the defendant's attorney (or deliver copies) at the close of the government's case all other evidence favorable to the defendant material to the question of his (or its) guilt.

(1) At the close of the government's case, place in the document depository established by this Court all evidence favorable to the defendant material to the question of his (or its) guilt, including, but not limited

* See Sample Order No. 12A for use where government does not agree to disclosure, *Appendix* 6.1. See Sample Pretrial Order No. 14, *Appendix* 6.2, creating a document depository for documents produced before a grand jury.

to, evidence which could reasonably weaken or overcome testimony adverse to the defendant given by the government witnesses.

and

(2) Immediately following the return of a jury verdict of guilty against the defendant, place in the document depository established by this Court all evidence favorable to the defendant material to the question of his (or its) punishment.

If the government has any bona fide question as to whether or not any evidence need be produced because it is not material to the defendants' guilt or innocence or because it is privileged, the government will, at the time it is required under this Order to place the documents in the depository, exhibit the same to the Court. The Court will return to the government attorneys all work product material, will place in the depository all matters which, in the Court's opinion, would bear on the question of the defendants' guilt or innocence and will order the balance of the file delivered to the Clerk so that it may accompany the record on appeal, if any.

H. *Handling the Production of Grand Jury Transcripts.*

The defendant has heretofore moved under Rule 16(a)(3), Rule 6(e) and the inherent powers of the Court for the production of portions of the transcript of proceedings of the grand jury which returned the indictment herein.

[FOR USE WHERE THE GOVERNMENT AGREES TO DISCLOSURE] *

The government has agreed:

---

* See Sample Order No. 12A for use where government does not agree to disclosure, *Appendix* 6.1.

(1) Within .. days hereof, to produce for defendant's inspection and copying the transcript of the testimony of the defendant before the grand jury (or, in the case of a corporate defendant, the transcript of testimony before the grand jury of some or all the corporate defendant's officers, directors or employees); and

(2) .... days prior to trial (or .... days prior to the witness' testimony at trial) the grand jury transcript of each government witness.

I. *Procedure Re: Cross-Examination Where Multiple Defendants.*

It has been agreed by the defendants and their attorneys that after a witness has been called by the government, the attorney for one of the defendants will be designated by defense counsel to conduct the general cross-examination of the witnesses with the right of the attorneys for the other defendants to further cross on matters not covered or fully developed by the first attorney's cross-examination.

J. *Order for Presentation of Case by Multiple Defendants.*

.....
.....

K. *Number and Use of Peremptory Challenges.*

.....
.....

L. *Seating Arrangements for Defendants and Counsel.*

. . . . . .
. . . . . .

M. *Procedure Re: Objections; Adoption by Other Defendants.*

. . . . . .
. . . . . .

N. *Use of Grand Jury Transcripts.*

. . . . . .
. . . . . .

O. *Absence of Defense Counsel During Trial.*

. . . . . .
. . . . . .

P. *Other Matters.*

. . . . . .
. . . . . .

Q. *Modification.*

This stipulation when approved and signed by the Court shall control the subsequent course of the action unless modified at the trial to prevent manifest injustice.

R. *Signatures.*

The defendants and their attorneys have read the foregoing pretrial stipulation and order and by signing the same have agreed and consented thereto.

The government attorney has read and signed the order and by signing has consented thereto.

.....
DEFENDANT

.....
ATTORNEY FOR DEFENDANT

.....
DEFENDANT

.....
ATTORNEY FOR DEFENDANT

.....
UNITED STATES ATTORNEY

Ordered and approved this ..... day
of ....., 19...

.....
UNITED STATES DISTRICT JUDGE

6.1 Sample Pretrial Order No. 12A. (The following is patterned upon an order entered in a Sherman Act proceeding (*United States v. Venn,* 41 F.R.D. 540 (S.D. Fla. 1966)), where no agreement was reached as to the production of grand jury transcripts and *Brady v. Maryland* materials.)

The defendants have moved pursuant to Rules 16(a)(3) and 6(e) of the Federal Rules of Criminal Procedure and by virtue of the inherent powers of the Court to inspect and copy in advance of trial the recorded testimony before the Grand Jury of (1) the individual defendants; (2) the directors, officers, agents and employees of the corporate defendants; and (3) insofar as it is not included in (1) and (2), those persons whom the government plans to call as witnesses at trial.

The defendants have also moved pursuant to *Brady v. Maryland* to require the government to produce in advance

of trial any evidence in the hands of the government which is favorable to defendants and material to the question of their guilt or punishment.

A fair trial means that the facts and issues are to be approached openly and honestly. In order to sift the wheat from the chaff in this case, maximum pretrial discovery and a clarifying organization of the thousands of documents is essential. Without it there will be no trial; there will be one long confused shuffling of words and papers. Difficult and complex trials call for liberal use of the judge's discretion in managing the trial. Consequently, this ruling is based upon the peculiar facts at bar and a showing of particularized need, and makes no attempt to formulate guidelines for future rulings.

Grand Jury Transcripts

It is, therefore,

ORDERED and ADJUDGED that:

1. The government will produce the grand jury transcripts of the individual defendants and of all officers, directors, agents and employees of the corporate defendants, but not former officers, agents and employees, for inspection by defendants prior to trial.* The transcripts are to be deposited with the Clerk of this Court by [*a day certain*], under the provisions set forth in the Order of the Court of ..... establishing a document depository. Authority for this ruling is: (a) the inherent power of the judge to manage a trial so as to achieve a fair and expeditious result; (b) Rule 6(e), Federal Rules of Criminal Procedure, which

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**Will v. U. S.*, ... U.S. ....., 88 S.Ct. ....., 19 L.Ed.2d 305 (1967); *Dennis v. U. S.*, 384 U.S. 855, 86 S.Ct. 973, 16 L.Ed.2d 973 (1966); *U. S. v. Hughes*, (C.A. 5 1968) 388 F.2d 236; *National Dairy Products Corporation v. U. S.*, (C.A. 8 1967) 384 F.2d 457, *cert. denied*, 390 U.S. 957, ... S.Ct. ....., 19 L.Ed.2d 1151 (1968).

permits the judge to authorize the production of any Grand Jury proceedings preliminarily to trial upon a showing of a particularized need therefor; (c) Rule 16(a)(3), which permits production of the defendant's grand jury testimony prior to trial; and (d) the case of *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 973, 16 L.Ed.2d 973 (1966).

2. The government will also advise the defendants .... days before trial (or .... days prior to the day each of its witnesses is expected to be called at trial) of the names and addresses of the witnesses and, at that time, deposit each designated witness' grand jury transcript, if any, in the document depository maintained by the Clerk.

3. The motion for the production of any other grand jury testimony is denied without prejudice at this time.

Brady v. Maryland Materials

It is further,

ORDERED and ADJUDGED that:

1. The motion under *Brady v. Maryland,* insofar as it concerns matters concerning punishment, is *postponed* for decision until after the verdict in the case.

(Alternates):

2. The motion as to matters concerning the defendant's *guilt or innocence* is denied without prejudice at this time and may be renewed by the defendant at the close of the government's case.

2. .... days prior to trial the government shall place in the document depository * all evidence favorable to the defendants material to the question of their guilt or innocence, including, but not limited to, evidence which could

* Alternates: "deliver to defense counsel" or "exhibit to defense counsel."

reasonably weaken or overcome testimony adverse to the defendants given by the government witnesses.

2. .... days prior to the testimony of each government witness the government shall place in the document depository all evidence favorable to the defendants material to the question of their guilt which could reasonably weaken or overcome testimony adverse to the defendants given by government witnesses, and at the close of the government's case the government shall place in the document depository all other evidence favorable to the defendants material to the question of their guilt or innocence.

2. At the close of the government's case, the government shall place in the document depository all evidence favorable to the defendants material to the question of their guilt.

If the government has any bona fide question as to whether or not any evidence need be produced because it is not material to the defendants' guilt or innocence or because it is privileged, the government will, at the time it is required under this Order to place the same in the depository, exhibit the same to the Court. The Court will return to the government attorneys all work product material, will place in the depository all matters which, in the Court's opinion, would bear on the question of the defendants' guilt or innocence and will order the balance of the file delivered to the Clerk so that it may accompany the record on appeal, if any.

ORDERED this ..... day of ....., 19...

.....
UNITED STATES DISTRICT JUDGE

6.2 Sample Pretrial Order No. 13. (Alternate order for a pretrial conference for use in criminal cases)

This case has been set for pretrial conference on the ..... day of ....., 19.., before the undersigned Judge.

The United States and Department of Justice Attorneys and all attorneys representing defendants are directed to meet not later than thirty days prior to the pretrial conference, at a mutually convenient time and place, and confer to consider such matters as will promote a fair and expeditious trial, including the following:

A. The possibility of each of the defendants waiving his right to be present at all or any part of the pretrial conference or subsequent conferences.

