The Manual for Complex Litigation: More Rules or Mere Recommendations?

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THE MANUAL FOR COMPLEX LITIGATION:
MORE RULES OR MERE RECOMMENDATIONS?

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I. INTRODUCTION

When I joined the United States Navy many decades ago, one of the first precepts learned was that a "request" from a senior officer was to be construed as an "order." It was sage advice. Similarly, the Manual for Complex Litigation, Second (the "Manual"),¹ is merely a set of suggestions, prepared by federal judges, without the force of law, as to how a complex case might be organized and administered. However, the lawyer who does not construe the Manual's precepts as directives, but "merely" as recommendations to be ignored as he sees fit, does so at his peril and at great potential risk to his client.

As part of this symposium on the golden anniversary of the Federal Rules of Civil Procedure, we would be remiss not to include for special recognition and comment a set of guidelines recommended by various federal court committees to be used in conjunction with the Federal Rules in cases of undue complexity. The Manual, by providing guidelines for both judge and advocate alike, allows both to find their way through the maze of hedgerows which a complex case will create to obstruct the effective and economic administration of justice—obstacles such as an unwieldy number of parties (into the hundreds, at times); incomprehensible issues to lay persons; enormous discovery requirements of both documents and people; and impossible circumstances within which to make fair allocations of responsibility or damage. It is easy for one to

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¹ MANUAL FOR COMPLEX LITIGATION, SECOND (1985) [hereinafter MANUAL].

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miss seeing the forest when it is populated by hundreds of trees, each of which has its own rights and duties, privileges and liabilities. The Manual allows multitudinous parties in a complex case to chart their course through the forest, sharing those concerns in which there is a commonality of interest and preserving the opportunity to select different directions in regard to issues on which they may choose to differ.

This Article will describe the genesis of the Manual, the symbiotic relationship it has with the Federal Rules of Civil Procedure and, by way of example, its felicitous use in complex environmental cases.

II. HISTORY

The Manual, in its present form, is a product of several attempts to manage complex litigation.2

A. The Prettyman Report

The first attempt to manage complex cases was the Report on Procedures in Anti-Trust and Other Protracted Cases (the “Prettyman Report” or the “Report”),3 so named after the chairman of the committee that published the Report. Soon after the Supreme Court promulgated the Federal Rules of Civil Procedure in 1938, a series of protracted antitrust cases arose which presented difficult procedural issues.4 The Prettyman Report, published thereafter by a committee appointed by the Judicial Conference of the United States,5 focused on the procedural difficulties in those cases and

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3 Prettyman Report, supra note 2 (thorough analysis of procedural issues presented by protracted litigation).

4 See id. at 63-64. Among these cases were United States v. New York Great Atl. & Pac. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946) (7,000 exhibits, 45,000 pages of testimony), aff’d, 173 F.2d 79 (7th Cir. 1949); United States v. Hartford-Empire Co., 46 F. Supp. 541 (N.D. Ohio 1942) (3,300 exhibits, 18,000 pages of record), aff’d in part, remanded in part, vacated in part, rev’d in part, 323 U.S. 386 (1945); United States v. Aluminum Co. of Am., 44 F. Supp. 97 (S.D.N.Y. 1941) (15,000 pages of record), aff’d in part, rev’d in part, 148 F.2d 416 (2d Cir. 1945).

5 Prettyman Report, supra note 2, at 62 n.1. The Committee was composed of Circuit
found that the most common problems were vagueness of issues, excessive production of evidence, and lack of organization. Based on these findings, the Report made recommendations for handling complex litigation in the future.

B. The Handbook of Recommended Procedures for the Trial of Protracted Cases

The next attempt to manage complexity in federal litigation was the Handbook of Recommended Procedures for the Trial of Protracted Cases (the "Handbook"). As an ever increasing number of complex cases reached trial, the recommendations of the Prettyman Report were proven effective. However, innovative judges were nonetheless required to fashion new, more appropriate remedies, tailored to the particular situation at hand. In the absence of an innovative judge, cases would stagnate because of their unwieldiness. Therefore, the newest innovations warranted a revision of the Report.

The Handbook was issued by the Judicial Conference Study Group on Procedure in Protracted Litigation. In September of 1955, the Judicial Conference of the United States authorized then Chief Justice Earl Warren to form the Judicial Conference Study Group under the auspices of the Pretrial Committee of the Judicial Conference. The Handbook was the result of the Study Group's analysis of the pretrial organization and trial of protracted cases. The Handbook "follows the analysis of the problems inherent in

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Judges E. Barrett Prettyman (chairman), Kimbrough Stone, Calvert Magruder, Augustus N. Hand, and Walter C. Lindley; and District Judges W. Calvin Chesnut, Frank L. Kloeb, Paul Leahy, Vincent L. Leibell, and Leon R. Yankwich. Id.  

Id. at 66.  

Id. at 84. The Prettyman Report states:  

[T]he most effective means of preventing unnecessary delay, volume of record, and expense are:  

(a) conferences between judge and counsel prior to trial . . . ;  
(b) the exclusion from the record of all unnecessary, as well as all irrelevant and incompetent, matter; and  
(c) a course of procedure which will minimize delay in the accurate disposition of the [case] after the completion of the trial.  

Id.  