B. The exhibiting to opposing counsel and the exchange of copies of all proposed exhibits. The fullest benefit will be derived from this procedure if each side makes an effort in good faith to exhibit and exchange copies of the exhibits it intends to offer with the understanding that additional exhibits may be offered if papers in the possession of one side or the other which do not seem important before trial become important as the result of developments during the course of the trial.

C. The listing and marking for identification of documents of the government and the various defendants.

D. The possible waiver of the necessity for laying the foundation for the introduction of such documents and their authenticity.

E. The possibility of securing admission of facts which are not controverted or can be established by testimony or undeniable documentary evidence, thus avoiding the necessity of introducing the evidence into the record.

F. Consideration will be given to supplying the defendants with Jencks Act statements prior to the testimony of the witness.

G. Procedures for the trial will be explored, including:

(1) *Voir dire* examination;

(2) The possibility of naming one attorney as principal spokesman for multiple parties;

(3) Methods of handling cross-examination involving multiple defendants;

(4) The order of presentation of the case by such multiple defendants;

(5) The number and use of peremptory challenges;

(6) Seating arrangements for defendants and counsel;

(7) Procedure on objections where, as here, there are multiple counsel, and particularly the possibility of having objections made by one defendant stand as if made on behalf of all defendants;

(8) The possible temporary absence of one or more defense counsel during the trial;

(9) The handling of any motions under *Brady v. Maryland* for evidence favorable to any of the defendants on the issue of guilt or punishment;

(10) Any and all other matters which may tend to simplify the issues or the trial; and

(11) The necessity, if any, of a showing *in camera* to the Court of any evidence prior to disclosure.

H. No admissions against interest made by any of the defendants or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney.

I. Any stipulations or agreements arrived at shall be entered solely for use in this case and will not be binding or usable by any party hereto in any other case or proceeding.

J. Following the above conference, an order will be prepared promptly for signature by each of the defendants, his attorney, the United States Attorney, and the Court,

summarizing and setting forth any stipulations or agreements voluntarily arrived at by the parties. A suggested proper form of order and stipulation will be found in 37 F.R.D. 106 and it is suggested that all counsel study it prior to the initial conference.

ORDERED this ..... day of ....., 19...

.....
UNITED STATES DISTRICT JUDGE

6.2 Sample Pretrial Order No. 14. (Order Creating a Central Depository) (If the subject is discussed at the pretrial conference, this order might be adopted and added to the pretrial order—See Sample Pretrial Order No. 12).

This cause came on to be heard upon the motion of defendants for return of the documents which they submitted to the grand jury pursuant to subpoena. The Court heard argument of counsel on this motion and the Court is of the opinion that all documents belonging to defendants heretofore produced in response to Subpoenas Duces Tecum issued on behalf of Grand Jury No. .... in the course of investigation of possible violation of ..... [cite statute] should be available in this district to counsel for all parties herein throughout pendency of this action, and upon consideration thereof, it is

ORDERED and ADJUDGED:

1. That all of said documents shall be delivered on or before ....., by the UNITED STATES to the Clerk of this Court at ....., ..., and thereupon impounded in the custody and care of said Clerk, to be maintained at his office in ....., ... None of such documents shall be returned by the government to the parties producing them without further order of the Court.

2. That the attorneys of record for all parties, but no other person, shall have access at all times during regular office hours of said Clerk to such documents for the purpose of examination, copying or both, provided, however, that any defendant herein may file a motion for a protective order to prevent examination if its documents by other defendants.

3. The Clerk of the Court is hereby authorized and directed to permit reasonable examination and inspection of said documents as aforesaid, and upon request of counsel to release any of said documents to such counsel for removal from the Clerk's office for the limited purpose of copying such documents and the return immediately thereafter to the Clerk's office. The UNITED STATES may have a person accompany such documents during their absence from the Clerk's office, but shall not be required to do so.

4. (If applicable: The provisions of this Order amend and supersede the provisions of Paragraphs .... of the *ex parte* Order impounding documents dated and entered by this Court on ..... to the extent inconsistent herewith.)

DONE and ORDERED at ....., this ..... day of .....

.....
UNITED STATES DISTRICT JUDGE

DECISIONS ON IMPORTANT ISSUES OF LAW

INDEX

	Page
Attorney-Client Privilege and Work Product Doctrine	217
Class Actions	218
Coercion	220
Evidence—Admissibility of Actual Costs, Profits, Losses, Capacity and Other Manufacturing Experience of Defendant During Conspiracy	220
Evidence—Hearsay Rule Relaxed in Complex Cases	222
Failing Company Defense	222
Grand Jury Transcripts and Documents	222
In Pari Delicto Defense in Civil Antitrust Cases	227
Intervention in Civil Antitrust Cases	227
National Deposition and Discovery Program	228
Nolo Contendere and Guilty Pleas	229
Passing on Defense in Civil Antitrust Cases	231
Prima Facie Evidence Rule of § 5(a) of the Clayton Act	233
Sham Answers to Complaints	233
Statute of Limitations in Civil Antitrust Cases	233
Theories of Damage	235
Transfer Pursuant to Title 28, U.S.C., § 1404(a)	235
Transfer Pursuant to Title 28, U.S.C., § 1407	237
Venue and Service in Civil Antitrust Cases	240

ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

City of Philadelphia v. Westinghouse Electric Corporation, (E.D. Pa., Kirkpatrick, J.) April 27, 1962 (defendants required to answer certain interrogatories over claims of attorney-client privilege) (written opinion). 205 F.Supp. 830.

City of Philadelphia v. Westinghouse Electric Corporation, (E.D. Pa., Kirkpatrick, J.) July 19, 1962 (defendant General Electric Company required to answer certain interrogatories over claim of attorney-client privilege) (written opinion). 210 F.Supp. 483.

Motion for modification *denied* October 19, 1962 (written opinion). 210 F.Supp. 483.

Application for writs of mandamus and prohibition *denied* (C.A. 3, December 31, 1962). Motion for rehearing *denied* (January 16, 1963). 312 F.2d 742.

Petition for *certiorari denied* (March 18, 1963) 372 U.S. 943.

Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, (N.D. Ill., Robson, J.) November 15, 1962 (defendants' motions claiming work product protection for certain documents ordered produced by National Pretrial Order No. 9 *granted*) (written opinion). 211 F. Supp. 736, affirmed 335 F.2d 203 (C.A. 7).

National Deposition of W. G. Lewis, (E.D. Pa., Kirkpatrick, J.) November 19, 1962 (plaintiffs' motion to produce memorandum re Grand Jury testimony of national deponent W. G. Lewis *denied*) (*City of Philadelphia v. Westinghouse Electric Corporation*) (written opinion). 32 F.R.D. 350. *Atlantic City Electric Company v. General Electric Company,* (S.D. N.Y., Christensen, Ryan, JJ.) December 2,

1964 (plaintiffs' motion to produce memorandum re Grand Jury testimony of national deponent F. Leon Yetter *granted*) (written opinion).

Sacramento Municipal Utility District v. General Electric Company, Westinghouse Electric Corporation, Allis-Chalmers Manufacturing Company, McGraw-Edison Company, Moloney Electric Company and Wagner Electric Company, (N.D. Calif., Halbert, J.) January 29, 1965 (General Electric's motion to compel further answers to certain interrogatories over work product claims granted in part and denied in part) (written opinion).

Fischer v. Wolfinbarger, (W.D. Ky. 1968) 45 F.R.D. 510.

CLASS ACTIONS

City of Chicago v. Allen Bradley Company, et al., (N.D. Ill., Robson, J.) April 6, 1963 (defendants' motion to dismiss representative action brought by municipality on behalf of nation-wide class of municipalities on theory of general conspiracy) (*denied*) (written opinion). 32 F.R.D. 448.

Diversity Jurisdictional Amount By Aggregation of Claims

Snyder v. Harris, ... U.S. ..., ... S.Ct. ..., ... L.Ed.2d ... (March 25, 1969) (aggregation of claims not permitted to satisfy jurisdictional amount under amended Rule 23).

Procedure and Standards

Eisen v. Carlisle & Jacquelin, (S.D. N.Y., Tyler, J.) September 30, 1966 (hearing required on request for class action determination under amended Rule 23 where claimant, an "odd-lot" purchaser of securities, had a miniscule interest in comparison to total number of "odd-lot" purchasers he purported to represent) (C.A. 2, March 8, 1968; Medina, J.) 391 F.2d 555 (reversing 41 F.R.D. 147).

Mader v. Armel, (C.A. 6) 402 F.2d 158 (class action in behalf of stockholders challenging merger held appropriate).

Esplin v. Herschi, (C.A. 10) 402 F.2d 94; *Green v. Wolf Corporation,* (C.A. 2) 406 F.2d 291 (class action in behalf of claimants under Sec. 106–5 appropriate).

Knuth v. Erie-Crawford Dairy Coop. Association, (C.A. 3) 395 F.2d 420 (denial of class action request without notice to class members error).

Richland, et al., v. Cheatham, et al., (S.D. N.Y., Ryan, J.) July 27, 1967 (class action inappropriate in actions brought by purchaser of securities). 272 F.Supp. 148.

Dolgow, et al. v. Anderson, et al., (E.D. N.Y., Weinstein, J.) January 3, 1968 (Court will not refuse to allow a securities suit to be maintained as a class action under amended Rule 23 solely because of the procedural or administrative difficulties that may be encountered) 43 F.R.D. 472.

Booth v. General Dynamics Corp., (N.D. Ill., Will, J.) January 25, 1967 (taxpayer suit maintainable as class action under amended Rule 23) 264 F.Supp. 465.

School District of Philadelphia, et al. v. Harper & Row Publishers, Inc., et al., (E.D. Pa., Kraft, J.) April 24, 1967 (class action under new Rule 23 held inappropriate in civil treble damage antitrust actions) 267 F.Supp. 1001.

Seigel v. Chicken Delight, Inc., et al., (N.D. Calif., Harris, J.) August 17, 1967 (class action under new Rule 23 held appropriate in civil treble damage antitrust actions) 271 F.Supp. 722.

Philadelphia Electric Co. v. Anaconda American Brass Co., (E.D. Pa., Fullam, J.) January 23, 1968 (class action under new Rule 23 held appropriate in civil treble damage antitrust actions). 43 F.R.D. 452.

State of Iowa v. Union Asphalt & Roadoils, Inc., (S.D. Iowa, Hanson, J.) March 14, 1968 (class action under new Rule 23 held appropriate in civil treble damage antitrust action). 281 F.Supp. 391.

City of New York v. International Pipe & Ceramics Corp., (S.D. N.Y., Ryan, J.) April 17, 1968 (class action under new Rule 23 held inappropriate in civil treble damage antitrust actions) (written opinion). 12 F.R.Serv.2d 23b.3, Case 1. 44 F.R.D. 584, affirmed (C.A. 2) ... F.2d ....

State of Minnesota v. United States Steel Corp., (D. Minn., Neville, J.) May 17, 1968 (class action under new Rule 23 held appropriate in civil treble damage antitrust actions) (written opinion). 12 F.R.Serv.2d 23b.3, Case 3. 44 F.R.D. 559.

Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., (N.D. Ill., Becker, J.—sitting by assignment) February 28, 1968 (class actions under new Rule 23 held appropriate in patent infringement actions) (written opinion). 285 F.Supp. 714, 11 F.R.Serv.2d 23b.1, Case 1.

COERCION

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) July 19, 1965 (Plaintiffs' motions to strike I-T-E Circuit Breaker Company's defenses of economic coercion *granted*) (written opinion). 245 F.Supp. 889.

EVIDENCE—ADMISSIBILITY OF ACTUAL COSTS, PROFITS, LOSSES, CAPACITY AND OTHER MANUFACTURING EXPERIENCE OF DEFENDANT DURING CONSPIRACY

Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., (N.D. Ill., Robson, J., April 21, 1966) 40 F.R.D. 104. In jury trial actual costs, profits and losses are admissible

only if (1) actual costs, profits and losses are substantially the same as they would be in the absence of conspiracy; and (2) data is available for all significant market factors (sellers); otherwise the data is logically and legally irrelevant, and immaterial. This case cites three similar rulings in jury trials as follows:

> "Philadelphia Electric Co., *et al.* v. General Electric Co., *et al.,* C.A. No. 30015 (E.D. Pa., Lord, J.) (power transformers) (trial transcript pp. 5573, 5691–5694); N.W. Electric Power Coop., Inc. v. Moloney Electric Co., *et al.,* C.A. No. 13290–3 (W.D. Mo., Becker, J.) (power transformers) trial transcript pp. 227–228, 670–671, 2489–2495, 3765–3804, 7747–7748); and The City of San Antonio v. Westinghouse Electric Corp., *et al.,* C.A. No. 3064 (W.D. Tex., Spears, C.J.) (steam turbine generators) (trial transcript pp. 5729–5733)."

Ohio Valley Electric Corp. v. General Electric Co., (S.D. N.Y., Feinberg, J., August 31, 1965) 244 F.Supp. 914. In trial without a jury evidence of costs, profits, capacity, utilization of capacity and orders for periods, including conspiratorial period, admissible on issues of damages and existence of conspiracy, though weight thereof was for trier of fact.

United States v. Aluminum Co. of America, (C.A. 2, L. Hand, J., March 12, 1945) 148 F.2d 416, 1.c. 427. In equity case triable without a jury profits during period of monopoly held tainted by narcotizing effect of monopoly.

American Crystal Sugar Co. v. Mandeville Island Farms, Inc., (C.A. 9, Healy, J., March 11, 1952) 195 F.2d 622, cert. den. 343 U.S. 957, 72 S.Ct. 1052, 96 L.Ed. 1357. In nonjury trial profits of seller plaintiff suing buyer charging oligopsony with conspiracy, held tainted by unlawful conspiracy and therefore not usable to limit damages of seller.

EVIDENCE—HEARSAY RULE RELAXED IN COMPLEX CASES

United States v. Aluminum Co. of America, (C.A. 2, March 12, 1945, L. Hand, J.) 148 F.2d 416.

United States v. United Shoe Machinery Corporation, (D. Mass., Wyzanski, J.) March 10, 1954, 89 F.Supp. 349, final judgment 110 F.Supp. 295, affirmed *per curiam* 374 U.S. 521.

FAILING COMPANY DEFENSE

Citizen Publishing Company v. United States, (March 10, 1969) ... U.S. ..., ... S.Ct. ..., ... L.Ed.2d ... (joint operating agreement between two newspapers held illegal under antitrust laws. The failing company doctrine defense was defined, held to be limited, and unavailable).

GRAND JURY TRANSCRIPTS AND DOCUMENTS

Dennis v. U. S., 384 U.S. 855 (June 20, 1966) (Failure of trial court to permit defendants to examine government witnesses' grand jury testimony constituted reversible error.)

U. S. v. National Dairy Products Corp., (W.D. Mo., Oliver, J.) May 28, 1964 (Use of grand jury transcript refused; permitting such use is within discretionary power of trial court.) 231 F.Supp. 663.

Affirmed, (C.A. 8, August 27, 1965) 350 F.2d 321.

Rehearing denied, September 23, 1965.

Reversed and remanded (for further consideration in the light of *Dennis v. U. S., supra*), 384 U.S. 883 (June 20, 1966).

Motion for *new trial denied, U. S. v. National Dairy Products Corp.,* (W.D. Mo., Oliver, J.) January 10, 1967 (Even though government was allowed to use grand jury testimony

to refresh its witness' memories, defendants were held not to have been prejudiced by refusal of court, after *in camera* inspection, to disclose grand jury testimony to them where it was found that no showing of particularized need or claim of inconsistency between grand jury and trial testimony was made by defendants.) 262 F.Supp. 447.

Affirmed in part; reversed in part, (C.A. 8, November 21, 1967) (Trial court's permitting government to refresh its witness' memory by use of grand jury transcript but denying defendant's request to inspect grand jury testimony was prejudicial error.) 384 F.2d 457.

Petition for certiorari denied, 390 U.S. 957 (March 4, 1968).

Atlantic City Electric Co. v. A. B. Chance Co., (C.A. 2, January 31, 1963) (Since a court may order disclosure of grand jury minutes where there is a showing of special and compelling circumstances sufficient to overcome policy against disclosure, discretion of lower court in finding such a showing will not be disturbed (absent a manifest abuse of discretion) by interlocutory appeal or mandamus.) 313 F.2d 431.

Application of the State of California to Inspect Grand Jury Subpoenas, (E.D. Pa., Ganey, J.) May 11, 1961 (application of State of California to inspect Philadelphia Grand Jury subpoenas *denied*) (written opinion). 195 F. Supp. 37.

In re Grand Jury Proceedings, (E.D. Pa., Woods, J.) November 16, 1961 (petition by Federal Trade Commission to examine transcript of the Philadelphia Grand Jury *denied*) (written opinion). 29 F.R.D. 151.

Affirmed (C.A. 3, November 1, 1962). 309 F.2d 440.

United States of America and Tennessee Valley Authority v. General Electric Company, et al., (E.D. Pa., Kraft, J.) August 22, 1962 (defendants' motion to impound Grand

Jury minutes and documents *granted* as to the T.V.A. but *denied* as to the U.S.A.), *certified* under § 1292(b) (written opinion). 209 F.Supp. 197.

National Deposition of A. C. Allen, (E.D. Pa., Clary, J.) October 23, 1962 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent A. C. Allen *denied, procedure outlined for obtaining transcripts of other national deposition witnesses upon request of the deposition judge*) (*City of Philadelphia, et al. v. Westinghouse Electric Corporation, et al.*) (written opinion). 210 F.Supp. 486. Rehearing *denied* (November 7, 1962).