Handbook, supra note 2 (report based on trial experiences of judges and lawyers since publication of Prettyman Report).  

See id. at 355, 359-60.  

Id. at 351.  

Id. at 355.
protracted litigation outlined in the ... Prettyman Report."112

C. Manual for Complex and Multidistrict Litigation

The third attempt at providing guidance in managing complex litigation was set forth in the Manual for Complex and Multidistrict Litigation (the "MCML").13 After the Handbook was issued, several antitrust cases involving conspiracies in the electrical equipment industry gave rise to a need for innovative techniques for handling large numbers of parties, documents, and proceedings.14 The resulting techniques were incorporated into the MCML.15 The MCML, the predecessor of the current Manual, underwent numerous revisions, resulting in several editions and supplements because of several complex cases, especially mass-tort disaster cases and class actions, that reached new levels of complexity and required innovative procedural solutions.16 The numerous revisions also demonstrated the increasing incidence of complex litigation and the need for a codification of the latest management techniques.17

D. The Manual for Complex Litigation, Second

The current manual, the Manual for Complex Litigation, Second, is a compilation of effective techniques developed by judges and lawyers who have dealt extensively with complex litigation.18

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112 Id. at 355-56.
113 See MCML, supra note 2. The name of the Manual was changed from the Manual for Complex and Multidistrict Litigation to the Manual for Complex Litigation with the publication of the third edition.
114 See generally Neal & Goldberg, The Electrical Equipment Antitrust Cases: Novel Judicial Administration, 50 A.B.A. J. 621 (1964) (discussing various techniques for streamlining case processing including use of national depositions, national pretrial hearings, and uniform interrogatories).
115 MCML, supra note 2 (recommendations in the MCML have subsequently been revised and are published in the Manual for Complex Litigation, Second).
116 See Manual, supra note 1, § 10, at 2 n.3. According to the Manual’s introduction: The editors of the Manual for Complex Litigation (as it was later retitled) recognized at the outset the need for periodic revision and sought, through five editions and other interim supplements, to note new decisions of significance and to incorporate the evolving techniques developed by judges and lawyers when handling complex litigation.
117 See id. at 2.
118 See id. at 1. According to its Board of Editors, “The Manual for Complex Litigation, Second, has been produced under the auspices of the Federal Judicial Center. The analyses and recommendations are those of the Manual’s Board of Editors. The Federal Judicial
Because of the dynamic nature of complex litigation, the Manual is subject to change as later cases reveal new and more difficult issues of complexity.19

III. PURPOSE

The Manual's suggested procedures give guidance to the bench and bar for handling complex litigation. As such, the recommendations are not intended to be followed strictly and the Manual "does not represent the final word on proper management of complex litigation."20 Since the suggestions in the Manual are gathered from the experiences of judges and lawyers, the recommendations recognize the ad hoc nature of complex cases and advocate experimentation and case-by-case application.21 The Manual provides a basic framework for managing complex litigation and suggests procedures that enable the courts to resolve complex cases fairly and efficiently.22

Although the Manual recommends procedures that have been very effective in handling complex cases, these recommendations are not the result of the exercise of legislative or other rule making authority.23 The Manual's popularity and increased use have been born out of necessity rather than any requirement, rule, or regulation. The creators of the Manual remind us that "it is not binding law. It has no binding effect. It is only as good as the credibility of the authors and the utility of the materials."24 The Manual asserts that its recommendations, like the Federal Rules, are examples of the court's inherent authority to manage litigation.25 Although the

Center speaks on matters of policy only through its own statutorily-created board." Id. at iii.

19 See id. § 10, at 2. The Manual welcomes suggestions and comments from attorneys and judges, and provides an address for such correspondence. Id. at 2 n.4.
20 Id. at 2.
21 See id. The Manual notes that its recommendations are the "result of the efforts of judges and lawyers to improve existing practices and their willingness to innovate . . . ; its suggestions are not intended to discourage this process." Id. at 1.
22 See generally id. § 20, at 5-23 (discussion of role of judges and lawyers in facilitating litigation of complex cases).
23 See id. § 10, at 1. "The various procedures are recommended in the sense that they should serve as a helpful starting point in planning a program to resolve the litigation in the most just, speedy, and inexpensive manner practicable under the circumstances." Id.
24 Panel Discussion, Charting A New Course for Complex Cases: The New Manual for Complex Litigation, Second, 54 ANTITRUST L.J. 417, 426 (1985) (Judge Pointer responding to the question, "what are the trial judges going to be told about how they ought to use it?").
Manual's recommendations are not binding, the Federal Rules, in a 1983 amendment, codified some of the Manual's procedures, and the notes of the advisory committee on the Rules recommend that the Manual be referred to when dealing with complex cases. Despite its status in the law as only a set of recommendations, it has the force and effect of law since it is frequently cited as a primary source of procedural authority, is often quoted by judges and commentators, and has proven very effective in managing complex cases. As noted below, it is frequently incorporated by reference in case management orders to provide procedural structure to complex cases.

The Manual represents the refinement of the Federal Rules to fit the requirements of complex litigation. Whether the Manual could or should be incorporated into the Federal Rules with the binding force of law is an issue which warrants serious consideration, but is not the subject of this Article. The benefits of compulsory rules for complex cases might be offset by a concomitant lack of flexibility to adapt such rules to the particular circumstances of a complex case. In any event, in-depth familiarity with the Manual must be viewed as compulsory by anyone who becomes immersed in complex federal litigation.