Dismissed appeal in connection with procedure outlined for obtaining transcripts upon request of deposition judge (C.A. 3, February 21, 1963).

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) October 30, 1962 (motion of defendant I-T-E Circuit Breaker Company for relief from producing Grand Jury documents pursuant to National Pretrial Order No. 9 *denied*) (written opinion). 211 F.Supp. 729.

United States v. General Electric Company, et al., (E.D. Pa., Ganey, J.) December 10, 1962 (motion of defendants to compel the Government to return documentary materials obtained through subpoenas during criminal Grand Jury investigations *granted*) (written opinion). 211 F.Supp. 641.

In the Matter of the National Deposition of John T. Peters, (S.D. N.Y., Boldt, Ryan, JJ.) December 18, 1962 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent John T. Peters *granted*), *certified* under § 1292(b) (written opinion).

Leave to appeal and petition for writ of mandamus *denied* (C.A. 2, January 31, 1963). 313 F.2d 431.

Appeal *dismissed* (C.A. 2, March 21, 1963).

Stay *denied,* but defendants were granted ten days to apply to the Supreme Court for a stay (C.A. 2, April 2, 1963).

Mr. Justice Harlan *denied* application for stay pending *certiorari* (April 10, 1963). 10 L.Ed.2d 122, 83 S.Ct. 964.

In the Matter of the National Deposition of Brenan R. Sellers, (N.D. Ill., Boldt, J.) December 18, 1962 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent Brenan R. Sellers *granted*), *certified* under § 1292(b) (written opinion). 32 F.R.D. 473.

Leave to appeal and petition for writs of mandamus and prohibition *denied* (C.A. 7, February 5, 1963).

Appeal dismissed (C.A. 7, April 19, 1963).

Stay *denied* (C.A. 7, April 19, 1963).

In the Matter of the National Deposition of Donald J. Nairn, (E.D. Pa., Boldt, Clary, JJ.) December 18, 1962 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent Donald J. Nairn *granted*), *certified* under § 1292(b) (written opinion).

Application for writs of mandamus and prohibition *denied* (C.A. 3, January 23, 1963). 312 F.2d 748.

Leave to appeal *denied* (C.A. 3, January 31, 1963).

Appeal *dismissed* (C.A. 3, February 21, 1963).

Stay *denied* (C.A. 3, April 3, 1963).

In the Matter of the National Deposition of J. W. McMullen, (S.D. Fla., Boldt, Dyer, JJ.) December 18, 1962 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent of J. W. McMullen *granted*), *certified* under § 1292(b) (written opinion).

Leave to appeal *granted* (C.A. 5, February 18, 1963).

Affirmed (C.A. 5, September 24, 1963). 323 F.2d 233.

Consolidated Edison Company of New York, Inc., et al. v. Allis-Chalmers Manufacturing Company, et al., (S.D. N.Y., Feinberg, J.) April 26, 1963 (plaintiffs' motions to release transcripts of Grand Jury testimony of national deponents L. M. Eikner, Clyde A. Lilly, Jr., and Daniel J. McLane, Jr., *granted*) (written opinion). 217 F.Supp. 36.

In the Matter of the National Deposition of John C. Rissinger in City of Philadelphia v. Westinghouse Electric Corporation, et al., (E.D. Pa., Clary, J.) May 21, 1963 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent John C. Rissinger *granted in part*).

Atlantic City Electric Company, et al. v. General Electric Company, et al., (S.D. N.Y., Christensen, Ryan, JJ.) January 15, 1965 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent Charles F. Hendrie *denied*) (written opinion).

Atlantic City Electric Company, et al. v. General Electric Company, et al., (S.D. N.Y., Christensen, Ryan, JJ.) February 10, 1965 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent A. L. Nolan, Jr. *denied*) (written opinion). 244 F.Supp. 707.

Atlantic City Electric Company, et al. v. General Electric Company, et al., (S.D. N.Y., Robinson, J.) March 3, 1965 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent M. P. Kartalia *denied*) (written opinion).

In the Matter of the National Deposition of James H. Patton in Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) March 5, 1965 (plaintiffs' motion to release transcript of Grand Jury testimony of national deponent James H. Patton *granted*) (written opinion).

Atlantic City Electric Company, et al. v. General Electric Company, et al., (S.D. N.Y., Feinberg, J.) March 25, 1965 (plaintiffs' motions to release transcripts of Grand Jury testimony of national deponents Howard Failmezger and Bruce B. Gravitt *granted in part*) (written opinion).

IN PARI DELICTO DEFENSE IN CIVIL ANTITRUST CASES

Need of pleading "specificity" of theory of recovery in civil antitrust cases.

"Specificity" of particular alternative theories of recovery in civil antitrust action not required. *Perma Life Mufflers v. International Parts,* 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed. 2d 982.

INTERVENTION IN CIVIL ANTITRUST CASES

City of Philadelphia, et al. v. Westinghouse Electric Corporation, et al., (E.D. Pa., Kirkpatrick, J.) October 23, 1961 (motion by Pennsylvania Public Utilities Commission to intervene on behalf of consumers on theory of common fund for refunds *denied*) (oral opinion).

Affirmed (C.A. 3, September 26, 1962). Rehearing *denied* (October 23, 1962). 308 F.2d 856.

Petition for *certiorari denied* (March 4, 1963). 372 U.S. 936.

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) May 17, 1962 (motion by State of Illinois to intervene on behalf of consumers on theory of common fund for refunds *denied*) (written opinion). 207 F.Supp. 252.

Affirmed (C.A. 7, April 1, 1963).

Petition for *certiorari denied* (October 14, 1963). 375 U.S. 834.

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) June 14, 1962 (motion by taxpayer to intervene on behalf of public consumers as representative of all taxpayers of said public consumers *denied*) (written opinion).

Harry J. Stadin v. Union Electric Company, et al., (E.D. Mo., Harper, J.) May 17, 1962 (motion by stockholder of utility to intervene *denied*), *certified* under § 1292(b) (oral opinion).

Leave to appeal *denied* (C.A. 8, June 11, 1962).

Harry J. Stadin v. Union Electric Company, et al., (E.D. Mo., Harper, J.) June 14, 1962 (motions by stockholder to intervene in two suits consolidated and *denied*) (oral opinion).

Affirmed (C.A. 8, November 15, 1962). 309 F.2d 912.

Petition for *certiorari denied* (May 13, 1963). 373 U.S. 915.

NATIONAL DEPOSITION AND DISCOVERY PROGRAM

City and County of San Francisco v. General Electric Company, et al., (N.D. Cal., Zirpoli, J.) December 21, 1962 (motions of defendants A. B. Chance Company and H. K. Porter Company, Inc. to vacate and modify National Pretrial Orders Nos. 8, 9 and 10 *denied*) (written opinion).

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (D. Mass., Caffrey, J.) January 22, 1964 (motions of defendants for further interrogation of national deponents Thomas A. Fearnside and Charles W. Maloney *denied*) (written opinion).

City of Burlington, Vermont, et al. v. Westinghouse Electric Corporation, et al., (D. D.C., Sirica, J.) February 14,

1964 (*subpoena duces tecum* served by defendants on the Attorney General of the United States *quashed*) (oral opinion).

Notice of Appeal filed March 16, 1964.

Reversed and remanded for further proceedings, Written opinion by Judge Washington (C.A. D.C., June 9, 1965). 351 F.2d 762.

Opening Remarks by Judge George H. Boldt at the Deposition of Oscar A. Haas, (S.D. N.Y., Boldt, J.) November 23, 1964 (Judge Boldt's remarks at the opening of third priority product line depositions, briefly summarizing the experience and rulings to date) (written memorandum).

Summary of Supplemental Remarks of Judge Christensen In the Third Round of the Electrical Antitrust Case Depositions, (S.D. N.Y., Christensen, J.) December 1, 1964 (Judge Christensen's remarks supplementing Judge Boldt's comments at the opening of third priority product line depositions) (written memorandum).

State of Washington, et al. v. General Electric Co., et al., (W.D. Wash., Boldt, J.) April 1, 1965 (plaintiffs' motions for further interrogation of national deponents Alvin C. Meixner and M. W. Johnson *denied*) (written opinion).

NOLO CONTENDERE AND GUILTY PLEAS

N.W. Electric Power Cooperative, Inc. v. General Electric Company, et al., (W.D. Mo., Duncan, J.) August 9, 1961 (defendants' motions to strike allegations of Philadelphia proceedings brought on behalf of the United States, including references to pleas of guilty and *nolo contendere granted*) (written opinion). 30 F.R.D. 557.

Sacramento Municipal Utility District v. Westinghouse Electric Corporation, et al., (N.D. Cal., Halbert, J.) May 2, 1962 (motion of defendant I-T-E Circuit Breaker Company

to strike allegations of prior government actions and guilty pleas *denied*) (written opinion).

Atlantic City Electric Company, et al. v. General Electric Company, et al., (S.D. N.Y., Feinberg, J.) July 18, 1962 (defendants' motions to strike allegations of pleas of guilty *denied,* defendants' motions to strike allegations of pleas of *nolo contendere granted*) (written opinion). 207 F.Supp. 620.

Brigham City Corporation, et al. v. General Electric Company, et al., (D. Utah, Christensen, J.) July 25, 1962 (defendants' motions to strike allegations of criminal pleas with reference to complaints charging general conspiracy *granted,* motion of defendant Wagner Electric Company to strike allegations of pleas of *nolo contendere granted*) (written opinion).

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) October 18, 1962 (defendants' motions to strike allegations of pleas of guilty and *nolo contendere granted*) (written opinion). 211 F.Supp. 712.

Affirmed with respect to pleas of *nolo contendere, reversed* with respect to plea of guilty (C.A. 7, September 12, 1963). 323 F.2d 412.

Petition for *certiorari denied* (March 2, 1964). 376 U.S. 939.

City of San Antonio, et al. v. General Electric Company, et al., (W.D. Tex., Spears, J.) December 7, 1962 (defendants' motions to strike allegations of pleas of guilty *denied,* defendants' motions to strike allegations of pleas of *nolo contendere granted*) (oral opinion).

City of San Antonio, et al. v. General Electric Company, et al., (W.D. Texas, Spears, J.) December 7, 1962 (defendants' motions to strike allegations of *prima facie* effect of

guilty and *nolo contendere* pleas *granted*), *certified* under § 1292(b) (oral opinion).

Leave to appeal *granted* (C.A. 5, January 22, 1963).

Affirmed as to pleas of *nolo contendere, reversed* as to guilty pleas (C.A. 5, June 24, 1964). 334 F.2d 480.

Department of Water and Power of the City of Los Angeles, et al. v. Allis-Chalmers Manufacturing Company, et al., (S.D. Cal., Byrne, J.) January 22, 1963 (defendants' motions to strike all allegations of Philadelphia proceedings brought on behalf of the United States, including all references to pleas of guilty and *nolo contendere granted*), *certified under* § 1292(b) (written opinion). 32 F.R.D. 204.

Affirmed as to pleas of *nolo contendere, reversed* as to guilty pleas (C.A. 9, March 20, 1964). 329 F.2d 825.

PASSING ON DEFENSE IN CIVIL ANTITRUST CASES

Hanover Shoe, Inc. v. United Shoe Machinery Corp., (defendant held not entitled to assert "passing on" as a defense.) 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (June 17, 1968).

Philadelphia Electric Company, et al. v. Westinghouse Electric Corporation, et al., (E.D. Pa., Clary, Lord, JJ.) December 16, 1963 (plaintiffs' objections to defendants' passing on interrogatories *sustained*).

Commonwealth Edison Company, et al. v. Allis-Chalmers Manufacturing Company, et al., (N.D. Ill., Robson, J.) December 17, 1963 (plaintiffs' objections to defendants' passing on interrogatories *sustained*), *certified* under § 1292(b) (written opinion). 225 F.Supp. 332.

Leave to appeal *granted* (C.A. 7, January 20, 1964).

Affirmed (C.A. 7, August 7, 1964). 335 F.2d 203.

Petition for *certiorari denied,* 375 U.S. 834 (October 14, 1963).

Atlantic City Electric Company, et al. v. General Electric Company, et al., (S.D. N.Y., Feinberg, J.) January 28, 1964 (plaintiffs' objections to defendants' passing on interrogatories *sustained*) (written opinion). 226 F.Supp. 59.

Denied application for leave to appeal under 28 U.S.C. § 1292(b). Written opinion *per curiam* (C.A. 2, July 16, 1964). 337 F.2d 844.

Public Utility District No. 1 of Chelan County, Washington v. General Electric Company, et al., (W.D. Wash., Boldt, J.) March 9, 1964 (plaintiff's objections to defendants' passing on interrogatories *sustained*) (written opinion). 230 F.Supp. 744.

State of Washington, et al. v. General Electric Company, et al., (W.D. Wash., Boldt, J.) March 31, 1965 (defendants' motion for summary judgment under Rule 56, F.R.Civ.P., based on plaintiffs' purchase of the electrical equipment in suit through independent contractors, *denied*) (written opinion).

The People of the State of New York v. Federal Pacific Electric Company, et al. and *New York State Thruway Authority v. Cutler-Hammer, Inc., et al.,* (S.D. N.Y., Feinberg, J.) April 26, 1965 (defendants' motions to dismiss pursuant to Rule 37(d), F.R.Civ.P., based on plaintiffs' failure to answer certain interrogatories regarding indirect purchases, *denied*) (written opinion).

Ohio Valley Electric Corp. v. General Elec. Co., (S.D. N.Y., Feinberg, J.) August 31, 1965 (defendant manufacturer held not entitled to assert passing on defense against utility purchaser of electrical equipment) (written opinion) 244 F. Supp. 914.

PRIMA FACIE EVIDENCE RULE OF § 5(a) OF THE CLAYTON ACT

Prima facie rule of § 5(a) of the Clayton Act applies to a successful defendant in a criminal action who agreed to a consent judgment against itself in the government's civil action.

State of Michigan v. Morton Salt Co., (D. Minn., Larson, J.) 259 F.Supp. 35, affirmed *sub. nom. International Salt Co. v. Ohio Turnpike Commission,* (C.A. 8 per curiam) 392 F.2d 579.

SHAM ANSWERS TO COMPLAINTS

Central Electric Power Cooperative, et al. v. Westinghouse Electric Corporation, et al., (W.D. Mo., Becker, J.) April 3, 1962 (plaintiffs' motions to strike certain answers to complaints as sham *denied*) (written opinion).

STATUTE OF LIMITATIONS IN CIVIL ANTITRUST CASES

Fraudulent concealment will toll the statute of limitations in civil treble damage antitrust cases:

Kansas City, Missouri v. Federal Pacific Electric Co., (C.A. 8, November 6, 1962) 310 F.2d 271.

Petitions for *certiorari denied,* 371 U.S. 912 (November 19, 1962) and 373 U.S. 914 (May 13, 1963).

Atlantic City Electric Co., et al. v. General Electric Co., (C.A. 2, December 13, 1962) 312 F.2d 236.

Petition for *certiorari denied,* 373 U.S. 909 (May 13, 1963). *Public Service Co. of New Mexico v. General Electric Co., et al.,* (C.A. 10, March 15, 1963) 315 F.2d 306.

Petition for *certiorari denied,* 374 U.S. 809 (June 10, 1963).

Allis-Chalmers Manufacturing Co., et al. v. Commonwealth Edison Co., (C.A. 7, March 29, 1963) 315 F.2d 558.

Westinghouse Electric Corp., et al. v. City of Burlington, Vermont, et al., (C.A. D.C., January 2, 1964) 326 F.2d 691.

Westinghouse Electric Corp., et al. v. Pacific Gas and Electric Co., (C.A. 9, January 6, 1964) 326 F.2d 575.

General Electric Co., et al. v. City of San Antonio, et al., (C.A. 5, June 24, 1964) 334 F.2d 480.

Hardy Salt Co. v. State of Illinois, et al., (C.A. 8, May 22, 1967) (Fraudulent concealment tolls the statute of limitations not only as to co-conspirators named as formal parties in the government antitrust proceedings but also as to co-conspirators not named as formal parties to those proceedings). 377 F.2d 768.

Petition for *certiorari denied.* 389 U.S. 912 (October 23, 1967).

State of New Jersey, et al. v. Morton Salt Co., et al., (C.A. 3, December 8, 1967) 387 F.2d 94.

Ohio Valley Electric Corp. v. General Elec. Co., (S.D. N.Y., Feinberg, J.) August 31, 1965 (fraudulent concealment will toll the statute of limitations in acts of concealment by participants therein for tolling even in the absence of direct misrepresentation to plaintiff) (written opinion) 244 F.Supp. 914.

In private civil antitrust actions four year statute of limitations is tolled by Section 5(b) of the Clayton Act (§ 16(b), Title 15, U.S.C.) as to parties not named as defendants, but named as conspirators in government action.

Hardy Salt Co. v. State of Illinois, (C.A. 8) 377 F.2d 768, Matthes, Circuit Judge affirming *State of Michigan v. Morton Salt Co.,* (D. Minn., Larson, J.) 259 F.Supp. 35.

State of New Jersey v. Morton Salt Co., (C.A. 3) 387 F.2d 94, Seitz, Circuit Judge.

THEORIES OF DAMAGE

Ohio Valley Electric Corp. v. General Elec. Co., (S.D. N.Y., Feinberg, J.) August 31, 1965 (plaintiff utility, purchaser of electrical equipment from manufacturer proved damages in treble damage price fixing antitrust action by showing discount off book price in conspiratorial period and post-conspiratorial period and by comparing the two, despite some economic differences between the two periods. Theory of case discussed in Shuchter, *The Just Price,* 1 Antitrust Law & Economic Review, 103.) (written opinion) 244 F. Supp. 914.