IV. THE Manual AND THE FEDERAL RULES

Although the Manual is properly viewed as providing general recommendations to the bench and bar in charting the procedural course of a particular complex civil litigation, the Federal Rules provide the mandatory framework within which the Manual must function.

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26 See supra note 24 and accompanying text.
28 See, e.g., In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 n.20 (7th Cir.) (citing Manual when discussing class action settlement orders), cert. denied, 444 U.S. 870 (1979); Plummer v. Chicago Journeyman Plumbers' Local Union No. 130, 77 F.R.D. 399, 402 (N.D. Ill. 1977) (citing Manual as strongly recommending bifurcation of complex cases).
30 See Manual, supra note 1, § 20.1, at 6. "The Federal Rules of Civil Procedure contain numerous grants of authority that supplement the inherent power of the court to manage litigation. Of particular importance are those contained in Rules 16, 26, 37, and 42." Id.
A. Status Conference

For example, the Manual recommends identification, as early as possible, of those cases that are potentially complex. Often, early identification takes the form of a standing court rule requiring the clerk of the court to notify the judge immediately upon the filing of any potentially complex case, such as one involving antitrust, a class action, or other mass-tort action. Once notified, it is recommended that the judge convene an initial status conference as soon as possible. To this end, the Federal Rules explicitly contemplate the use of conferencing for the judge to "consider and take action with respect to . . . the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." The notes of the advisory committee on Rules also acknowledge the "extensive guidance" offered by the Manual in this area.

Recognizing the importance of conferencing, the Manual stresses that it is the "primary means for exercise of judicial supervision and control during pretrial proceedings." In addition, the Manual even provides a sample proposed order, which schedules the initial conference and requires that counsel familiarize themselves with the Manual and be prepared to suggest schedules, assert positions, and discuss issues.

Certain procedural or administrative matters, which typically pose little or no difficulty in "ordinary" litigation, oftentimes become burdensome in complex cases. Some interim measures frequently resorted to include extending the time to answer until after the initial pretrial conference, limiting the length of briefs, eliminating

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31 See id. § 20.11, at 7.
32 See id.
33 Id. § 21.12, at 26. The Manual notes that "[t]he first conference should be held early in the litigation, well before the end of the 120 day period for entry of the scheduling order mandated by Fed. R. Civ. P. 16(b)." Id. Since the initial conference is generally the first opportunity for the court to assume control of the case, it is an appropriate time to create a "blueprint" for the litigation. See id. § 21.24, at 31-32 (discussing scope of issues to be addressed at initial conference).
34 Fed. R. Civ. P. 16(c)(10).
35 See id. advisory committee's note.
36 MANUAL, supra note 1, § 21.2, at 29. The Manual also contains a checklist of agenda items for the initial conference, covering, inter alia, filing and service, pleadings and motions, and discovery. Id. § 40.1, at 344-47.
37 See id. § 41.2, at 365-67.
tables of authority in briefs, and generally reducing filed papers to those ordered by the court. The court may also look to federal rule 16\textsuperscript{39} in setting a scheduling conference and other time limitations as to joining parties, amending pleadings, hearing motions, completing discovery, and any other "matters appropriate." Under federal rule 26(f), the court similarly may order a discovery conference to define the bounds of discovery.\textsuperscript{39}

B. Use of Liaison Counsel

One of the most innovative recommendations contained in the Manual is the suggestion that one or more attorneys be designated to represent the common interest of a particular group of parties.\textsuperscript{40} The Manual suggests the appointment of liaison counsel to receive papers on behalf of the group, to handle various administrative matters, and to act as a conduit of information among the group, its adversaries, and the court.\textsuperscript{41} Similarly, the Federal Rules, which ordinarily require service of pleadings and papers upon each of the parties to the litigation, allow the court to order otherwise in cases where "there are unusually large numbers of defendants."\textsuperscript{42} Simplified service orders are also recommended by the Manual.\textsuperscript{43} Such orders may provide that service is satisfied upon proper service of the documents upon liaison counsel.

\textsuperscript{39} See Fed. R. Civ. P. 16. Federal rule 16(b) provides, in relevant part:

\begin{quote}
(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
\begin{enumerate}
\item to join other parties and to amend the pleadings;
\item to file and hear motions; and
\item to complete discovery.
\end{enumerate}
The scheduling order also may include
\begin{enumerate}
\item the date or dates for conferences before trial, a final pretrial conference, and trial; and
\item any other matters appropriate in the circumstances of the case.
\end{enumerate}
\end{quote}

\textit{Id.}


\textsuperscript{40} See Manual, supra note 1, § 20.22, at 15 (suggested procedures for implementing use of liaison counsel).

\textsuperscript{41} See id. § 20.222, at 17-18.

\textsuperscript{42} Fed. R. Civ. P. 5(c).

\textsuperscript{43} See Manual, supra note 1, § 20.22, at 15.
Liaison counsel is not only the administrative lawyer for the group, but also “is frequently in the best position to learn the reaction of other parties to developments, assess their impact, and to advise the group on litigation strategy or the conduct of the negotiations.” Indeed, it is quite possible that one attorney may be lead, liaison, and trial counsel for the entire group. The Manual also suggests the use of various committees, consisting of a few of the attorneys from the group, to manage, steer, advise on technical matters, and ultimately try or negotiate a settlement of the case.

Since the Federal Rules contain no specific reference to the use of designated counsel, the Manual has become an invaluable source of guidance to the bench and bar in this respect. For example, courts have turned to the Manual to resolve disputes over fees for services rendered by designated counsel. At a panel dis-

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4. See generally id. § 20.222, at 17-18 (discussing roles, functions, and responsibilities of lead/liaison counsel).

These third-party defendants, however, all had the option, when faced with participation in the final consent decree, not to sign it. Having signed the decree they now enjoy the fruits of the Management and Settlement Committee’s labor. Plainly, all signatories are beneficiaries of the work the committees performed in arriving at a document acceptable to all parties. The settling third-party defendants should not be unjustly enriched at the expense of the remaining third-party defendants. With respect to compensation of lead or liaison counsel in multi-party litigation, The Manual for Complex Litigation, Second § 20.223 (1985) states:

“In fairness, expenses incurred and fees earned by special counsel and committees should not be borne solely by their own clients, but rather should be shared equitably by all benefiting from their services and relieved from similar obligations. If possible, the terms and procedures for payment should be established by agreement among counsel. If a consensus cannot be reached, however, the judge has the power and duty to order fair reimbursement and compensation.”

Equity requires that all the third-party defendants who signed the decree be subject to payment of their fair allocation to the common defense group fund. Since the fees and expenses involved are those for which each client would have had to pay separate counsel and are not large, per capita payment seems appropriate.

discussion held prior to the publication of the Manual, it was noted that the “court has . . . presumably the power to assess the cost as against the people benefitted.” In resolving such fee disputes, courts typically look to whether an agreement providing for reimbursement and court approval of expenses was entered into by the parties (sometimes referred to as a “common defense agreement”).

C. Settlements

Another important area where liaison counsel is used is in conducting settlement negotiations. However, designated counsel may find itself in the midst of a conflict with respect to obligations to the group and counsel’s individual clients. Even where the individual client has participated in the settlement, designated counsel, having played a central role, may have to continue representing the remaining group’s interest. Although designated counsel would ordinarily be the one most likely to conduct settlement negotiations, if this cannot be done without jeopardizing the rights or interests of the group, an appointment of a magistrate or judge for settlement purposes would be appropriate.

The Manual’s discussion and recommendations as to settlements of complex litigation find no counterpart in the Federal Rules. The Federal Rules merely provide that in class actions, settlement shall not occur in the absence of court approval and notice to all class members. The recommendations contained in the Manual are the result of viewing rule 16 as affording discretionary authority to judges for facilitating the settlement of the case. The Manual cautions, however, that the role of the judge in settlement is an uncertain one, and recommends judicial restraint in several respects. Obviously, a judge must avoid becoming an advocate for

48 Panel Discussion, supra note 24, at 431 (Judge Pointer speaking); see also In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1016-18 (5th Cir. 1977) (court has power to direct lead or liaison counsel to be compensated by others).
49 See infra notes 83-84 and accompanying text.
50 See Simons, supra note 44, at 4.
52 See Fed. R. Civ. P. 16(c)(7). Federal rule 16(c) provides that “[t]he participants at any [pretrial] conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.” Id. For a thorough discussion of techniques that are productive in effectuating settlements, see Manual supra note 1, § 23.12, at 162-64.
any one particular party.\textsuperscript{53}

In settling complex cases with multiple parties, a determination must frequently be made as to whether a partial settlement by some, but not all, of the parties will help or hinder the final resolution of the case. Apportionment of ultimate liability on the non-settlers requires serious scrutiny. This is particularly troublesome in hazardous waste litigation,\textsuperscript{54} since it is very often difficult to determine the quantity or type of waste for which each party is responsible.

D. Narrowing the Issues

One of the primary objectives in managing complex cases is the development of procedures to clarify and narrow the issues in dispute. Federal rule 16(c)(1) allows the participants at a pretrial conference to take action to eliminate any frivolous claims or defenses that might otherwise be pursued.\textsuperscript{55} Consistent with this rule, the Manual contemplates "collegiality of the lawyers among themselves and with the court."\textsuperscript{56}

Summary judgment motions under federal rule 56 serve to narrow or eliminate issues by disposing of some or all, and by determining which facts, if any, are truly in controversy. Under federal rule 56(d), the court, "by examining the pleadings and the evidence before it . . . shall if practicable ascertain what material facts exist without substantial controversy" and embody them in an order as findings of fact. This process reduces or entirely eliminates those matters which are the subject of discovery or trial.\textsuperscript{57} The difficulty which arises in the context of complex litigation is that the motion papers on a summary judgment motion can be so numerous that the motion may serve to clarify very little. In such instances, in the interest of "highlighting" the evidence, the court "may di-

\textsuperscript{53} See Manual, supra note 1, § 23.11, at 160-61. "Neither the bench nor the bar agrees on the role a trial judge should play in bringing about a settlement." Id. at 160. Although a court may interject its views in settlement discussions "it should never distort those views for strategic effect and should give the same information to all parties." Id. at 161.