TRANSFER PURSUANT TO TITLE 28, U.S.C., § 1404(a)

Kansas City Power and Light Co., et al. v. I-T-E Circuit Breaker Co., (W.D. Mo., Becker, J.) February 1, 1965 (plaintiffs' involuntary motions to transfer two power switchgear assembly cases to the Northern District of Illinois pursuant to Title 28, U.S.C. § 1404(a) *granted*) (written opinion). 240 F.Supp. 121.

Petition for writ of mandamus and prohibition *denied* (C.A. 8, March 29, 1965) (written opinion *per curiam*). 343 F.2d 361.

City of Philadelphia, et al. v. Federal Pacific Electric Co. and I-T-E Circuit Breaker Co., (E.D. Pa., Lord, J.) February 23, 1965 (*Order* of Judge Lord transferring 17 power switchgear assembly cases pending in the Eastern District of Pennsylvania to the Northern District of Illinois pursuant to Title 28, U.S.C. § 1404(a)) (no written opinion).

Petition for writ of mandamus or rule to show cause *denied* (C.A. 3, March 26, 1965) (no written opinion, Order of the Court distributed).

Petition for *certiorari denied* (June 1, 1965). 381 U.S. 936.

Central Power & Light Co., et al. v. Allis-Chalmers Manufacturing Co., et al., (S.D. Texas, Connally, J.) March 5, 1965 (plaintiffs' motions to transfer three power switchgear assembly cases to the Northern District of Illinois pursuant to Title 28, U.S.C. § 1404(a) *granted*) (written opinion).

Kentucky Utilities Co. v. I-T-E Circuit Breaker Co., (W.D. Ky., Shelbourne, J.) April 5, 1965 (plaintiff's motion to transfer a power switchgear assembly case to the Northern District of Illinois pursuant to Title 28, U.S.C. § 1404(a) *granted*) (written opinion).

City of Burlington, Vermont, et al. v. Westinghouse Electric Corporation, et al., (D. D.C., Sirica, J.) May 17, 1965 (*Order* of Judge Sirica transferring two power switchgear assembly cases pending in the District of Columbia to the Northern District of Illinois pursuant to Title 28, U.S.C § 1404(a)) (written opinion).

Pacific Gas & Electric Co., et al. v. Westinghouse Electric Corp., et al., (S.D. Cal., Byrne, C.J.) May 24, 1965 (plaintiffs' motions to transfer two power switchgear assembly cases to the Northern District of Illinois pursuant to Title 28, U.S.C. § 1404(a) *granted*) (written opinion).

Union Electric Co. v. I-T-E Circuit Breaker Company, (E.D. Mo., Regan, J.) June 23, 1965 (plaintiff's motion to transfer a power switchgear assembly case to the Northern District of Illinois pursuant to Title 28, U.S.C. § 1404(a) *granted*) (written opinion).

Petition for writ of prohibition *denied* (C.A. 8, July 23, 1965) (written opinion *per curiam*). 348 F.2d 403.

Atlantic City Electric Company, et al. v. I-T-E Circuit Breaker Company, (S.D. N.Y., Feinberg, J) November 23, 1965 (*Order* of Judge Feinberg transferring cases in nine product lines to the various districts recommended by the

Co-Ordinating Committee for Multiple Litigation pursuant to Title 28, U.S.C. § 1404(a)) (written opinion). 247 F. Supp. 950.

Pacific Car and Foundry Company v. Pence, (C.A. 9) 403 F.2d 949, holding that, although orders respecting venue under § 1404(a) are not appealable, they are reviewable on mandamus where extraordinary circumstances reveal orders clearly erroneous.

TRANSFER PURSUANT TO TITLE 28, U.S.C., § 1407

In re Technograph, Inc. (Docket No. 1, Jud. Pan. Mult. Lit.) September 17, 1968 (plaintiff's motion to transfer cases to the Northern District of Illinois pursuant to Title 28, U.S.C., § 1407, denied by the Panel).

In re Library Editions of Children's Books (Dockets Nos. 2, 4, 5, 6, and 7, Jud. Pan. Mult. Lit.) October 17, 1968 (Order of the Panel transferring nineteen antitrust cases involving library editions of children's books to the Northern District of Illinois pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Library Editions of Children's Books (Dockets Nos. 2, 4, 5, 6, and 7, Jud. Pan. Mult. Lit.) April 3, 1969 (Order of Panel transferring fifteen antitrust cases involving library editions of children's books to the Northern District of Illinois pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Plumbing Fixture Cases (Docket No. 3, Jud. Pan. Mult. Lit.) September 13, 1968 (Order of Panel transferring thirty-seven related multidistrict civil treble damage antitrust actions involving plumbing fixtures to the Eastern District of Pennsylvania pursuant to Title 28, U.S.C., § 1407) 295 F.Supp. 33.

In re Plumbing Fixture Cases (Docket No. 3, Jud. Pan. Mult. Lit.) December 27, 1968 (Order of Panel transferring

nine antitrust actions to the Eastern District of Pennsylvania pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F. Supp. ....

In re Air Crash Disaster at Cincinnati Airport (Docket No. 8A, Jud. Pan. Mult. Lit.) October 21, 1968 (Order of Panel transferring six related antitrust actions to the Eastern District of Kentucky pursuant to Title 28, U.S.C., § 1407) 295 F.Supp. 51.

In re Air Crash Disaster at Cincinnati Airport (Docket No. 8B, Jud. Pan. Mult. Lit.) October 21, 1968 (Order of Panel transferring ten antitrust cases to the Eastern District of Kentucky pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Protection Devices and Equipment, etc. (Docket No. 9, Jud. Pan. Mult. Lit.) October 3, 1968 (Order of Panel transferring antitrust cases involving protection devices and equipment to the Southern District of New York pursuant to Title 28, U.S.C., § 1407) 295 F.Supp. 39.

In re Protection Devices and Equipment, etc. (Docket No. 9, Jud. Pan. Mult. Lit.) November 14, 1968 (Order of Panel transferring four antitrust cases to the Southern District of New York pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Antibiotic Drugs (Docket No. 10, Jud. Pan. Mult. Lit.) October 21, 1968, as amended November 19, 1968 (Order of Panel transferring twenty-three antitrust actions to the Southern District of New York pursuant to Title 28, U.S.C., § 1407) 295 F.Supp. 1402.

In re Antibiotic Drugs (Docket No. 10, Jud. Pan. Mult. Lit.) November 22, 1968 (Order of Panel transferring three tag-along cases to the Southern District of New York pursuant to Title 28, U.S.C., § 1407).

In re Antibiotic Drugs (Docket No. 10, Jud. Pan. Mult. Lit.) April 3, 1969 (Order of Panel transferring ten tag-along

cases to the Southern District of New York pursuant to Title 28, U.S.C., § 1407 (written opinion) ... F.Supp. ....

In re Air Crash Disaster at Ardmore, Oklahoma (Docket No. 11, Jud. Pan. Mult. Lit.) October 17, 1968 (Order of Panel transferring seven antitrust cases involving the air crash disaster at Ardmore, Oklahoma, to the Eastern District of Oklahoma pursuant to Title 28, U.S.C., § 1407) 295 F.Supp. 45.

In re Concrete Pipe Cases (Docket No. 12, Jud. Pan. Mult. Lit.) May 23, 1969 (Order of Panel transferring twenty-four antitrust actions to the Eastern District of Pennsylvania pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Mid-Air Collision Near Henderson, North Carolina (Docket No. 13, Jud. Pan. Mult. Lit.) January 14, 1969 (Order of Panel transferring two antitrust cases pending in the Western District of Missouri to the Western District of North Carolina pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Gypsum Wallboard Cases (Docket No. 14, Jud. Pan. Mult. Lit.) February 27, 1969 (Order of Panel transferring three antitrust actions to the Northern District of California pursuant to Title 28, U.S.C., § 1407).

In re Gypsum Wallboard Cases (Docket No. 14, Jud. Pan. Mult. Lit.) May 22, 1969 (Order of Panel transferring a tag-along case from the Western District of Washington to the Northern District of California pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Air Crash Disaster at Hong Kong (Docket No. 15, Jud. Pan. Mult. Lit.) March 12, 1969 (Order of Panel transferring seven cases to the Northern District of California pursuant to Title 28, U.S.C., § 1407)

In re Fourth Class Postage Regulations Cases (Docket No. 16, Jud. Pan. Mult. Lit.) April 3, 1969 (Order of Panel transferring eight antitrust cases to the District of New Jersey pursuant to Title 28, U.S.C., § 1407) (written opinion) ... F.Supp. ....