\textsuperscript{54} See infra notes 68-93 and accompanying text.

\textsuperscript{55} See Fed. R. Civ. P. 16(c)(1) & advisory committee's note (rule added to identify real issues before trial).

\textsuperscript{56} Panel Discussion, supra note 24, at 432 (Mr. McSweeny expressing thoughts of Judge Pointer).

rect the filing of briefs or statements . . . requiring references to source materials.”

Also, in cases involving a multitude of parties, it may be wise for liaison counsel to prepare and file only one motion, with the represented parties joining in. Such a procedure helps temper what might otherwise become a voluminous motion file.

Through the court’s discretionary power, inherently acknowledged in the Federal Rules, the Manual gives guidance to the court regarding the means for controlling the scope, frequency, and extent of discovery in complex cases. Techniques employed to control discovery suggested by the Manual are numerous, each of which is adaptable to the needs or requirements unique to a particular case. Various methods employed by the courts to control or limit duplicative discovery include imposing deadlines for the completion of discovery, placing limitations on the forms of discovery and quantity of material which is discoverable, and allowing discovery in a predetermined sequence based on the importance or complexity of the issues involved.

The Manual notes that under federal rule 26 the court and counsel may properly place limitations on discovery. As discussed above, the court may order a discovery conference under rule 26(f) to define the boundaries of discovery. The Manual’s recommendations, in keeping with the spirit of the Federal Rules, include limiting the number and length of depositions of various types of witnesses, and taping and conducting telephonic depositions. The Manual also encourages the use of stipulations. The court in

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58 Manual, supra note 1, § 21.34, at 40.
59 Id. § 21.4.
60 Id. § 21.421, at 45-46.
61 FED. R. Civ. P. 26(b)(1).
62 See supra note 39 and accompanying text. Under federal rule 26(f)(3), it is within the court’s discretion to order a conference, upon an attorney’s motion, in order to set “limitations proposed to be placed on discovery.” FED. R. Civ. P. 26(f)(3). Federal rule 26(b)(1) provides in pertinent part that “[t]he frequency or extent of use of the discovery methods . . . shall be limited by the court.” FED. R. Civ. P. 26(b)(1).
63 Manual, supra note 1, § 21.451, at 64.
64 Id. § 21.452, at 65. "Tape-recording of depositions under Fed. R. Civ. P. 30(b)(4) is increasingly common . . . Counsel should be encouraged to make liberal use of this procedure . . . ." Id. (footnote omitted).
65 Id. § 21.47, at 77-82. The Manual suggests that stipulations of fact may be obtained through requests for admissions pursuant to federal rule 36. Id. The purpose of admissions or stipulations is twofold: to facilitate proof and to narrow the issues. See Fed. R. Civ. P. 36 advisory committee’s note. See generally Tripp & Armentano, Stipulations, N.Y. St. B.J., Feb. 1987, at 44 (comprehensive discussion of advantages and pitfalls of use of stipulations
its discretion may also limit attendance at depositions and may circumscribe the number of copies of transcripts produced. These methods of controlling discovery, although not specifically enunciated in the Federal Rules, nevertheless appear consistent therewith.

A unique contribution of the *Manual* to discovery in complex litigation is its recommended method for managing the voluminous documents and files engendered by complex cases. It is suggested that at the outset of litigation the parties attempt to seek a court order for the preservation of any documents generated in or even remotely related to the litigation, and, in accordance with the *Manual*’s recommendations, establish a document depository in the interest of preserving time, expense, and effort. Such a depository, which is also typically established by agreement among the parties, provides for easy access to documents, facilitates copying, and further simplifies filing and allocation of various costs.

While the *Manual* is “merely” a set of recommendations to the bench and bar for the handling of complex litigation, it has been found to be an indispensable tool, making the most efficient use of the judicial process. Without question, the *Manual* is a welcome supplement to the Federal Rules in areas of complexity, where the Federal Rules provide only little guidance.

V. THE *Manual* AND HAZARDOUS WASTE LITIGATION

While the *Manual* has proven its value in many different areas of practice (antitrust actions, multidistrict commercial cases, mass-tort litigation, and the like), in this author’s experience, the immense value of the *Manual* has been no more clearly demonstrated than in the multiparty hazardous waste cases brought under state and federal superfund laws. These cases, generally instituted pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), as amended by the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), and the Resource Conservation and Recovery Act of

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67 See id. § 21.444, at 57-58. "Central document depositories may be of great value in the efficient, economical management of voluminous documents. By depositing documents at one or more convenient locations, counsel may reduce substantially the expensive, burdensome, time-consuming, and wasteful efforts that otherwise may result . . . ." Id. at 57.
68 See Comprehensive Environmental Response, Compensation, and Liability Act of
1976, as amended by the Hazardous and Solid Waste Amendments of 1984, along with a plethora of common law state claims, frequently involve the United States, one or more state governments, one or more municipalities, and a multitude of what are commonly referred to as “potentially responsible parties” (“PRPs”). These PRPs are comprised of generators and transporters of hazardous wastes, owners and operators of landfills at which the hazardous wastes have been deposited, and owners and operators of toxic waste facilities where such wastes have been stored, treated, or disposed of. Occasionally such lawsuits will involve only a handful of parties, such as the government(s) involved in enforcing the environmental laws, and one or a few PRPs. However, more frequently, such lawsuits involve a veritable host of parties, making the Manual the only sensible road map towards an efficient, economically sound, and fair administration of justice. Invariably these cases are brought in federal court, based on federal statutory claims, and are administered in accordance with the Federal Rules and the Manual.

A. Some Pending Cases

In an atypical case resolved by consent judgment in 1985, suit had been instituted by the State of New York, the County of Nassau, and the Town of Hempstead against Purex Corporation for some alleged contamination in an industrial area. While the case resulted in the erection of the first sophisticated remedial facility on Long Island, intended to reclaim contaminated ground water, the case did not require the use of the Manual in light of the small number of parties and the even smaller number of issues (however difficult to resolve).

At the other end of the spectrum, in 1985 the City of New York instituted suit in federal court against approximately fifteen alleged PRPs in order to address the alleged illegal disposal of

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71 See id. Actually, a number of actions, several in state court and several in federal court, were instituted against Purex Corporation; they were all resolved by the federal consent judgment. See id.
waste oil, and the results thereof, at the five New York City landfills. Damages were alleged to be many millions of dollars, and the discovery process which ensued was painstakingly time-consuming, expensive, and very complex—requiring inquiry into all records kept by various entities involved over a period of many years. Several groups among the fifteen defendants brought no less than four different third-party actions against over three hundred separate third-party defendants seeking, *inter alia*, contribution under both federal and state law. The difficulty in compiling and maintaining accurate service lists in each of the several different third-party actions dramatically indicated the need for some kind of organizational structure for the litigation. (This was simply the compiling of the service list, not the service of the pleadings pursuant to the service list!)

In addition to the above two cases, we have seen the landmark case of *New York v. Shore Realty Corp.*, brought in federal court by the State of New York against the subsequent owner (and for the most part non-operator) of a toxic waste facility to compel cleanup of a contaminated site. *Shore Realty* included a third-party action brought for contribution by the owner against various alleged PRPs, including the United States Coast Guard and the Veteran's Administration Hospital. The owner-defendant moved to compel the State to bring in the alleged PRPs as necessary parties, but the motion was denied, requiring the defendant itself to bring the third-party actions. The third-party defendants numbered approximately ninety in this action, and the matter is still pending.

Similarly, the State of New York brought suit against the Town of Oyster Bay in regard to its ownership and operation of the Old Bethpage landfill, also naming as defendants three of the allegedly significant contributors to the landfill. The four defendants thereafter brought a variety of third-party actions involving between one hundred and two hundred third-party defendants, and, to add further confusion to the matter, the Town brought two separate third-party actions alleging the same claims against different groups of alleged PRPs.

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73 759 F.2d 1032 (2d Cir. 1985).

B. A Ballroom Full of PRPs

A personal example will again demonstrate the need for the organizational structure afforded by the Manual. In the currently pending case of City of New York v. Exxon Corp., which involves over three hundred parties, an "instructional" conference of the representatives of the third-party defendants was scheduled shortly after the third-party pleadings had been served. The conference took place at a hotel adjacent to Newark Airport, which facilitated attendance by those representatives outside the jurisdiction. Upon arrival at the hotel, I was directed into a large ballroom and was met by a crowd of over three hundred people (parties, lawyers, environmental consultants, and others). Thereafter, I was treated to discourses by both representatives of the City and the various defendants on the background of the litigation, what had already transpired, and what they anticipated would happen in the future. The fifteen defendants had their own organization, and it became incumbent upon the three hundred or so third-party defendants to quickly organize in order to mount an effective defense—the alternative to losing their voice in the clamor of hundreds, none of whom would be heard by the court.

C. The Status Conference

Frequently in cases such as Shore Realty, New York v. Town of Oyster Bay, and Exxon, after a presentation by a representative of the plaintiff or third-party plaintiff, the group of third-party defendants will meet among themselves to discuss the organization of their defense. While unanimity may not be achieved, usually a consensus quickly evolves that organization is necessary, and the easiest tool with which to accomplish this is the Manual. Judges and experienced advocates are familiar with it; it contains no surprises; it provides a blueprint for the effective administration of a lawsuit; and it lends authority to those seeking to organize the defense. Whether or not the third-party defendants reach total accord among themselves, the judge to whom the case is assigned will frequently call for a status conference to be attended by the multitude of parties, at which it will usually be made clear by the court that in order to be heard, spokespersons must be designated by the

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76 No. 85 Civ. 1939 (S.D.N.Y.) (Conboy, J.).
77 See supra notes 31-39 and accompanying text.
various factions.\textsuperscript{77}

\textbf{D. The Case Management Order}

Normal procedure will have the status conference followed by the promulgation of a case management order signed by the court. Such an order will typically set out a schedule to be followed regarding compliance with the Federal Rules on various matters such as pleadings, motion practice (including summary judgment), discovery, pretrial conferences, and trial. It is appropriate for the parties to suggest drafts of language to be included in the case management order\textsuperscript{78} and, not infrequently, the parties themselves stipulate to the case management order, which provides the framework within which they will be compelled to organize the litigation. The case management order will often expressly refer to the Manual, both in general and in regard to specific sections, referring to such contingencies as the designation of liaison counsel, the appointment of lead or trial counsel,\textsuperscript{79} the organization of a steering committee or a trial management committee,\textsuperscript{80} the creation of a common defense organization and/or fund,\textsuperscript{81} and the creation of a

\textsuperscript{77} See supra notes 40-49 and accompanying text.