In re Distribution of Scotch Whiskey Cases (Docket No. 19, Jud. Pan. Mult. Lit.) May 21, 1969 (Order of Panel denying a motion to transfer a case from the District of Colorado to the District of New Jersey) (written opinion) ... F.Supp. ....

VENUE AND SERVICE IN CIVIL ANTITRUST CASES

Commonwealth Edison Company, et al. v. Federal Pacific Electric Company, et al., (N.D. Ill., Robson, J.) May 11, 1962 (motion of defendant Schwager-Wood Corporation to dismiss for improper venue on the ground that it did not transact business within the district granted) (written opinion). 208 F.Supp. 936.

Ohio-Midland Light and Power Company, et al. v. Ohio Brass Company, et al., (S.D. Ohio, Weinman, J.) June 23, 1962 (motion of defendant Lapp Insulator Company, Inc. to dismiss for improper venue on the ground that it did not transact business within the district *granted*) (written opinion). 221 F.Supp. 405.

Guernsey-Muskingum Electric Cooperative, Inc., et al. v. Federal Pacific Electric Company, et al., (S.D. Ohio, Weinman, J.) June 23, 1962 (motion of defendant Schwager-Wood Corporation to dismiss for improper venue on the ground that it did not transact business within the district *granted*) (written opinion). 221 F.Supp. 409

Metropolitan Sanitary District of Greater Chicago v. General Electric Company, et al., (N.D. Ill., Robson, J.) July 19, 1962 (motions of individual defendants to dismiss for

improper service, based on lack of personal residence or agents' residence in the district denied, subject to further discovery on fact of agents' residence in district) (written opinion). 208 F.Supp. 943.

Public Service Company of New Mexico v. Federal Pacific Electric Company, et al., (D. N.M., Rogers, J.) November 7, 1962 (motion of defendant Schwager-Wood Corporation to dismiss for improper venue on the ground that it did not transact business within the district *granted*) (written opinion). 210 F.Supp. 1.

Lower Colorado River Authority v. Westinghouse Electric Corporation, et al., (W.D. Texas, Spears, J.) July 15, 1963 (motions of defendants Schwager-Wood Corporation and Schwager-Wood Company, Inc. to dismiss for improper venue on the ground that they did not transact business within the district *denied*) (written opinion). 219 F.Supp. 743.

Metropolitan Sanitary District of Greater Chicago v. General Electric Company, et al., (N.D. Ill., Robson, J.) April 10, 1964 (defendants' motion to quash extraterritorial service on individual defendants *denied*). 35 F.R.D. 131.

Florida Power & Light Co. v. A. B. Chance Co., et al., (S.D. Fla., Choate, J.) August 20, 1962 (motion of defendant Cole Electric Company to dismiss for improper venue on the ground that it did not transact business within the district *granted*) (written opinion).

School District of Philadelphia v. Harper & Row Publishers, Inc., (E.D. Pa.) 267 F.Supp. 1006 (venue held proper where defendant solicited business by mail in district, and sent corporate officer on a good will tour of its customers in the district. The defendant was not licensed to do business in Pennsylvania and had no offices, telephone, real estate or resident agent in the state.)

Index to Part I

[References are to sections unless otherwise indicated]

A

American Bar Association
committee representatives, p. xiii

American College of Trial Lawyers
committee on revision of *Manual,* p. xiii
committee representatives, p. xiii

Antitrust cases
civil
summary judgment in, 2.11

Assignment to a single judge
complex cases
first recommendation, 0.3
generally, 0.3
Roster of Senior Judges, 0.3
second recommendation, 0.3
Senior judge, 0.3
visiting judges, 0.3
multiple and multidistrict litigation, 5.1
generally, 5.11

B

Board of Editors
members listed, p. xix

Briefs
defendant's pretrial, 3.3
final pretrial, 3.3
initial, 1.2
plaintiff's pretrial, 3.3
plaintiff's pretrial reply, 3.3
schedule for filing pretrial, 3.3

C

Case law (See separate index of important decisions *infra* at p. 215)

Challenges
peremptory, number and use of, 4.10

Civil antitrust cases
summary judgment in, 2.11

Class actions
conflicting, 5.5
generally, 1.6
in multidistrict litigation, 5.5

Classes of complex cases
criminal cases, 6.1
generally, 0.22

Complex and multidistrict litigation (See appropriate subject headings this Index)

Complex cases
classes of, 0.22
criminal cases, 6.1, 6.2
judicial control of, 1.1
pretrial procedures, 0.3–0.5
proof of facts in, 2.61

Computer evidence (See also **Evidence**)
admissions of records, 2.616
admissions of summaries, 2.617
computer records, 2.614
discovery requests, 2.615
inquiry into, 2.6
results derived from, 3.52

Conclusions
nonjury cases, request for, 4.13

Consolidation of cases, 1.6

Co-Ordinating Committee for Multiple Litigations
members listed, pp. ix–xii

Counsel
cooperation of, 1.10
liaison, 1.9, 4.0, 4.8
views of, 1.2

Counterclaims
separation of issues, 4.3

Criminal cases
discovery of documentary evidence, 6.2
pretrial procedures, 6.1

Cross claims
separation of issues, 4.3

D

Decisions (See separate index of important legal decisions *infra* at p. 215)

Depositions
designations, 4.1
pretrial, schedule for filing, 3.3
summaries, use of, 4.6

Definitions
class actions, 0.1
complex litigation, 0.1
first wave of discovery, 0.1
generally, 0.1
judicial panel, 0.1
multiple litigation, 0.1
multidistrict litigation, 0.1
second wave of discovery, 0.1

Discovery
appointment of master, 3.22
criminal cases, 6.2
documentary evidence, 6.2
on merits, 1.7
for emergencies, 1.7
limiting subject matter, 2.4

Discovery—Cont.
on merits—Cont.
limiting time, 2.4
to narrow issues, 1.7
sequence of, 0.5

Document depositories
central, 2.5
multidistrict litigation, 2.5

Documentary evidence
discovery of, criminal cases, 6.2

E

Evidence
admission of computer records, 2.616, 3.52
computer, 2.6, 2.614, 2.615
early inquiry into, 2.6
expert opinion, 2.6
polls, 2.6, 3.52
receipt of, cut-off dates, 4.5
samples, 2.6, 3.52
surveys, 2.6, 3.52

Exhibits
filing of, 3.3

Experts
court-appointed, 3.51
evidence of, 2.6

Expert opinion
evidence, 2.6

F

Facts
stipulations of, 3.53

Federal Judicial Center
creation, p. vi

Federal Rules of Civil Procedure
Rule 13(h), 1.6
Rule 14, 1.6
Rule 16, 6.1
Rule 16(a), 6.2
Rule 16(b), 6.2
Rule 16(c), 6.3
Rule 16(5), 3.21
Rule 17, 6.1
Rule 17(c), 6.2
Rules 19–22, 1.6
Rule 23, 0.1, 1.0, 1.6, 2.1, 5.5
Rule 26, 2.4
Rule 36, 3.53
Rule 42(a), 5.12
Rule 42(b), 1.6
Rule 77(b), 5.32(3) n. 130

Final pretrial conference (See **Fourth Principal Pretrial Conference**)

Findings
request for, nonjury cases, 4.13

First wave of discovery (See also **Discovery**)
scheduling requests for, 1.5

First Principal Pretrial Conference (See also **Principal pretrial conferences)**
ascertainment of counsels' views, 1.2
class actions, 1.6
consolidation of cases, 1.6
cooperation of counsel, 1.10
discovery on merits, 1.7
early determination of special legal questions, 1.8
first wave of discovery, scheduling, 1.5
joinder of additional parties, 1.6
liaison counsel, 1.9
notice of entry of preclusion orders, 1.4
timetable for pleadings and motions, 1.3

Fourth Principal Pretrial Conference
deposition designations, 4.1
deposition summaries, 4.6

Fourth Principal Pretrial Conference—Cont.
generally, 4.0
jurors, alternate, 4.9
jury demand, 4.4
liaison counsel, 4.8
lists of witnesses, 4.8
"marginal" indications on orders, 4.1
opening statements, control of, 4.12
order of proof, 4.4
peremptory challenges, 4.10
period of proof, 4.5
preclusion orders, 4.2
request for instructions, findings, conclusions, 4.13
rulings annotated, 4.1
separate issues, trial of, 4.3
timesaving trial orders, 4.8
trial, schedule of days and hours, 4.7
voir dire examination, 4.11

Function of Manual
generally, p. xix
Handbook (1960), p. xix

Final pretrial conference
(See **Fourth Principal Pretrial Conference**)

First wave of discovery
completion of, 2.3
discovery on merits, scheduling requests for, 2.3
ruling on requests for, 2.2
scheduling, 1.5, 2.3

I

Identification of complex and multidistrict litigation
generally, 0.2
means of, 0.23
action by judge, 0.23
inspection by clerk, 0.23
notice by attorneys, 0.23
resort to administrative information, 0.2