\textsuperscript{78} See, e.g., Manual, supra note 1, § 41.3, at 367-72 (sample case management order); cf. Fed. R. Civ. P. 16(e) (pretrial orders).

\textsuperscript{79} See Manual, supra note 1, § 41.31, at 372-74 (sample order setting forth duties and responsibilities of designated counsel); see also id. § 20.22, at 15 (recommendations as to appointment, compensation, and responsibilities of lead/liaison counsel).

\textsuperscript{80} See id. § 20.221, at 16. The Manual suggests the creation of various committees to perform the many functions in complex cases:

Committees of counsel—which may be given such names as steering committees, coordinating committees, management committees, executive committees, discovery committees, and trial teams—may be formed to serve a wide range of functions. Particularly in cases in which the interests and positions of group members are similar but not identical, a committee of counsel representing the different interests may give valuable guidance to lead counsel. Committees may be formed to carry out various tasks assigned by lead counsel, such as preparation of briefs or conduct of portions of the discovery program, but care must be taken to avoid unnecessary duplication of efforts. See § 24.2.

\textsuperscript{81} See id. § 20.223, at 18-19. The Manual provides for liaison counsel’s compensation as follows:

In fairness, expenses incurred and fees earned by special counsel and committees should not be borne solely by their own clients, but rather should be shared equitably by all benefiting from their services and relieved from similar obligations. If possible, the terms and procedures for payment should be established by agreement among counsel. If a consensus cannot be reached, however, the judge has the power and duty to order fair reimbursement and compensation. Whether done by agreement or court order, these procedures should be established before
E. Common Defense

While the organization of the litigation can be, and usually is, directed by the court through the device of the case management order, it does not provide the litigants with the mechanism by which they can effectively pool their resources, designate their representatives, protect their clients' confidentiality, and reserve to themselves the right to litigate those issues which do not have a common basis among them. This protection must be afforded to the members of the group through a common defense agreement, generally supported by a common defense fund through which the expenses of a document depository, site investigation, compensation of liaison counsel, and attendant costs can be paid on some sort of fair allocation.

The common defense agreement will frequently provide for the forming of various committees, including the committee which will be the final decision maker within the common defense group, frequently referred to as the "steering," "management," or "trial management" committee, to be aided by a technical committee, an allocation committee, a settlement committee, a litigation committee, and sometimes an executive committee.

substantial services are rendered and provision should be made for periodic billings during the litigation or for creation of a fund through advance assessments of members of the group. The agreement or order should provide that parties entering partial settlements make appropriate contributions with respect to services already rendered by designated counsel, and in some cases may appropriately require contributions from parties in later filed or assigned cases who benefit from the work of special counsel.

When fees and expenses are to be allocated to co-parties, just as when counsel seeks their recovery against adverse parties, the court should require at the outset that contemporaneous time and expense records be kept and may also require that these be periodically filed under seal. Designated counsel should limit the number of persons who will seek remuneration for participation at conferences, in depositions, on briefs, and on other work. The court should make clear at the first pretrial conference that compensation will not be approved for unnecessary participation or duplication of activities.

Id. (footnotes omitted); see also id. § 24.11, at 179-80 (recognizing creation of common defense fund); Boeing Co. v. Van Gemert, 444 U.S. 472, 478-81 (1980) (upholding validity and recognizing necessity of "common funds"). See generally supra note 47 and accompanying text.
F. Commonality of Interest

It is important to note that the common defense organization, structured pursuant to the Manual, is solely for the purpose of addressing those issues in the litigation upon which the members of the group have a commonality of interest. Where there is no commonality of interest, each must have its own opportunity to be heard, and the common defense group "qua" group will not usually participate regarding such issues. Where this, of course, becomes most evident is in the area of allocation of liability and allocation of damage, if any. While the common defense group of third-party defendants will usually have a commonality of interest in regard to opposing the claims of both the plaintiff and the third-party plaintiffs, there is no commonality of interest regarding relative allocation of responsibility *inter se*. The tension which results from the juxtaposition of those issues on which there is a commonality of interest with those on which there is an adversarial interest makes the litigation process all the more challenging and necessitates effective and efficient organization and administration.

In *New York v. Town of Oyster Bay*, referred to above, 65 it was virtually impossible to efficiently organize the defense of the third-party action until Judge Sifton's case management order directed that the two third-party actions instituted by the Town be placed on the same timetable so that the schedules for motion practice, discovery, and the like could be coordinated. 66

G. Severance and Stay

Similarly, an interesting confluence of the Federal Rules and complex litigation occurred in the *Exxon* litigation, 67 in which one of the third-party defendants had the temerity to suggest to Judge Weinfeld that the very existence of the third-party action, involving over three hundred parties, made impossible the litigation of the main action, involving sixteen parties. It was suggested that Judge Weinfeld sever the third-party action from the main action

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65 No. CV-83-5357 (E.D.N.Y.) (Sifton, J.); see supra note 74 and accompanying text.
and stay any further proceedings in the third-party action until the conclusion of the main action. To his eternal credit, Judge Weinfeld had the wisdom to accept this suggestion and granted the motion, to the surprise of practically everyone involved in the litigation.88

So surprised was Ford Motor Company by Judge Weinfeld’s order that it took it upon itself to move for a “clarification” on the purported ground that it was unclear whether Judge Weinfeld intended that the third-party defendants be bound by the discovery process in the main action. At the hearing on this motion for “clarification,” before a courtroom filled with representatives of the parties (amply demonstrating to Judge Weinfeld the soundness of his initial decision), Judge Weinfeld’s first query to the attorney for the movant seeking “clarification” was why the order appeared ambiguous or unclear to him, while being apparently clear to the multitude of other parties. Needless to say, Judge Weinfeld adhered to his original decision and clarified it to the extent that the severed third-party defendants, no longer parties to the main action, were not required to participate in the discovery process in the main action and would not be bound thereby.89 According to the court, the severance and the stay would avoid duplicative and time-consuming discovery (until necessitated by an adverse finding

88 See Exxon, No. 85 Civ. 1939, slip op. at 1-2 (Jan. 23, 1987) (Weinfeld, J.). Judge Weinfeld’s decision provided, in relevant part:

The motions made by Benjamin Kurzban & Son, Inc. and other third-party defendants to sever and stay the claims against them in this litigation are granted. Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, this Court orders that any and all claims asserted against third-party defendants and any and all counterclaims and/or crossclaims asserted by third-party defendants be severed and tried separately from the primary suit brought by the City of New York against the fifteen original defendants. Further, all proceedings relating to claims, counterclaims, crossclaims, and pretrial discovery involved in the third-party actions are stayed pending further order of this Court.

To try this case with well over three hundred parties would be overwhelming due to the resulting administrative, procedural, factual, and legal complexities. Such a mass trial would also result in the unnecessary expenditures of a tremendous amount of money, time, and effort on the part of hundreds of parties and a wasting of judicial resources arising out of months of discovery, motion practice, and the trial itself. Determination of the issues in the primary case, or a settlement, should it occur, is likely to eliminate many issues in dispute between the defendants and the third-party defendants. This would dispose of certain claims and parties involved in the third-party actions, as well as offer the prospect of an amicable disposition of many of the other third-party claims.

Id.

89 See Exxon, No. 85 Civ. 1939, slip op. at 1-3 (Mar. 9, 1987) (Weinfeld, J.).
in the main action), and, as Judge Weinfeld originally stated, the resolution of the main action was "likely to eliminate many issues in dispute between the defendants and the third-party defendants" and spur resolution of the action.\textsuperscript{90}

\textbf{H. Settlement}

There is one final note in regard to the usefulness of the procedures of the \textit{Manual} in hazardous waste cases. Liability is, for the most part, strict under the federal and state statutory scheme. Proof of liability is frequently documentary in nature and often requires extensive discovery. An organized defense is essential for an orderly discovery process,\textsuperscript{91} with a concomitant sharing of common expenses. However, where an effective organization becomes paramount is in the settlement process,\textsuperscript{92} which has become an integral element of the organization of a hazardous waste case. Obviously, with one hundred, two hundred, or even more than three hundred parties involved, settlement negotiations are extremely significant, sensitive, and fraught with problems; they can only be effectively managed by an efficient settlement committee made up of the representatives of the various constituent groups of the defendants or the third-party defendants, respected by all sides and authorized by their own respective clients to participate in the process. Without the organization engendered by the use of the \textit{Manual}, productive settlement negotiations are impossible, thereby increasing the length of the litigation and the transactional costs to be borne by each of the parties thereto.

Last but not least, the \textit{Manual} also allows the court to become involved in the allocation of payment of common expenses if the parties are among themselves unable to reach agreement.\textsuperscript{93}

\textbf{VI. Conclusion}

During this golden anniversary of the adoption of the Federal Rules of Civil Procedure by the United States Supreme Court, it is

\textsuperscript{90} Exxon, No. 85 Civ. 1939, slip op. at 2 (Jan. 23, 1987) (Weinfeld, J.). In retrospect, Judge Weinfeld appears to have been correct in that a group of six defendants subsequently moved for court approval of a proposed partial settlement with the plaintiff, which had the effect of dismissing all claims of the settling parties against third-party defendants. Judge Kenneth Conboy thereafter approved the settlement of that action by granting the motion.

\textsuperscript{91} See supra notes 83-84 and accompanying text.

\textsuperscript{92} See supra notes 50-54 and accompanying text.

\textsuperscript{93} See supra notes 46-48, 81 and accompanying text.
fitting that we reflect upon how beneficial and useful the Federal Rules have been in providing an effective procedure for the administration of the federal court system. Moreover, in this day and age of high technology, laser beams, computers, and outer space exploration, our litigation has similarly become all the more complex, sophisticated, multitudinous, and difficult to administer. The Manual for Complex Litigation, Second has given us a diagram which helps us cope with some of this modern complexity, allowing at the same time sufficient flexibility for each individual litigant to have the opportunity to be heard on issues that are idiosyncratic to the particular litigant. Perhaps we have reached the point where the Manual should be incorporated into the Federal Rules of Civil Procedure with the same force, effect, and authority as those hallowed procedural guidelines.