Instructions
request for, nonjury cases, 4.13

Interstate commerce
separation of issues, 4.3

Intercircuit multidistrict litigation
related cases, 5.4

Interdivision multiple litigation
related cases, 5.2

International Academy of Trial Lawyers
committee representatives, p. vii

Intracircuit multidistrict litigation
related cases, 5.3

Intradivision multiple litigation
related cases, 5.1

J

Joinder of parties, 1.6

Judicial Panel on Multidistrict Litigation
Clerk of Panel, p. xviii
composition of Panel, p. xvii
correspondence with, p. xviii
rules adopted, App. 5.33

Jurors
alternates, 4.9

Jury demand
generally, 4.4

Jury panel
voir dire examination, 4.11

L

Liaison counsel (See **Counsel**)

M

Master (See **Special Master**)

Motions
non-discovery, 1.3
timetable for, 1.3

Multidistrict litigation (See **Multiple and multidistrict litigation**)

Multiple and multidistrict litigation
intercircuit related cases, 5.4
interdivision multiple litigation, 5.2
consolidate and continue, 5.22
transfer to single division, 5.21
intradistrict multidistrict litigation, 5.3
intradivision multiple litigation, 5.1
assignment to single judge, 5.11
consolidation of cases, 5.12
procedure as in complex cases, 5.13
use of class actions, 5.5
conflicting cases, 5.5

N

Non-discovery motions
timetable for, 1.3

Nonjury cases
conclusions, 4.13
request for instructions, findings, 4.13

O

Opening statements
control of, 4.12

Order of proof, 4.4

Orders
preclusion
notice of entry of, 1.4

P

Peremptory challenges (See **Challenges**)

Pleadings
timetable for, 1.3

Polls
admission of, 3.52
as evidence, 2.6
generally, 2.612(b)

Preclusion orders
notice of entry, 1.4

Preliminary pretrial conference (See **Principal pretrial conferences**)

Pretrial conferences (See also **Principal pretrial conferences**)
criminal cases, 6.1
final conference, 0.4
generally, 0.4
preliminary conference, 0.4
principal conferences, 0.4

Pretrial procedures
assignment to a single judge, 0.3
criminal cases, 6.1, 6.2
discovery in criminal cases, 6.2
generally, 0.3–0.5
pretrial conferences, 0.4
sequence of discovery, 0.5

Prettyman Report
deposition summaries, 4.6 n. 112
documentary record, 2.611
generally, 1.2 n. 13
time period of proof, 4.5

Principal pretrial conferences
First conference, 1.0
ascertainment of counsels' views, 1.2
class actions, 1.6
consolidation of cases, 1.6

Principal pretrial conferences—Cont.
First conference—Cont.
cooperation of counsel, 1.10
discovery on merits, 1.7
early determination of special legal questions, 1.8
first wave of discovery, scheduling, 1.5
joinder of additional parties, 1.6
liaison counsel, 1.9
notice of entry of preclusion orders, 1.4
timetable for pleadings and motions, 1.3
Second conference
completion of first wave of discovery, 2.3
determination of class action issue, 2.1
determination of preliminary legal questions, 2.1
document depositories, 2.5
evidence, use of, 2.6
exchange of estimated trial dates, 2.7
first wave of discovery, ruling on requests, 2.2
generally, 2.0
proof of facts, 2.61
requests for first wave of discovery, ruling on, 2.2
summary judgments in civil antitrust cases, 2.11
Third conference
additional steps to consider, 3.5
briefs, 3.3
court-appointed expert, 3.51
depositions, 3.3
exhibits, 3.3
filing schedules, 3.3
fixing dates, final conference and trial, 3.4
generally, 3.0
presentation of mechanical evidence, 3.52
scheduling subsequent cases, 3.1
special master, appointment, 3.2
stipulations of fact, 3.53
witness lists, 3.3
Fourth conference
deposition designations, 4.1
deposition summaries, 4.6

Principal pretrial conferences—Cont.
Fourth conference—Cont.
generally, 4.0
jurors, alternate, 4.9
jury demand, 4.4
liaison counsel, 4.8
lists of witnesses, 4.8
"marginal" indications on orders, 4.1
opening statements, control of, 4.12
order of proof, 4.4
peremptory challenges, 4.10
period of proof, 4.5
preclusion orders, 4.2
request for instructions, findings, conclusions, 4.13
rulings annotated, 4.1
separate issues, trial of, 4.3
timesaving trial orders, 4.8
trial, schedule of days and hours, 4.7
voir dire examination, 4.11

Provisional rules
rules adopted, App. 5.33

Purpose of Manual
generally, p. xix
Handbook (1960), p. xix

R

Robinson-Patman Act
15 U.S.C. § 13(a, d-f), 4.3

Rulings
"marginal" notations, 4.1

Roster of Senior Judges, 0.3

S

Samples
admission of, 3.52
as evidence, 2.6
generally, 2.612(a)

Separate issues
agency, 4.3
claims under different laws, 4.3
foreign v. domestic commerce, 4.3
interstate commerce, 4.3
liability v. amount of damages, 4.3
patent validity v. infringements, 4.3
patent validity v. misuse, 4.3
primary v. counterclaims, 4.3
primary v. cross claims, 4.3
release, 4.3

Sequence of discovery, 0.5

Sherman Act
15 U.S.C. §§ 1, 2, 4.3

Sources of information
generally, 0.21
routine procedures, 0.21

Special master
appointment of, 3.2
generally, 3.21
to supervise discovery, 3.22

Stipulations
of fact, 3.53

Summary judgment
in civil antitrust cases, 2.11

Surveys
admission of, 3.52
as evidence, 2.6
machine tabulated, 2.617

T

Trial
schedule of days and hours, 4.7
separate issues, 4.3

Trial dates
estimated, exchange of, 2.7

U

U.S.C., Title 28
§§ 291–293, 0.3, 5.32(4)
§ 293, 0.4
§ 1404(a), 5.3, 5.4
§ 1404(b), 5.2, 5.4
§ 1407, xvii, xviii, 0.1, 5.32(4), 5.4
§ 1732, 2.616
§ 1870, 4.10
§ 3500, 6.1, 6.2

V

Views of counsels
generally, 1.2

Voir dire examination
manner of, 4.11

W

Witnesses
daily lists of, 4.8
lists of, filing, 3.3

Index to Part II

(A separate index of decisions on important issues of law has been prepared by the Judicial Panel and appears at page 215.)

C

Class actions
local rule on, 1.6

D

Discovery
use of masters, 3.2

E

Expert witnesses
generally, 3.51

F

Federal Rules of Civil Procedure
Rule 23, 1.5, 1.6
Rules 27–37, 1.10
Rule 34, 3.2
Rule 39(c), 3.51
Rule 53, 3.2, 3.51

Federal Rules of Criminal Procedure
Rule 6(e), 6.1
Rule 16(a)(3), 6.1

J

Judicial Panel
Provisional Rules of Procedure, 5.33

L

Local rules (See also **Suggested Local Rules**)
class actions, 1.6
Local Civil Rule 12(d), E.D.Pa., 0.3
Local Rule 10B, N.D.Ill., 5.12

M

Masters
order appointing, 3.2
use of, re discovery, 3.2

Multidistrict litigation
Judicial Panel, rules of, 5.33

O

Order
appointing special master, 3.2

P

Pretrial order (See **Sample pretrial order**)

Prettyman Report
qualifications of experts, 3.51

Provisional Rules of Procedure
Judicial Panel, 5.33

S

Sample pretrial order
Sample Pretrial Order No. 1, 1.1
Sample Pretrial Order No. 2, 1.5
Sample Pretrial Order No. 3, 1.5
Sample Pretrial Order No. 3A, 2.5
Sample Pretrial Order No. 3B, 2.5
Sample Pretrial Order No. 3C, 2.5
Sample Pretrial Order No. 4, 3.2
Sample Pretrial Order No. 5, 3.3
Sample Pretrial Order No. 6, 3.51
Sample Pretrial Order No. 7, 3.52

Sample pretrial order—Cont.
Sample Pretrial Order No. 8, 4.0
Sample Pretrial Order No. 9, 5.21
Sample Pretrial Order and Memo No. 10, 5.32
Sample Pretrial Order No. 11, 6.1
Sample Pretrial Order No. 12, 6.1
Sample Pretrial Order No. 12A, 6.1
Sample Pretrial Order No. 13, 6.2
Sample Pretrial Order No. 14, 6.2

Suggested local rules
Suggested Local Rule 1, 0.2
Suggested Local Rule 2, 0.2
Suggested Local Rule 3, 6.1
Suggested Local Rule 4, 6.1
Suggested Local Rule 5, 5.11
Suggested Local Rule 6, 1.10

U

U.S.C., Title 28
§ 1404(a), 5.32
§ 1404(b), 5.21
§ 1407 (text of), 5.32
§ 3500, 6.1

W

Witnesses
expert, 3.51